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FEMALE DIRECTORS ON BOARD

The Roadmap for India

Anindita Jaiswal

Presented for the Degree of Doctor of Philosophy

The University of Edinburgh

2020

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LIST OF ABBREVIATIONS AND DEFINED TERMS

2010 Act	United Kingdom's Equality Act of 2010
2016 Code	United Kingdom's Corporate Governance Code (The Financial Reporting Council, April 2016)
2018 Code	United Kingdom's Corporate Governance Code (The Financial Reporting Council, July 2018)
Act of 2013	India's Companies Act of 2013
Annex	Annexure
ASSOCHAM	Associated Chambers of Commerce and Industry of India
CDO	Chief Diversity Officer
CEO	Chief Executive Officer
CII	Confederation of Indian Industry
COI	Constitution of India
CSWI	Committee on the Status of Women in India
Davies Report	Lord Davies, 'Women on Boards' (The Department for Business, Innovation & Skills, February 2011).
EC	European Commission
EEA	European Economic Area
ERA	Equal Remuneration Act of 1976
EU Directive	Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures – COM(2012) 614 Final 2012/0299 (COD) (The European Commission, Brussels, 14 November 2012).
EU	European Union

FICCI	Federation of Indian Chambers of Commerce and Industry
FRC	United Kingdom's Financial Reporting Council
Gender Equality Act	Norway's Gender Equality Act of 1979 (now replaced by the Gender Equality Act of 2013)
Guidance Note	India's Guidance Note on Board Evaluation (SEBI/HO/CFD/CMD/CIR/P/2017/004, 5 January 2017)
IIMs	Indian Institutes of Management
ILO	International Labour Organization
INC	Indian National Congress
INR	Indian Rupees
Kotak Committee	Report of the Kotak Committee on Corporate Governance (SEBI, 5 October 2017)
Listing Regulations	SEBI (Listing Obligations and Disclosure Requirements) Regulations of 2015
Ltd	Limited
MCA	Ministry of Corporate Affairs
MoU	Memorandum of Understanding
NFHS-4	National Family Health Survey- 4
Norway Act	Norway's Public Limited Liability Companies Act of 1997
NPP	National Perspective Plan
NSE	National Stock Exchange of India Limited
OECD	Organisation for Economic Co-operation and Development
Para	Paragraph
SEBI	Securities and Exchange Board of India
SEC	Securities and Exchange Commission

STEM	Science, Technology, Engineering, Maths
Summary	Improving the Gender Balance on British Boards- Women on Boards Review: Five Year Summary' (KPMG & Cranfield University, October 2015)
UN	United Nations

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DECLARATION

I confirm that this thesis has been composed by me, that the work contained in this thesis is my own, and has not been submitted for any other degree or professional qualification.

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28 April 2020

ABSTRACT

"One woman" to "one independent woman" director … where next?

This statement explains the core of this thesis, which aims to craft a future roadmap for India in relation to boardroom gender diversity. In line with global trends seeking to promote women to corporate leadership positions, and concurrent with the overhaul of its company law, India enacted a "one woman director" quota for boardrooms in certain categories of public companies, including all listed ones. Enforced in 2013, and with a deadline of 2015, this would appear to be in line with legislation in countries such as Norway and France and in contrast to voluntary or softer measures adopted by some other countries such as the United Kingdom (UK) and Sweden.

To assess India's mandatory quota and suggest a future regulatory course, it is imperative to understand what causes such divergence in legal strategies across countries. Hence, this thesis commences with the question of *why* gender diversity is needed in boardrooms, particularly how this issue is seen from a country's regulatory standpoint. This question is explored specifically in the jurisdictions of Norway and the UK, alongside a parallel review at pan-European Union level. Once the thesis identifies the rationale for each, it then explores the nexus between such rationales and the policy approaches or legal strategies adopted. This helps in explaining what determines their choice for a mandatory quota or discretionary targets – in other words, the connection between the reason *why* a country seeks female directorship and *how* it regulates or implements that. While offering this explanation, the thesis examines in greater detail the nuances of hard law versus soft law as policy approaches, specifically within the realm of corporate governance and boardroom gender diversity.

Next, based on the connections deduced, this thesis makes an attempt to theorise (which is largely absent in the reviewed literature on the subject) how a legal strategy is derived, and, furthermore, how an optimum strategy can be formulated in this regard. It also makes a few proposals towards potential optimum strategies for such diversity. However, as much depends on the national context in which it is adopted and implemented, the focus then turns towards India.

Starting with a review of India's "one woman director" quota and its underlying rationale and justifications (inferred from scantily available sources), this thesis investigates how the quota has performed and its results, based on an in-depth and purposive study of 100 top and medium-sized listed (Nifty 50 and Nifty mid-cap 50) companies in India. The strategy (including the recently announced regulatory reform that requires a "one independent woman" quota), in light of these results, is then compared and mapped out with respect to India's rationale to identify if they correlate. For the gaps or mismatches that exist, alongside the country-specific challenges (which appear to have been overlooked), this thesis then proposes an extensive regulatory roadmap. In addition to fixing such discrepancies, the aim is to offer more workable/optimum strategic solutions, which would provide an all-inclusive (involving both the regulator and the industry) way forward for India.

LAY SUMMARY

Instead of investigating as regards the justifications for gender diversity in boardrooms in general terms (on which much ink has been spilt already), this thesis proceeds on an assumption that a dual case for such diversity exists.[1] This is founded upon the combined justifications of social justice and business rationales, often otherwise found at loggerheads.

Given the dual case, the thesis rather takes a step forward to assess the relevance of such rationales in the law-making by countries, more specifically in the context of Norway, the UK, and at the pan-EU level.[2] This assessment reveals how the predominance of one rationale over the other decides the choice of policy approach (hard law or soft law) so adopted by the country, and the strategy implemented from a regulatory standpoint. With a link or nexus thus identified between social justice and hard law (or a mandatory quota), vis-à-vis business motives and soft law (or discretionary industry-driven measures), further substantiated from a cursory review of a few other countries, this thesis for the first time theorises the law-making and strategising of such regulations.[3] That being, it is the choice of rationale which causes the difference in policy approaches and legal strategies across countries.

Based upon this theory, and the dual case of gender diversity found at the outset,[4] the way to derive an optimum strategy is formulated.[5] Arguing that neither hard law nor soft law (both of which are critically examined, specifically with respect to corporate governance and diversity) can suffice on a stand-alone basis, a balance of the two is instead recommended.[6] This formula is then used to make a few broad-level proposals for optimum strategies, which include comply-or-explain (popularly used in corporate governance codes) involving both the hard and soft approaches in a single strategy.

[1] As found in section I.4 in chapter I of this thesis.
[2] Summarized in section II.5 in chapter II of this thesis.
[3] Illustrated in figure 7 in chapter II of this thesis.
[4] In chapter I of this thesis.
[5] Illustrated in figure 8 in chapter II of this thesis.
[6] In section II.7B in chapter II of this thesis.

The other proposal (more preferred, and originally contributed by this thesis) involves a mix of strategies - one hard and one soft, which together bring the balancing effects.

Such distinction between the policy approaches and strategies may be carved out at levels of the two constituents – non-executive directors and executive directors. This would be appropriate as they are significantly different from each other, not only in terms of their composition, eligibilities and functions, but even the talent pool of resources/potential candidates (or their "candidature") differs tremendously. While the former has a supervisory role with a more broad-based candidature, the latter, which requires more hands-on and company-specific expertise, is rather confined and restricted. Accordingly, this thesis suggests that a "one-size-fits-all" (as adopted by India, and many other countries) would not be a prudent regulatory stance. While mandatory hard law (or a quota) might work for non-executive directors, it would not be suitable for executive directors, for whom discretionary measures would instead be preferred. In addition to avoiding a blanket uniform approach that can never fit all boardrooms (and much less their constituent directorships), this proposal can also attain the balance sought between hard law and soft law policy approaches at overall board level.

Nevertheless, as this is only a broad-level proposal at a rather conceptual level, it must be subject to and adapted in accordance with the national context and country-specific peculiarities where it is sought to be implemented. Accordingly, prior to applying all of the above theory for strategising regulations and the formulae for an optimum strategy,[7] to suggest a regulatory roadmap (which is the ultimate objective of this thesis), the thesis connects with the national context and conditions specific to India.

Moving to the focal point of this thesis- India,[8] the rationale underlying the strategy of the "one woman director" quota is sought to be decrypted from the scantily available resources on legislating of such quota. It is inferred that, although India seemingly commenced with a mixed social cum-business rationale (concurring with the dual case of boardroom gender diversity), it deviated to the mandatory "one woman director"

[7] As derived in chapter II of this thesis.
[8] Discussed in chapter III of this thesis.

quota, resonating a purely hard law approach. This appears incompatible with the business side of its rationale at the outset, and more so with the formulae for optimum strategising as discussed above. As opposed to this, it rather seems to be in continuance of the country's quota legacy replicating the gender quota in politics. This thesis argues that the "one woman director" (including the reformed "one independent woman director") quota seems to have been enacted without critically assessing the specific nuances of the corporate domain or diversity in India, and, specifically, the dynamic within boardrooms. As expected, the quota, borrowed from an unrelated context, has been unable to attain much success in terms of numbers/demographic representation or functionally, within boardrooms – all of which is argued based upon an in-depth and purposive scrutiny of 100 top and medium-sized listed (Nifty 50 and Nifty mid-cap 50) companies in India.[9]

This thesis further argues that what further jeopardises the structurally and rationally incongruent quota, and what intensifies and adds to the crisis, is the shortfall of candidature. With significantly high gender disparities in the labour force/employment and education, and with a more than severely leaking pipeline, all of which is set amidst rigid and culturally systemic patriarchy, attaining candidates for female directorship is a challenge.[10] This goes on to further assert why India is not yet ready for such an over-arching quota.

In view of the above discrepancies of the "one woman director" quota measured against the formulae for optimum strategising, and against the shortfall of candidature amidst the specific cultural and social context unique of India, what unravels is a regulatory mismatch.[11] Accordingly, this thesis recalls the mid-way policy approach found optimal for gender diversity in general terms, to the specific context of India, and re-asserts the proposal (for distinct strategies- one for the non-executive directors and one for the executive directors) as made in chapter II, but in a slightly modified form.

[9] Detailed discussion section III.5 in chapter III of this thesis.
[10] Explained in section IV.3 in chapter IV of this thesis.
[11] Illustrated in figure 29 in chapter IV of this thesis.

The ingeniously developed roadmap[12] for India (not borrowed or transplanted from any other jurisdiction) would be to provide for a mandatory (but appropriately adapted) quota for non-executive female directorship, alongside a target on a conform-or-explain basis for executive directors. This thesis therefore offers a two-fold solution. Through this, India can address the regulatory mismatch, and strike the much sought-after balance between hard law and soft law policy approaches that is ideal for India's mixed rationale (and for the dual case of such diversity otherwise too). Further, the proposal comes with progressive thresholds and phased timelines, which this thesis believes would align better with India's restricted candidature.

Finally, realising that crafting a strategy as outlined is only the tip of the iceberg, and that much else is needed to sustain such a strategy, an all-inclusive roadmap involving the industry and market players, as well as the regulator, with their roles interwoven with the strategy, is recommended.

[12] Discussed in section IV.4 in chapter IV of this thesis.

INTRODUCTION

A. *Background*

One of the many definitions of corporate governance describes it as the "structure that", in essence, "is intended (i) to make sure that the right questions get asked, and (ii) that checks and balances are in place to make sure that the answers reflect what is best for the creation of long-term, sustainable, renewable value".[13] This hints at corporate decision-making and accountability, which then brings in the organ that is responsible for such functions, namely the board of directors and management, particularly its structure, composition and role, all more visible from outside (when compared to the subtle and veiled procedures of decision-making inside boardrooms). This also explains why regulators and lawmakers emphasise reforms that pertain most often to such ostensible attributes. More recent deliberations revolve around one constituent – i.e., non-executive and independent directors – who are vested with the responsibility of bringing independent and critical thinking, integrity and high ethical standards, sound judgment, ability and willingness to challenge and probe, and strong interpersonal skills, to corporate leadership.[14] Despite not being supported by concrete empirical results establishing causal relations to corporate profits,[15] independence within the board has now been accepted as an indispensable attribute, particularly following the recurring instances of corporate failures and financial crisis. While the institution of such independence finds itself surrounded by criticisms of too restricted or cosmetic definitions and ineffective implementation, it is continuously evolving so as to become an over-arching characteristic required of not just formally designated independent directors but every person responsible as a director of the company. Accordingly, newer initiatives for greater objectivity and unencumbered thinking in the boardroom are being brainstormed, with diversity in board composition being one. Such diversity may be explained in terms of functional features such as perspectives,

[13] RA Monks & N Minow, *Corporate Governance* (John Wiley & Sons 2011) Preface xxii.
[14] R Barratt & N Korac-Kakabadse, 'Developing reflexive corporate leadership: The role of the non-executive director' (2002) 2(3) Corporate Governance: The International Journal of Business in Society 32-36, 34.
[15] RC Iwu-Egwuonwu, 'Some empirical literature evidence on the effects of independent directors on firm performance' (2010) 2(9) Journal of Economics and International Finance 190-198.

skills, competences, exposure, background and experiences, and, on the other hand, can be expressed based on more tangible and measurable parameters such as age, race, culture, caste and gender. This research deals with gender diversity in the corporate boardroom.

In particular, this thesis emanates from the recently overhauled company law framework in India, with the enactment of the Companies Act of 2013 replacing the erstwhile Companies Act of 1956. Amongst the numerous weighty changes introduced, one significant reform is the mandatory quota for at least one female director on the boards of companies, notified under Rule 3 of the Companies (Appointment and Qualification of Directors) Rules of 2014. This was reaffirmed by India's capital market regulator – the Securities and Exchange Board of India – in its circular dated 17 April 2014, amending the corporate governance provisions to align with the new Companies Act.[16] Accordingly, a large group of publicly held companies, including all listed companies, were required to comply and have at least one female director by the deadline, initially fixed at 1 October 2014 and later extended until 1 April 2015. Although well acquainted with the compulsory "quota", as every Indian would be from the realms of politics and social castes,[17] what was surprising was its extension to the private commercial sector or the corporate domain, where this imposition was the first of its kind.

To understand the above, and notably, the law-making or strategising of regulations on diversity in general, it was felt that referring to a few other countries, which preceded India in similar reforms, might help. Accordingly, a start was made with Norway, which pioneered a (not so similar) quota, followed by contrasting findings from the UK, and the chain that was subsequently triggered across the globe. It was interesting to note, however, that India was perhaps the foremost country amongst its developing peers to react to such global unrest, and with such a rigid strategy. This research work had commenced against this background, *and so does the story that this thesis will narrate...*

[16] 'Corporate Governance in listed entities - Amendments to Clauses 35B and 49 of the Equity Listing Agreement' (CIR/CFD/POLICY CELL/2/2014, SEBI, 17 April 2014).
[17] Detailed in section III.4 in chapter III of this thesis.

B. *Objectives of the Research*

With an ultimate objective to craft an optimum regulatory roadmap for boardroom gender diversity in India, this thesis seeks to:

1. examine *why*, i.e., what are the reasons or rationales underlying diversity from a conceptual standpoint.

2. explore *how*, i.e., strategies through which countries implement or enforce diversity, and what determines (the relevance of rationales in) their choice of strategy or policy approach.

3. theorise how a strategy is derived, how an optimum strategy may be formulated or constructed, and further make proposals for potential optimum strategies, subject to the national context.

4. investigate India's current position on boardroom gender diversity, and the outcome of the "one woman director" quota.

5. critically assess whether India is ready for an over-arching immediate quota, and identify the regulatory gaps and/or mismatch, if any, in strategising.

6. ingeniously devise a regulatory roadmap for India, conforming to optimum strategising and rectifying such existing regulatory mismatches.

C. *Research Questions*

1. Why should boards be gender diverse, or what are the rationales underlying boardroom gender diversity?[18]

2. How do countries regulate boardroom gender diversity, and what determines (the relevance of rationales in) their choice of strategy or policy approach?[19]

[18] This question is addressed in chapter I of this thesis.
[19] This question is reviewed and analyzed in chapter II (sections II.2 to II.7A) of this thesis.

3. How is a legal strategy, and more so an optimum one, for boardroom gender diversity formulated?[20]

4. What is India's position on boardroom gender diversity and whether the "one woman director" quota has attained what India aims for?[21]

5. What are the regulatory gaps and/or mismatch, if any, experienced in legal strategising for India, and how can these be addressed?[22]

D. *Original Contribution*

First, the main contribution made by this thesis lies in how it proposes and articulates an ingeniously devised regulatory roadmap for India, which can direct the country's future strategising of laws on boardroom gender diversity.[23] Second, and underpinning all of the above, this thesis theorises more generally how a strategy for boardroom gender diversity is derived, and, further, how an optimum strategy (subject to national context) could be formulated in this regard. The author believes that the above originally contributed proposals will add value both, from a practical and academic standpoint. While these might offer a logical and well-informed direction for India's much needed regulatory overhaul, countries seeking to regulate boardroom gender diversity or still in the formulative stages may also be aided with the foundation or theory (which is largely absent or unorganised at present) on policy-making or strategising in this regard. Academically too, this thesis would expectedly offer a helpful reference and contribute to future critical reviews of policy-making and regulatory approaches within jurisdictions, or comparative research across them.

[20] The formula and proposals in response to this question are explained in chapter II (sections II.7B and II.7C) of this thesis.
[21] This question specific to India is assessed in chapter III of this thesis.
[22] This contains the core contribution of this thesis, and is elaborated in chapter IV (more particularly, the regulatory mismatch and related shortfalls are highlighted in section IV.2 and IV.3, followed by recommendations for a regulatory roadmap which this thesis proposes in sections IV.4 and IV.5).
[23] As illustrated in figure 36 and chapter IV of this thesis.

In what appears to be a sporadic or impulsive regulatory move, by replicating what India has historically adopted in the area of politics and social castes, the "one woman director" quota came as both a surprise and less of a surprise. It was a surprise for the reason that, for the first time, a quota was extended to the private or commercial sector of companies. On the other hand, it was less surprising as the choice of a "quota" would have been the most obvious and expected response from India to the global movement on gender diversity. Such an idiosyncratic response was once again sensed when the regulator announced the "one independent woman director" to replace "one woman director" quota. This was a reaction to media allegations of family favouritism and cosmetic compliance. As expected, when a strategy is impulsively replicated without enough reflection and transposed from one area to an unrelated domain for which it is not meant, the outcome is likely to be anything but impressive, and so it has proven in the case of the "one woman director" quota.

While few industry reviews on the statistics of female directorships can be found,[24] this thesis is the first study to critically review the "one woman director" quota and its outcomes from a legal or regulatory standpoint.[25] In other words, this is the first of this kind of comprehensive analysis into why India, at the outset, adopted the strategy of the "one woman director" quota; its outcome based on data analysis; what went wrong in strategising for the quota; and finally, a roadmap offering solutions from a regulatory standpoint. Although not the only one, this thesis nonetheless lays out the most comprehensive and all-encompassing account of boardroom gender diversity issue in the Indian context, and perhaps the pioneering one in relation to its regulatory strategising.

It is worthwhile to note here that, the roadmap which the thesis proposes is ingeniously created for India, and does not recommend for any law to be transplanted or borrowed from other jurisdictions. Instead, the roadmap stands on a theory which this thesis offers in chapter II, as regards how regulations on such diversity are strategized at

[24] 'First Step: India Overview' (Catalyst Information Center, June 2013).
[25] India's current legal position on boardroom gender diversity is described and critically assessed in chapter III (section III.2) of this thesis.

country levels, what relevance rationales of social justice or business (as the case may be) has on the choice of policy approach and such strategising, and how an optimum strategy may be formulated. While this theory is propounded based on a jurisdictional review of Norway, the UK, and pan-EU level (representing polarized and extreme approaches and legal strategies), this thesis does not suggest replication of any of their laws as such. The roadmap for India has been devised from scratch, peculiar to the national context.

This thesis thus extensively examines the reasons why India endorsed the idea of boardroom gender diversity to start with. This has not been an easy task, as none of the existing literature (including the scantily available legislative debates or records) explicitly mentions whether the introduction of the female directorship requirement was designed to secure gender equality (i.e., a better gender balance in boardrooms), or was put in place for reasons of enhanced board effectiveness, or because it would generate greater advantages for business. This was all the more difficult to decipher as the reform appears to have been silent, hidden amidst and coinciding with more valued and weighty changes undertaken simultaneously during the overhaul of entire company legislation. Only by closely scrutinising brief accounts of the quota in various versions of the draft legislations, pre-legislative standing committee reports, regulatory notifications/circulars and concept papers, expert committee views and other associated deliberations[26] could the regulator's motive be identified as one that is constructed upon a mix of business and social justice rationales.[27] Neither one of the two dominates the other, and the reasons of business advantage and equality go hand in hand, meaning that India arguably endorses an intermediate justification between the rationales (in line with the dual case of boardroom gender diversity, as the concept stands).[28]

Having identified India's underlying rationale for strategising of the "one woman director" quota, this thesis further investigates the outcome as regards how the quota has fared since its enactment five years back. While existing statistics provide some

[26] Listed in the "methodology" section below, and "India resources" in the bibliography of this thesis.
[27] Identified in chapter III (section III.3) of this thesis.
[28] The dual case (social cum business rationales) of boardroom gender diversity, as a concept, is established in chapter I of this thesis.

fragmented numerical indications relating to female representation in boardrooms, the substance of this presence can be mapped out only through more in-depth scrutiny. Accordingly, as well as looking at statistics, this thesis takes a more pragmatic stance, aiming for an in-depth and purposeful assessment. To this end, given the large number of listed and unlisted public companies to which the quota applies for which data is not organised or readily available, the scope of the review was defined to capture 100 top and medium-sized listed (Nifty 50 and Nifty mid-cap 50) companies in India. This diverges from the regular emphasis on the largest or most top-notch companies, which are usually the fore-runners or top ones, and results from which tend to offer inflated or deceptive impressions, not reflecting the realistic discrepancies within the industry. Considering that Nifty 50 and Nifty mid-cap 50 are two standardised and frequently used indices for measuring stock performances and market movements, the outcomes would mitigate (if not eliminate) any probability of biases in sampling or selection of such companies. Rather, as the companies are spread across top and medium performing ones, the results would be more balanced and fairer.

As would be required for a purposive analysis, the thesis goes beyond the aggregate compliance figures to assess the individual profiles of female directors in these companies (including, *inter alia*, their age, attributes and competencies; the nature of their directorships – executive, non-executive or independent; their connectivity to other board members or promoter owners; sectoral presence; and functional segregations across board committees), as well as examine the diversity policies of the companies identified, where published.[29] All of these deductively[30] yield results which are far from being satisfactory or appealing. Women were found to occupy less than 14% of total directorships (which reduces further to 11% if measured at aggregate industry level). Other findings included minimalist female representation in executive director positions (six out of 157 and 11 out of 136 in Nifty 50 and Nifty mid-cap 50 companies);[31] segregation of female directors to board committees linked to monitoring rather than core business or productivity;[32] occupation of only 24 of more

[29] Illustrated in chapter III (section III.5) of this thesis.
[30] K Pole, 'Mixed Method Designs: A Review of Strategies for Blending Quantitative and Qualitative Methodologies' (2007) 20(4) Mid-Western Educational Researcher 1-4, 2.
[31] Illustrated in figures 22 and 23, respectively, of this thesis.
[32] Illustrated in figure 24 of this thesis.

than 300 chair positions; niche and not-so-diverse attributes in terms of age, background, qualifications and competencies; and close connectivity with existing directors reflecting the close confines to which board searches remain restricted.[33] With very few companies having more than one female director over and above what the quota requires,[34] and weak or boiler-plate contents of diversity policies,[35] the impact of the quota appears superficial. These deductively reached outcomes offer an insight not only into legal compliance, but also into the nature and characteristics of such directorships and levels of substantive diversity attained. Needless to say, this analysis of the outcomes of the "one woman director" quota is helpful in identifying some of the gaps where the strategy has not been able to reach or where it might need to be further redressed.

Regulatory Mismatch

With a glimpse of the outcomes of the "one woman director" quota as revealed in the data analysis, it is not too difficult to decipher that all has not been right with India's strategy. Accordingly, this thesis, with a regulator's hat on, takes the necessary initiative to re-visit the quota five years after its enactment. In doing so, and comparing the mixed rationale with which India commenced with the purely hard law mandatory approach to the quota, this thesis finds a mismatch at the outset.[36]

In other words, India's rationale premised on social-cum-business objectives ought to have taken a mid-way approach between hard law and soft law (as against either one of them in exclusion of the other). This is because the theory for strategising regulations on boardroom gender diversity (as derived in chapter II of this thesis)[37] finds a link between the predominance of social justice rationale and the adoption of hard law (or mandatory quota), as against voluntary soft law measures where the country is inspired by business motives. Hence, for a rationale that comprises of both, social justice and business reasons (or the dual case of such diversity, as the concept stands), the ideal regulatory stance would be one that is mid-way between hard law

[33] Revealed in chapter III (section III.5F) of this thesis.
[34] Illustrated in figures 15 and 16 of this thesis.
[35] Elaborated in chapter III (section III.5G) of this thesis.
[36] Revealed in chapter IV (section IV.2 and illustrated in figure 29) of this thesis.
[37] Illustrated in figure 7 of this thesis.

and soft law policy approaches.[38] In case of India, this equation is broken, as despite having a mixed rationale, it has imposed a strict mandatory quota- referred to as the regulatory mismatch. Accordingly, this thesis proceeds to the task of regulatory re-crafting to address this mismatch and establish potentially optimum strategies for India.

In doing this, one cannot overlook the challenge of candidature, which concern becomes more severe in India owing to its low female labour force participation, literacy rates, and social and cultural ethos characterised by strong patriarchal values. Although the thesis restricts itself to the regulatory perspective of boardroom gender diversity from a corporate governance standpoint, discussions on the socio-cultural implications cannot be ousted in its entirety, more so when the mismatch sought to be rectified necessitates addressing the candidature shortfall too (and which in turn is a consequence of such social and cultural undercurrents- all running in a vicious cycle).[39] Considering that no strategy can sustain without the requisite candidature, this thesis takes an all-inclusive approach involving actions by both the regulator and the industry as the protagonists, to propose a roadmap for India.

Roadmap for India – Resolving the Mismatch

Considering that the roadmap must address two fold concerns- one that of deviation from the mixed rationale resulting in a regulatory mismatch, and the second of the crisis of candidature, the proposals do not stop at prescribing the regulations *per se*. Instead, the solutions are offered in terms of *first*, the strategic reform so as to attain the appropriate regulatory match and balance of policy approaches in tandem with India's rationale, and *second*, measures to build upon and strengthen the resource pool or candidature, as the case may be.

In re-crafting the strategies as above, this thesis takes cognisance of variances in the roles, responsibilities, tasks, functions and eligibilities, and therefore differences in candidature, for the two constituents – non-executive and executive directors – within boardrooms. Accordingly, rejecting a "one size" for both, the thesis takes a unique

[38] Illustrated in figure 8 of this thesis.
[39] Explained in section IV.3 in chapter IV of this thesis.

stance to devise distinct strategies for each of the two, which together and on a cumulative basis, would attain the balance of hard law and soft law policy approaches. This is in accordance with (but applied here with adaptations and modifications to suit the Indian context specifically) one of the preferred proposals for optimum legal strategy in relation to boardroom gender diversity, suggested in more general terms and at a broad-level in chapter II of this thesis.[40]

Non-executive Directorships

Not entirely ousting the quota enforced as a choice of strategy, this thesis takes a pragmatic stance to retain it but with substantial modifications. These include a rehashed focus confined to listed companies alone; second, more progressive thresholds that adhere to critical mass; definite and incremental sanctions; and a phased implementation in two stages.[41] Moreover, compliance deadlines are divided across companies based on their market capitalisation, starting with larger ones followed by medium-sized and smaller ones. Such restricted outreach of the quota to only the non-executive constituent of boards of listed companies, alongside deferred and phased-out timelines, helps reduce the stress on candidature too, which is a major impediment for India owing to its low labour force participation rate at 28.5%, low literacy at little more than half of that for males, a drained-out pipeline, and strong patriarchal values.[42]

Further, to ensure that India is able to utilise its existing candidature and further develop and strengthen it in a manner so as to continually align with the quota, the proposal goes beyond this to interweave the modified quota outlined with additional regulatory mechanisms, assigning more proactive roles to search firms and nomination committees. These include a voluntary code (coupled with disclosure obligations), comprising directions that can enable a more extensive and diversified search for candidates,[43] creation of a centralised database[44] and professionalising of non-

[40] Suggested in section II.7C in chapter II of this thesis.
[41] Proposed in chapter IV (section IV.4A(B)) of this thesis.
[42] Elaborated in chapter IV (section IV.3) of this thesis.
[43] Proposed in chapter IV (section IV.4A(C)) of this thesis.
[44] Proposed in chapter IV (section IV.4A(D)) of this thesis.

executive directorships, covering both genders through certification and courses structured under an "Academy of Corporate Directors".[45]

Executive Directors

Owing to the greater dynamism and confidentiality with which this constituent operates, and more proximate and direct involvement in strategic decisions and business functions, the more specialised levels of competencies required, and the necessity for company-specific expertise or familiarity, a rigid "one size" cannot fit executive directorships. This thesis therefore proposes a realistic 30% target on a conform-or-explain basis, which can be adapted based on business logic and needs. As the target would operate upon disclosure obligations, it would enable regulatory oversight, while not exerting any unwarranted pressure to comply.

Similar to the modified quota, this target would also work on timelines divided across companies based on their market capitalisation, such that there is no impracticable rush or stress on candidature, more so as much of it depends upon key managerial, line and staff positions within the organisation or across competing businesses, or the executive pipeline, which is highly deficient in India. Once again, this thesis steps ahead of recommending a goal to interweave regulations that would help sustain the target in the long run. In other words, an "in-house ready reckoner" is proposed alongside the target, which the regulator may notify as a direction towards a policy or a model diversity policy that companies could follow while devising their diversity policies (currently existing as no more than boiler-plates).[46] The reckoner encompasses provisions of diversity mainstreaming into recruitment/progression criteria, work profile and fixing of liability, conditions of work-life, and board evaluation, with both, a top-down and bottom-up approach.[47] The reckoner is proposed along with suggestions as regards its administration, accountability and audit provisions, which, although not a self-contained code, may nonetheless aid in self-reflection and harnessing a stronger candidature in future.

[45] Proposed in chapter IV (section IV.4A(E)) of this thesis.
[46] Proposed in chapter IV (section IV.4B(C)) and Annexure A of this thesis.
[47] Refer to section IV.4B(C) in chapter IV and Annexure A of this thesis.

Having addressed both the constituents, their strategies and candidature, this thesis finally reiterates that law in itself may not suffice for diversity, which requires more activism from within the company (top executives/CEO), as well as externally from the industry. This is particularly the case as voluntary or soft law strategies that primarily operate on "naming and shaming" by market forces require the industry to react or respond. However, until boardroom gender diversity evolves into a business norm which might then offer a benchmark to such soft laws, such industry initiatives cannot be expected to come on their own. Hence, the trigger at present needs to emanate from the regulator, which the industry can then carry forward. Accordingly, this thesis strategies how regulations can provide more concrete and collated activism by institutional investors and industry agencies by means of enumerating diversity as a licensing and investment criterion, sponsoring of candidates who might contest for director positions in companies, mainstreaming diversity into board evaluation, constructing diversity ratings and awards, gathering industry-wide data and record-keeping, and related disclosure obligations.[48]

All of these recommendations that seek to fill gaps, of which the industry and the regulator alike appear to be oblivious, are thus tailor-made to suit what may be more relevant in a country-specific context of India. All in all, through an integrative legal strategisation constructed upon a combination of a mandatory quota and a target on a conform-or-explain basis, alongside other regulatory innovations interwoven with these, the proposed roadmap attains the much sought-after balance between hard law and soft law policy approaches. While this brings consistency with what India seeks to attain by way of its mixed rationale, this is also expected to be better aligned with India's governance set-up, which lies intermediate between a rule-based and principle-based approach. Thus, the recommended roadmap can be presented as an original, extensive and indicative future course, particularly from the regulatory standpoint, for India. It cannot, however, be exhaustive or self-contained, as much would depend upon the peculiar characteristics and needs of each business, company, sector and industry, as well as changing times.

[48] Proposed in chapter IV (section IV.4C) of this thesis.

Theorising how to Derive an Optimum Legal Strategy for Boardroom Gender Diversity

While many reviews of countries and their prevailing laws and the effects of diversity have been undertaken before,[49] the theoretical basis of such laws has not been emphasised. To fill this vacuum, this thesis therefore takes a step further to use such reviews in understanding what causes variances in the strategies and policy approaches that countries adopt in this regard. To this end, this thesis has relied upon a detailed jurisdictional review of Norway and the UK, alongside the European Union as a whole. The reason for having selected these countries, as mentioned earlier, is the range or variances between their policy approaches and legal strategies. Norway, on one hand, imposes a strict hard law mandatory quota backed by severe sanctions, as against the UK which relies upon industry-led voluntary targets. It is within the expanse of these two polarised and extreme situations where lies the scope for strategising regulations for boardroom gender diversity.

Not stopping at narration of laws adopted by countries as an end objective (which is where most of the existing literature concludes), this thesis engages in a more purposive analysis of Norway, the UK and the EU (alongside a cursory review of a few others) to deduce linkages or connections between the strategy/policy approach that each of these countries or territories has adopted and their underlying reasons or rationales (social justice or business) as to why they are seeking such diversity.[50] Accordingly, where the main aim is to attain gender equality and social justice as an end objective in itself, the policy approach/strategy adopted is generally hard law or a state-enforced mandatory quota rather than soft law or voluntary industry-driven measures where business motives are predominant.

With such a linear nexus drawn, the thesis then uses this to formulate a general theory for how a legal strategy,[51] and more so an optimum strategy, for boardroom gender

[49] A review of the existing literature on gender diversity in boardrooms, which includes Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing 2013). See also, Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017); and Seierstad, Gabaldon, & Mensi-Klarbach (eds), Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas (Palgrave Macmillan 2017).
[50] Reviewed in chapter II (sections II.2 to II.5) of this thesis.
[51] Illustrated in figure 7 of this thesis.

diversity (which conceptually stands on a dual case using both the social justice and business rationale, as inferred from current scholarship) can be derived. To reach an intersection between the two rationales, this thesis advocates a balance of hard law and soft law, or an optimum policy approach lying mid-way between the two.[52] Explaining and using this formulation, proposals are next made as regards a potential optimum strategy at a broad level. Two alternate methods are proposed, with the first being a single strategy that has hybrid characteristics (such as comply-or-explain) and the second being a mix of strategies (each borrowed from either hard law or soft law) that add up to attain such balance. While the former is already widely practised by regulators in the context of corporate governance, it is in relation to the latter that this thesis diverges from the conventional methods to propose a mix of strategies that could operate distinctly from the two different constituents within a single board – i.e., for non-executive and executive directors. To recall, it is this proposal which is applied to India, with adaptions and modifications to suit its national context, in rectifying the regulatory mismatch and offering strategising solutions for the roadmap.

Both the offices of non-executive and executive directors are significantly different from each other in terms of their composition, eligibilities and functions, and, therefore, their candidature is also different. A "one size" approach towards female directorship is thus strongly opposed. Instead, in view of the nature of these roles and functions, and the variances in candidature, this thesis suggests that, while mandatory hard law (akin to a quota) might work for non-executive directors, discretionary measures are preferred for the latter. While avoiding "one-size" that can never fit all boardrooms (and much less its constituents), this can also attain the balance sought between hard law and soft law policy approaches at overall board level. This is, however, only suggested as a broad-level theory, as much would depend upon the national context and country-specific peculiarities where one seeks to enforce it. Applying what is theorised above, the regulatory mismatch in India is identified, and an optimum strategy adapted to its national precincts is then re-crafted in the form of the proposed regulatory roadmap – the primary and core contribution of this thesis.

[52] Illustrated in figure 8 of this thesis.

E. *Methodology*

Overall, the research undertaken is doctrinal. It is based on a review of primary sources, which include, *inter alia*, laws, statutes, regulations, rules, listing agreements, expert committee reports, annual reports and websites of companies, as well as secondary sources, which include, *inter alia*, academic journals, publications, reported empirical surveys, statistics, databases and media/news reports.

The thesis starts with a literature review on the concept of boardroom gender diversity. While not deviating its focus from governance in boardrooms, sources from organisational behaviour and feminist/gender studies are referred to, only to the extent that they may help in understanding how gender operates within group dynamics, or what would resemble female directorship. Based on these, and reports of empirical surveys, this research assumes a dual case for diversity, using both social justice and business rationales. This thesis does not therefore undertake any independent investigation as regards how diversity influences business outcomes or profits, or which of the two rationales better justifies the concept. Rather, it relies upon existing sources that help in elucidating diversity as what the industry and regulators now perceive as good governance practice, regardless of which rationale overrides the other.

Having said that, the relevance of rationale re-emerges when this thesis seeks to examine[53] how countries arrive at the different policy approaches and strategies that they adopt. The thesis accomplishes this through a review of the strategies, their outcomes, and the underlying rationales in Norway, the UK, and at EU level (as well as a cursory review of a few other countries), which are largely sourced from statutes, legislative debates, corporate governance codes, ministerial announcements, books, published articles in peer-reviewed journals, media reports and statistical databases in the public domain. This review introduces a range of policy approaches (hard law versus soft law), which is examined from academic literature, particularly in the discipline of corporate governance, as this has greater relevance to boardrooms. Having drawn the linkages between such rationales and policy approaches/strategies,

[53] Discussed in sections II.1 to II.7 in chapter II of this thesis.

the thesis then offers a theory as regards the law-making and strategising of regulations in this regard. It further formulates reform proposals at a broad-level as regards what can be a potentially optimum strategy and how to derive it, subject to national context and conditions.

Hence, chapter II adopts a technique akin to reverse engineering of the strategies adopted by, and the underlying rationales of Norway, the UK and the EU, to arrive at what could, in more generalised terms, explain and establish the theory for law-making and strategising of regulations for boardroom gender diversity at a broad country-neutral level. Given that such theorising is substantially absent in the reviewed literature on the subject, much of it is originally contributed. The theory is then further used to devise a way how an optimum strategy maybe derived (along with a few proposals made in this regard). The selection of countries- Norway and the UK made here, is based on the variance in their strategies and policy approaches – mandatory quota versus voluntary targets- which could offer the thesis an opportunity to explore a vast expanse between the two policy approaches of hard law and soft law. Hence, the choice of these countries was inspired primarily from the polarized and extreme nature of their regulatory choices (and not due to any resemblance to India, as such). This explains why these jurisdictional reviews are used in the thesis only and limited to devising the general theory of strategising regulations in chapter II, and not to transplant or borrow any law as such to India. In any event, such a replication or mimicking of the laws from countries will not work, as India resonates neither the egalitarian social and cultural sentiments of Norway, nor the neo-liberal ideologies of the UK- the nation specific conditions amidst which the strategies are placed, and which restrict such transplant on an "as is" basis. Although India's law-making bears its legacy from the colonial times (such that may pre-independence British laws still prevail, and many others have been legislated inspired from similar laws in the UK), the "one woman director" quota is a deviation from it, and hence, any reformative roadmap must be ingeniously developed, as is done in chapter IV of this thesis (using the general theory and formulae for optimum strategy as derived in chapter II, but adapted to its national context).

To do so, details of the strategy for the "one woman director" quota and the underlying rationale are extracted from statutes, legislative drafts, expert committee reports,

ministerial and regulatory circulars/notifications, media reports and a few books and published articles. Given that the "gender diversity" is still not a very familiar topic and is yet to be institutionalised in India, resources or research works on it are limited, and/or not accessible in the public domain. Hence, the thesis primarily relies upon, *inter alia*, the following sources- Companies Act of 2013 read with Companies (Appointment and Qualification of Directors) Rules 2014;[54] the Standing Committee Reports on the preceding bills of 2009[55] and 2011;[56] a concept paper as a note on the approach for revising the company law statute in 2013 from the 1956 legislation;[57] the Listing Regulations of 2015 and other notifications/circulars issued by India's Securities and Exchange Board of India ("SEBI") from time to time;[58] and the expert Kotak Committee report of 2017[59] followed by amendments to the timelines and application of the quota notified more recently in 2018.[60]

Likewise, to assess the outcome of the "one woman director" quota, as there is no centrally available or consolidated database/statistics on boardrooms or female directorships that can be accessed publicly, data pertaining to directors of the Nifty 50 and Nifty mid-cap 50 companies in India, as of February 2018, was procured for a fee. The data was sourced from Prime database, which is a subscription-based paid information service that manages data on companies listed, in association with the National Stock Exchange.[61] Started in 1989, it has developed into what is now the most referred to centre for company and securities market-linked information in India.

[54] GSR 259 (E), Ministry of Corporate Affairs, 31 March 2014.
[55] Twenty-first Report- The Companies Bill 2009 (Standing Committee on Finance 2009-10, Fifteenth Lok Sabha, MCA, 31 August 2010); Legislative Brief- The Companies Bill , 2009 (PRS India, 18 August 2009).
[56] Fifty-seventh Report- The Companies Bill 2011 (Standing Committee on Finance 2011-12, Fifteenth Lok Sabha, MCA, 26 June 2012);
[57] Concept paper – Note on the Approach (Press Note 1 of 2004, F No1/1/2004-CL-V No: 1/3/2003-RC, Ministry of Corporate Affairs, 4 August 2004)
[58] Fine structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement (CIR/CFD/CMD/1/2015, SEBI, 8 April 2015); Guidance Note on Board Evaluation (SEBI/HO/CFD/CMD/CIR/P/2017/004, 5 January 2017); and Consultative paper on review of corporate governance norms in India (SEBI, 4 January 2013).
[59] 'Report of the Kotak Committee on Corporate Governance' (SEBI, 5 October 2017).
[60] SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations 2018, with effect from 1 April 2019; SEBI Board Meeting (PR No 09/2018, 28 March 2018); and SEBI/HO/CFD/CMD/CIR/P/2018/79 (SEBI Circular, 10 May 2018).

[61] <http://www.primedatabase.com/> accessed 15 December 2018.

Prime database is the flagship product of the group operated by Praxis Consulting & Information Services Private Limited.

As regards the range of the companies chosen for review, Nifty 50 and Nifty mid-cap 50 are standard indices for trading and tracking the stock movements in India. Hence, the thesis does not use any discretion as such in selection of the sample (and thus, no question of author's bias arises), which is rather standardised and comprises of the most frequently used indices to measure any stock performances in India. Together, they capture two distinguished and diverse cross-sections, with a total of 100 large and medium-sized companies (in terms of market capitalisation). Although this is by no means representative of the industry or the country as a whole, an investigation into these companies nonetheless provides some indicative and interesting findings as regards the outcomes, implications (including legal compliances) of the "one woman director" quota. Moreover, as the spread of companies penetrates beyond the usual fore-runners or top ones (on which most corporate governance reviews tend to focus), the results are expected to be more real and fair, and further mitigates any probability of bias. Confinement to statistics of compliances alone, including amongst top-notch companies, has so far yielded results that are found to be heavily skewed or weighted. This deceives the reader into believing a story of progress that is otherwise not so impressive, if one digs deeper.

The above data was obtained company-wise, based on which all of the related graphs and statistics have been constructed by the author herself exclusively for the purposes of this thesis. This thesis takes a more pragmatic stance, aiming for an in-depth and purposeful assessment of the data. Accordingly, the analysis goes beyond the aggregate compliance figures to comprehensively assess the individual profiles of female directors in these companies (including, *inter alia*, their age, attributes and competencies; the nature of their directorships – executive, non-executive or independent; their connectivity to other board members or promoter owners; sectoral presence; and functional segregations across board committees). Further, the most recent (2017–2018) annual reports of the top ten Nifty 50 companies were reviewed to examine their diversity policies, if and where they were published. All of these outcomes deductively reveal the current status, as regards where India's strategy of "one woman director" stands five years since its enactment.

F. *Scope and Limitations*

Although references to the disciplines of organisational behaviour and gender studies are indispensable and are made from time to time in this thesis, the complex taxonomy of gender identities, correlation between gender and sex and theories surrounding gender studies or feminism, which represent a stand-alone discipline and area of research in itself, are beyond the scope of this thesis. Rather, the term "gender" has been used in its ordinary meaning – i.e., the binary divide between male and female with a social and cultural meaning, that often coincides with the otherwise anatomical connotation of "sex" when used in the general sense.[62]

Instead, this research is primarily focused on boardroom gender diversity as an issue of corporate governance. In particular, it is concerned with how such diversity is legally strategised, and how it can be optimally regulated, specifically in the national context of India. As such, the roadmap that this thesis recommends is primarily focused on gender diversity on boards of listed companies in India. Although much of it might also hold relevance for unlisted public companies, it is therefore reiterated that, to start with, the intention is to apply recommendations for reform to listed companies only. The outcome of the "one woman director" quota that is assessed for listed (Nifty 50 and Nifty mid-cap 50) companies in India further helps to retain that focus.

On another note, although gender equality is discussed at length, this is done with a view to its role as one of the rationales justifying boardroom gender diversity. Such equality or its institutional set-up has therefore been concisely reviewed for that purpose only, and is not sought to be studied as a stand-alone human right subject in this thesis. It is reiterated that the recommendations made in this thesis aim to consider gender diversity as a corporate governance issue (and not equality *per se*). Therefore, a distraction to how best India's equality/anti-discrimination laws, institutional set-up, or social and cultural ethos can be re-organised has been consciously avoided. Instead, this could be taken up separately as a topic for research in future.

[62] J Meyerowitz, 'A History of Gender' (2008) 113(5) American Historical Review 1346- 1356, 1351.

A major limitation to this research, however, has been the restricted extent of resources on the "one woman director" quota in India. While the thesis captures substantially all of the laws, pre-legislative materials, and information available and accessible in the public domain as of this date (as would be the expected standards for a doctoral thesis), any further information on consultative reviews with the industry, detailed responses on the bill proposing the quota, or ministerial deliberations could not be found. Not much of academic research has advanced either, considering that "gender diversity" is yet to come in the spotlight (and which this thesis hopes to attain) for India. This is further aggravated by the lack of organised, consolidated and centralised data on the boards of Indian companies. The information procured on Nifty 50 and Nifty mid-cap 50 companies was for a hefty fee. As a result, there were constraints on the spread of data across years, and, at best, data could be procured only a single time, as recently as February 2018. Finally, given the limited transparency in the governance set-up of India, penetrating boardrooms to access directors or their personal experiences was not possible. Although this has not significantly impacted this research, which is undertaken primarily from a regulatory (rather than industry) standpoint, it would nonetheless have been beneficial to obtain some such insights. The same applies to some of the women's organisations claiming to work for gender diversity in India, from where, despite repeated requests, not much assistance or information could be gathered. Any responses received were unsatisfactory. Having said that, the author wishes to pursue greater levels of industry interactions for future research.

Finally, the choice of jurisdictional reviews of Norway, the UK and the EU does not offer any direct legal transplant to strategising of laws for India in this regard. This is because, neither the egalitarian social structure of Norway, nor the neo-liberal ideologies of the UK, is resonated by India. Even the principle-based corporate governance set-up of the UK does not relate to that of India, which is still at an intermediate stage between rule-based and principle-based systems. The inability of direct application of laws from either of these countries to India, however, does not impair the thesis in any manner, as the thesis relies upon these jurisdictional reviews only for and to the extent of devising a general theory for strategising of regulations on boardroom gender diversity at a broad level. As their policy approaches or strategies

are not applied to India on an "as is" basis, which is instead devised ingeniously subject to its specific national context, this does not impact much as a limitation as such.

G. *Structure of the Thesis*

To answer the research questions, and eventually reach the ultimate objective sought, this thesis is organised as follows.

Chapter I starts by examining the existing literature on gender diversity as a concept. After a review of the two seemingly competing rationales, social justice and business, and the effects of diversity on both, the chapter reveals that boardroom gender diversity rather stands on a dual case of *gender plus* or equality-cum-business. It further reveals that "whether or not diversity" is a redundant debate, as both the industry and regulators now perceive such diversity as good governance practice, regardless of which of the two rationales better justifies it. Based on this perception which assumes a dual case for such concept of diversity, and having answered research question 1 in this chapter, this thesis proceeds to the question of "how such diversity is strategised" in chapter II.

In *chapter II*, while examining how countries strategise laws and regulate boardroom gender diversity, the relevance of rationale re-emerges. When the different strategies of Norway and the UK and at EU level (alongside a cursory review of a few other countries) are explored, ranging from a mandatory sanction-backed quota on one hand, voluntary industry-driven measures on the other, and a procedural quota in between, and the reasons for such variances are traced, it is found that one rationale over the other (or at least the predominance of one, where both apply) is what decides the choice of policy approach/strategy. Based on such linear connections or linkages drawn between the rationales and the choice of policy approaches (hard law versus soft law), specifically the implications that each one has or might have on boardroom gender diversity, this chapter then offers a general theory as regards how a policy approach or strategy can be derived in this regard. These strategies or approaches, alongside the dual characteristics of diversity, are further used to formulate how an optimum policy approach or strategy – i.e., one that emanates from an intersection of both rationales

and lies mid-way between hard law and soft law (while balancing both) – can be derived.

The chapter then makes proposals as regards what an optimum strategy might look like. Offering two different possibilities, the first is based on a single strategy with hybrid characteristics (such as comply-or-explain), which is commonly prevalent in corporate governance (if not specifically for regulation of gender diversity) across countries. The second entails a mix of strategies (each borrowed from either hard law or soft law) that add up to attain such balance, which is where this thesis diverges from conventional methods. Significantly different from each other in terms of their composition, eligibilities and functions, and therefore also their candidature, "one size" for female directorship in the two constituents – non-executive directors and executive directors – is strongly argued against. Instead, a need to distinguish strategies for the two is emphasised, which would also help in attaining the sought-after balance of policy approaches at overall board level. Having said this, the proposal made in this chapter is a broad-level one, and is subject to, or should be adapted in accordance with, the national context where one seeks to enforce it. Having responded to research questions 2 and 3 in this chapter, the thesis then arrives at its core – i.e., the national context of India.

Chapter III unfolds the India story – i.e., the "one woman director" quota, the journey that led to the quota and to the reasons and rationale underlying it, and the outcome five years after its enactment. This chapter contains an in-depth and purposive assessment of both the statistics and the characteristics of female directorship in the 100 top and medium-sized listed (Nifty 50 and Nifty mid-cap 50) companies. Alongside this, based on a critical review of the annual reports of a few such companies to examine their diversity policies (if and where published), this chapter reflects upon the minimal extent of momentum that the quota has created within the industry. All of these investigations help in ascertaining not only the extent of compliance, but the depth of such compliance, and how far India has been able to capture the true spirit of diversity. Thus, chapter III answers research question 4 of this thesis.

Identifying the gaps in such outcomes, the thesis then proceeds to examine what might be the potential causes for these. This leads to the discovery of a regulatory mismatch

between India's rationale (premised on social-cum-business reasons) and its strict hard law mandatory quota, which breaks the equation drawn and deviates from the general theory of strategising derived in chapter II. Given that this mismatch still continues, and considering the insufficient candidature (a result of poor female share in labour force/employment and education, and a vicious cycle of gender segregation, lingering pay gaps, and leaking pipeline – all adding up to double glass ceilings, and which resonate strict patriarchal values characterising India's social and cultural set-up), it becomes clear that the over-arching quota applicable to the entire board is not a prudent regulation for India. To substitute this misplaced quota, *chapter IV* recommends an optimum roadmap for India. Interweaving strategies for each of the two constituents (non-executive and executive directors within boardrooms), alongside ideas to build and sustain their respective candidatures, this chapter offers an all-inclusive direction for the country's future regulatory course, where both the regulator and the industry must act as protagonists. With this, the final research questions 5 and 6- the ultimate research objective of this thesis is complete and accomplished.

CHAPTER I – BOARDROOM GENDER DIVERSITY AND CORPORATE GOVERNANCE

I.1 *Overview of the chapter*

This chapter peruses some of the existing research and literature relating to, first, the meaning of gender diversity and, second, its relevance more particularly in the organisational and boardroom context. To this end, an extensive review of assertions made from apparently competing sources – business versus social justice – has been helpful in understanding the reasons for "boardroom gender diversity". Amidst many advocacies, protests and counter-protests, and notwithstanding that its direct correlation with corporate profits remains debatable (akin to independent directorship, which has nonetheless been institutionalised), what emerges clearly is that such controversies or criticisms do not make any claims seeking to eliminate or oust such diversity. Rather, both rationales, otherwise seemingly antithetical to each other, agree upon the need for a gender mix in corporate leadership (but for different reasons). The debate is therefore no longer about whether or not to have diversity.

Perceived as a good governance practice, and with affirmation from the industry too,[63] boardroom gender diversity makes no distinction between the two rationales – more so when assessed from a practical standpoint. Instead, with an innate "gender plus" meaning to it that goes beyond representative balance or demographic equality, gender diversity gathers its significance from a dual case of "gender" and "utility", or, in other words, both the social justice and business rationale. Based on this assumption concluded in this chapter, and without engaging in any independent investigation or findings justifying boardroom gender diversity in general terms (on which enough ink has already been spilled), this thesis then proceeds to the question of "how to strategise regulations for such diversity" in chapter II.

[63] 'How Diverse should Boards be' (The Institute of Chartered Accountants in England and Wales 2014) <https://www.icaew.com/en/technical/corporate-governance/corporate-governance-community/board-diversity/board-diversity-articles/how-diverse-should-boards-be> accessed 10 June 2017. 'Gender Diversity in Boardrooms' (The Institute of Company Secretaries of India, December 2014) vii.

I.2 *What is Gender Diversity?*

Gender diversity, a term derived from "gender" and "diversity", involves complex interpretations. Each of these terms, which can generate volumes of evolving theories, meanings, ramifications, nuances and challenges in themselves, can represent an exclusive discipline or research area. Given that such conceptual veracities are beyond the scope of this thesis and, the questions it seeks to answer, each of the terms are used with their ordinary meanings.

Accordingly, "gender" here refers to, as is commonly understood, a social identity accorded to biological sex, explained as follows:

> *the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.*[64]

In other words, the term refers to the binary divide between male and female,[65] but with a social and cultural meaning attached. Thus, while sex is about definite and anatomically distinct physiognomies that a human body is born with, gender represents the meaning that body acquires from its social and cultural precincts. This explains why, unlike sex, gender is reckoned as stretching beyond biology and unnatural by definition.[66] Despite such conceptual variances, it is commonly found that "sex" and

[64] 'World Survey on the Role of Women in Development' (United Nations 1999) ix.
[65] D Rosenblum & D Roithmayr, 'More Than A Woman: Insights into Corporate Governance After the French Sex Quota' (2015) 48 Indiana Law Review 889–930, 890. See also, J Meyerowitz (n 62) 1351.
[66] P Eckert & S McConnell-Ginet, *Language and Gender* (Cambridge University Press 2003) chapter 1, 9. See also, J Butler, 'Sex and Gender in Simone de Beauvoir's Second Sex' (1986) 72 Yale French Studies 35–49, 35.

"gender" are interchangeably used.[67] This is perhaps because the two often coincide in the real world,[68] and it is such convergence that this thesis connotes as "gender".

Likewise, "diversity" is taken in its generic sense to mean variety, difference or mixed population, and, more specifically within a group, as a "distribution of personal attributes among interdependent members".[69] Originally perceived as a threat to unity and cohesion, the term has evolved from being perceived as something that can only be tolerated to what is now believed to be essential and indispensable.[70] Despite its rising prominence, there exists no single universal or exhaustive definition. Instead, definition must be determined on a need- or context-specific basis. This is what the US Securities and Exchange Commission ("SEC") asserts while describing diversity in relation to organisations/companies:

> *We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments*.[71]

Although left open-ended, hints of what constitutes diversity can be gathered from the above quote. Explained in terms of experience, perspectives and skills on one hand, and more tangible and measurable parameters such as gender, race and ethnicity on the other, what remains consistent is the underpinning idea of "differences".

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[67] GN Powell, 'Sex, Gender, and Leadership: What Do Four Decades of Research Tell Us?' in Kumra, Simpson & Burke (eds), *The Oxford Handbook of Gender in Organizations* (Oxford University Press 2018).
[68] Simone de Beauvoir, *The Second Sex* (Vintage Books 2010) 50.
[69] S Nielsen, 'Top Management Team Diversity: A Review of Theories and Methodologies' (2010) 12 International Journal of Management Review 301–316, 306.
[70] PH Schuck, 'The Perceived Values of Diversity, Then and Now' (2000-01) 22 Cardozo Law Review 1915– 1960, 1917.
[71] Proxy Disclosure Enhancements, 74 Fed Reg 68, 334 (23 December 2009) (codified at 17 CFR – SEC adopting amendments to enhance information regarding proxy solicitations).

"Gender diversity", as this thesis describes it,[72] therefore fundamentally indicates differences associated with men and women.[73] With this foundational understanding (and to avoid moving away from the research objectives), this thesis moves up to the next level of enquiry – why gender diversity?. Given that diversity is innately a-contextual, it becomes important to attach an appropriate context to it prior to examining its significance. For the purposes of this thesis, this context is corporate leadership, or, more particularly, boardrooms. To this end, it is worthwhile to start by examining its relevance and implications within an organisational set-up. As an organisation operates not simply as an aggregate of individuals,[74] but as a group symbolising certain shared commitments and synergy,[75] replication takes place of similar group dynamics, behaviour and interpersonal forces peculiar to a corporate boardroom.[76] This aids drawing of the nexus between gender diversity and company leadership, and, more broadly, corporate governance.

I.3 *Why Gender Diversity?*

The reasons for gender diversity are two-fold: first, to bank upon the benefits or utilities that such a mix would bring, and, second, it is always ideal to attain social equality or gender parity. For a business set-up, these reasons are broadly classified as the "business rationale" and the "social justice rationale", respectively.[77]

I.3A Business Rationale

For an organisation, gender diversity is neither a numbers game nor about disseminating fairness to those less privileged. Rather, it gains significance or is valued

[72] Based on review of relevant literature discussed and referenced in section I.2 and I.3 of this thesis.
[73] Krawiec, Conley, & Broome, 'Dangerous Categories: Narratives of Corporate Board Diversity' (2011) 89 North Carolina Law Review 759–808, 760.
[74] KY Williams & CA O'Reilly, 'Demography and Diversity in Organizations: A Review of 40 Years of Research' in BM Staw & LL Cummings (eds), *Research in Organizational Behaviour* (JAI Press 1998) 77–140, 83.
[75] GB Northcraft & MA Neale, *Organizational Behavior: A Management Challenge* (Dryden Press 1994) chapters 8 and 16. See also, H Hamann, 'Unpacking the Board: A Comparative and Empirical Perspective on Groups in Corporate Decision-Making' (2014) 11 Berkeley Business Law Journal 1–54, 20–21.
[76] NF Sharpe, 'The Cosmetic Independence of Corporate Boards' (2010-11) 34 Seattle University Law Review 1435-1456, 1437, 1452.
[77] B Choudhury, 'New Rationales for Women on Boards' (2014) 34(3) Oxford Journal of Legal Studies 511–542, 512. See also, E Roberts, 'Corporate Leadership and the Unfinished Diversity Movement' (2011-12) 14 Duquesne Business Law Journal 277–309, 306–307.

because of the manifold advantages that it contributes to the business,[78] which can be summarised under three key headings of (a) corporate performances; (b) governance; and (c) corporate profits.

(A) Corporate Performances

The first and foremost advantage that naturally comes with a gender-diverse workforce is the expanse of talent and human resources, which otherwise would remain untapped. Exclusion of anyone, whether man or woman, would mean a missed opportunity, and the organisation would remain devoid of the knowledge, skills and expertise that could have been added to its business.[79] As this then affects the growth and competitiveness of the organisation, such omission represents no less than an instance of mismanagement.[80] For a boardroom where complex challenges are dealt with and strategic decisions are made, losing out upon the right mix of competencies and attributes can have more severe repercussions that can permeate down the hierarchy to the whole of the company. This is condemned as an economic loss, both from a macro and micro standpoint:

> *The business case for gender equality is another important issue. It is widely argued that women's advancement in the world of work brings benefits for businesses, while the under-utilisation of women's skills is a loss for the economy, particularly in the light of anticipated skill shortages.*[81]

Gender diversity can ensure that organisations, and, more specifically, corporate leadership draw upon and learn/gain from a wider spectrum of skill-sets, backgrounds and real-life experiences with potential to enrich internal processes and decision-making.[82]

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[78] 'How Diverse should Boards be' (n 63).
[79] D Weber-Rey, 'Professionalization on the Supervisory Board, Diversity and Women' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing 2013) chapter 26, 184.
[80] Lord Davies, 'Women on Boards' (The Department for Business, Innovation & Skills, February 2011) 9.
[81] 'The Gender Balance in Business Leadership' (Commission Staff Working Paper, Brussels, SEC (2011) 246 final, 2011) 3.
[82] C Lagarde, 'The Business Case for Women's Empowerment' (International Monetary Fund, 18 November 2016) <https://www.imf.org/en/News/Articles/2016/11/18/SP111816-The-Business-Case-for-Womens-Empowerment> accessed 10 October 2017.

Next, to locate newer target markets, identify and understand customer preferences, and better respond to a wider range of demands, people who identify with and have allegiance to such broader cross-sections can help.[83] A mix of men and women who can relate to both of these segments, results in natural extension of the periphery of the potential market.[84] Similar logic also applies to relationships with employees and stakeholders, who are better able to connect with and are more comfortable when dealing with diverse organisations with variety.[85] Gender diversity therefore enhances the horizon for and space within which boards and companies can operate.

Representing a more participative and democratic work culture,[86] higher sensitivity,[87] and reduced levels of conflict and related costs,[88] gender diversity sends out signals of benevolence and positivity,[89] which in turn creates what is termed the "salutary"[90] effect of diversity that adds to the institutional legitimacy,[91] reputation and good will of the organisation.[92] This explains why, as the number of women directors increases,

[83] Brief for *Amicus Curiae* 65 major American businesses, and Brief for *Amicus Curiae* General Motors Corporation, in *Grutter v Bollinger*, 539 US 306 (2003).
[84] DA Thomas, 'Diversity as Strategy' (2004) Harvard Business Review <https://hbr.org/2004/09/diversity-as-strategy> accessed 30 October 2015.
[85] Krawiec, Conley, & Broome, 'The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity' (2013) 3 University of Illinois Law Review 919–958, 924. See also, 'Invest in Women, Invest in America: A Comprehensive Review of Women in the US Economy' (Congress Joint Economic Committee, Government Printing Office, December 2010) 11.
[86] PY Gomez & H Korine, 'Democracy and the Evolution of Corporate Governance' (2005) 13(6) Corporate Governance: An International Review 739–752, 747–748. See also, S Machold & K Hansen, 'Policy Approaches to Gender Diversity on Boards: An Introduction to Characteristics and Determinants' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing 2013) chapter 24, 167.
[87] B Choudhury (n 77) 531.
[88] S Nielsen & M Huse, 'The Contribution of Women on Boards of Directors: Going beyond the Surface' (2010) 18(2) Corporate Governance: An International Review 136–148, 140. See also, M Woryk, 'Women in Corporate Governance: A Cinderella Story' (2011–12) 37 University of Dayton Law Review 21–38, 36.
[89] GB Northcraft & MA Neale (n 75) chapter 16.
[90] Fanto, Solan, & Darley, 'Justifying Board Diversity' (2010-11) 89 North Carolina Law Review 901–936, 934.
[91] RF Burch, 'Worldview Diversity in the Boardroom: A Law and Social Equality Rationale' (2010-11) 42 Loyola University Chicago Law Journal 585–628, 628.
[92] Fanto, Solan, & Darley (n 90) 911. The "signalling" effect has, however, been condemned as a mirage, as it is argued that showcasing (and not diversity) sends out signals to the industry, which may not be true always. PS Shin & M Gulati, 'Showcasing Diversity' (2010–11) 89 North Carolina Law Review 1017–1053, 1030.

the chances of companies appearing on lists that applaud corporate citizenship also increases.[93]

All of the above advantages find corroboration in industry examples where diversity appears to have bridged the gap between organisation and marketplace.[94]

(B) Governance

Of all the benefits attributed to gender diversity, the most notable relates to governance.[95] If an organisation or boardroom was made up of individuals with similar backgrounds and experiences, their outputs would be similarly aligned. In other words, with restricted thinking and perspectives, their decisions would reflect such homogeneity, resulting in what is termed "group-think".[96]

- Group-think

Ideally, group decisions are preferred to individual ones, as the former bring synergy.[97] However, this is not universally true, as, often to match standards of others, better performing members compromise upon and reduce their levels.[98] Further, group interactions and influences can at times inhibit the potential novelty or creativity of individuals working independently could bring.[99] One such inhibition is group-think. Coined by Irving Janis, group-think is defined as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity overrides their motivation to realistically appraise alternative

[93] Larkin, Bernardi, & Bosco, 'Does Female Representation on Boards of Directors Associate with Increased Transparency and Ethical Behavior?' (2013) 13(1) Accounting and the Public Interest 132-150.
[94] CG Cooper, 'Diversity: Denied, Deferred or Preferred' (2004-05) 107 West Virginia Law Review 685–698, 686–688. See also, K Eichenwald, 'Texaco to Make Record Payout in Bias Lawsuit' (The New York Times, 16 November 1996) <http://www nytimes.com/1996/11/16/business/texaco-to-make-record-payout-in-bias-lawsuit.html> accessed 15 March 2015; and G Winter, 'Coca-Cola Settles Racial Bias Case' (The New York Times, 17 November 2000) <http://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html> accessed 15 March 2015.
[95] R Sealy & S Vinnicombe, 'Women and the Governance of Corporate Boards' in T Clarke & D Branson (eds), *The SAGE Handbook of Corporate Governance* (SAGE Publications 2012) chapter 14.
[96] IL Janis, *Victims of Groupthink: A Psychological Study of Foreign-policy Decisions and Fiascos* (Houghton Mifflin Company 1972) 9.
[97] H Hamann (n 75) 27–53.
[98] KA Merchant & K Pick, *Blind Spots, Biases, and Other Pathologies in the Boardroom* (Business Expert Press 2010) 109.
[99] *Id* at 108.

courses of actions".[100] Although Janis' model has since been critically re-hashed and re-cast several times,[101] fundamentally it remains what is formed when group members embrace a viewpoint (generally one adopted by a strong leader), enforce conformity with that, react with hostility to anyone challenging it, and maintain the perspective despite conflicting evidence.[102]

Emanating from a "we-feeling" and "group-mindlessness", whereby, for example, persons adjust their behaviour in response to impressions that other group members have of them, group-think involves compromising on the potential and abilities of individual group members to nurture cognitive biases and inferior decisions.[103] Where, so as not to interrupt group allegiance, dissenters opt for silence, which creates an illusion of unanimity and superiority for others, critical reflection and reality testing are hindered.[104] With inflated levels of cohesiveness[105] and polarised thinking, ignorance of the conflicting interests in the organisation often results.[106] Accordingly, decisions affected by group-think are often more extreme – either more cautious or riskier than individual decisions.[107] Further, groups have a tendency to consider and deliberate only upon such information known to be in common, while not according similar attention to unshared information known to one member or only a few members in the group.[108] This often leads to hasty, irrational and faulty judgments.[109]

What can naturally reverse such strong grasp of unanimity, re-instating objective, independent and critical thinking, is infusion of some element of difference or

[100] IL Janis (n 96) 9.
[101] G Whyte, 'Groupthink Reconsidered' (1989) 14(1) The Academy of Management Review 40-56; and RS Baron, 'So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making' (2005) 37 Advances in Experimental Social Psychology 219–253.
[102] S Nielsen (n 69) 307.
[103] H Hamann (n 75) 43.
[104] MA O'Connor, 'The Enron Board: The Perils of Groupthink' (2002–03) 71 University of Cincinnati Law Review 1233–1320, 1259.
[105] MA Hogg & SC Hains, 'Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink' (1998) 28(3) European Journal of Social Psychology 323–341, 337.
[106] MB Leslie, 'The Wisdom of Crowds? Groupthink and Non-profit Governance' (2010) 62 Florida Law Review 1179-1226, 1184.
[107] J Stoner, 'Risky and Cautious Shifts in Group Decisions: The Influence of Widely Held Values' (1968) 4(4) Journal of Experimental Social Psychology 442–459, 457.
[108] KA Merchant & K Pick (n 98) 32.
[109] Y Zhao, *Corporate Governance and Directors' Independence* (Kluwer Law International 2011) 156.

variation in information, values, perceptions, way of thinking, beliefs and operating styles:

> *We should invite physicists into chemistry departments, psychologists into economic departments, and political scientists into business schools. We should include engineers in marketing meetings and marketers in engineering meetings.*[110]

An obvious and potential recourse therefore lies in diversity (particularly of gender), which can lead to outperforming a group of more able individuals,[111] as the necessary dismantling force. This is because, with women found to be more heterogeneous and individualist in their values and preferences,[112] mixed-gender groups are empirically proven to have higher tendencies to avoid group-think than single gender groups.[113]

A similar ethos is mirrored in boardrooms, defined as "a homogenous group of elites who have similar socio-economic backgrounds, hold degrees from the same schools, have similar educational and professional training, and, as a result, have very similar views about business practices".[114] Typically characterised by strong patriarchal values[115] and one or a few strong male leaders (for instance, the chief executive officer, managing director and executive directors who replicate the management), such boardrooms put forward similarity of outlook or familiarity, serving as an antecedent for board appointments.[116] Accordingly, board decisions, often taken outside boardrooms, are only rubber stamped by remaining directors.[117] To dismantle such "cosy old boys' club",[118] and high susceptibilities to self-censorship, polarised decisions and group-think, differences in terms of background, experiences and perspectives, greater monitoring, and a critical/dissenting approach need to be

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[110] JW Scott, *Gender and the Politics of History* (Columbia University Press 1988) 29.
[111] *Id* at 91.
[112] C Hakim, *Key Issues in Women's Work – Female Diversity and the Polarisation of Women's Employment* (The Glass House Press, 2004) 212.
[113] Kroon, van Kreveld, & Rabbie, 'Group Versus Individual Decision Making: Effects of Accountability and Gender on Groupthink' (1992) 23 SmallGroup Research 427–458, 450.
[114] JD Westphal & LP Milton, 'How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards' (2000) 45(2) Administrative Science Quarterly 366–398, 366.
[115] N van der Walt & C Ingley, 'Board Dynamics and the Influence of Professional Background, Gender and Ethnic Diversity of Directors' (2003) 11(3) Corporate Governance: An International Review 218–234, 228.
[116] JD Westphal & LP Milton (n 114).
[117] B Gunter, *Why Women Should Be Taken More Seriously in the Boardroom* (Taylor & Francis 2017) 22.
[118] 'Banking Crisis: Reforming Corporate Governance and Pay in the City – Ninth Report of Session 2008–09' (House of Commons, Treasury Committee, 12 May 2009) para. 151 – Treasury Report.

introduced.[119] This draws inspiration from the definition of diversity in the context of corporate governance, advanced as "relat[ing] to board composition and the varied combination of attributes, characteristics and expertise contributed by individual board members in relation to board process and decision-making".[120] "Age, gender, ethnicity, culture, religion, constituency representation, independence, professional background, knowledge, technical skills and expertise, commercial and industry experience, career and life experience" are only a few constituents of this.[121]

Accordingly, an explicit call for a more diverse board was made by the International Corporate Governance Network in response to the banking crisis of 2008–09, when companies and regulators asked, "whether the crisis could have been avoided if Lehman Brothers had been Lehman Sisters?"[122]

Apart from resistance to crisis situations,[123] diversity, as a counter-force to group-think and passive free-riding,[124] is regarded as an enabler for better decision-making:

> *… diversity produces more effective problem-solving. While heterogeneity may initially produce more conflict* **…** *the variety of perspectives that emerges causes decision makers to evaluate more alternatives and more carefully explore the consequences of these alternatives*.[125]

Thus, with a wider range of viewpoints that challenge dominant and like-minded influences,[126] critical assessment of alternatives and solutions that are often more

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[119] B Gunter (n 117) 3. See also, Kang, Cheng & Gray, 'Corporate Governance and Board Composition: Diversity and Independence of Australian Boards' (2007) 15(2) Corporate Governance 194–207, 195.
[120] N van der Walt & C Ingley (n 115) 219.
[121] *Id* at 227.
[122] C Lagarde, 'What If It Had Been Lehman Sisters?' (New York Times, 11 May 2010) <https://dealbook.nytimes.com/2010/05/11/lagarde-what-if-it-had-been-lehman-sisters/> accessed 10 April 2017. See also, JA Nelson, 'Would Women Leaders have Prevented the Global Financial Crisis? Implications for Teaching about Gender, Behaviour and Economics' (Global Development and Environment Institute, September 2012).
[123] SA Hewlett, 'Too Much Testosterone on Wall Street?' (2009) Harvard Business Review <https://hbr.org/2009/01/too-much-testosterone-on-wall> accessed 20 February 2017.
[124] B Hannigan, 'Board Failures in the Financial Crisis – Tinkering with Codes and the Need for Wider Corporate Governance Reforms: Part 1' (2011) 32(12) 363, 364. See also, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities' – Walker Review (November 2009) annex 4.
[125] Carter, Simkins, & Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003) 38 The Financial Review 33–53, 36.
[126] Walker Review (n 124) para 3.5.

creative,[127] such diversity is crucial to prevent and mitigate the occurrence of group-think within boardrooms.[128] More specifically for gender, the Conference Board of Canada found that boards with women bring better governance,[129] as they are more likely to determine standards to appraise strategies, monitor their execution, prevent conflict of interests, adhere to codes of conduct, and provide for better communication and non-financial performance measures.[130] This was later corroborated by a 2010 study of the Harvard Business School[131] and, more recently, a 2015 survey reiterated that the presence of female directors can bring more innovative and creative perspectives to boards, resonating with wider market segments, enhancing firms' reputations and providing role models for future candidates.[132] All of these do not necessarily imply different facts or solutions – rather, women are seen to bring in different approaches or applications of such facts to offer newer (or possibly better) solutions, or means to attain those solutions[133]: "when women are more involved in decision-making, they make different decisions – not necessarily better or worse – but decisions that reflect the needs of more members of society".[134]

Having said this, narratives which warn that diversity or heterogeneity, if mismanaged or running too deep, may undermine the communitarian ethos and commonality of goals must not be overlooked.[135] Potential dangers involving decisions becoming stuck or organisational environments becoming too stressful are cited as some of the ramifications[136] – an argument advanced by studies demonstrating that close social ties

[127] KY Williams & CA O'Reilly (n 74) 87: These findings were listed for diversity generally (not gender).
[128] Carter, Simkins, & Simpson (n 125) 36. See also, SA Ramirez, 'A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?' (2003) 77 St John's Law Review 837–866, 840.
[129] Anastasopoulos, Brown, & Brown, 'Women on Boards: Not Just the Right Thing ... But the 'Bright' Thing' (Conference Board of Canada 2002) 5.
[130] J Sarra, 'Class Act: Considering Race and Gender in the Corporate Boardroom' (2005) 79 St Johns Law Review 1121–1160, 1130.
[131] B Groysberg & D Bell, 'Dysfunction in the Boardroom' (Harvard Business Review June 2013) <https://hbr.org/2013/06/dysfunction-in-the-boardroom/ar/1> accessed 2 July 2015.
[132] 'Gender Diversity in the Boardroom: Reach for the Top' (The Chartered Institute of Personnel Development Survey Report, February 2015).
[133] SE Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton University Press 2007) 55, 72.
[134] 'Global Gender Gap Report' (World Economic Forum 2017) Preface.
[135] KY Williams & CA O'Reilly (n 74) 77.
[136] *Ibid*.

can lead to greater board involvement.[137] This finds further support from slightly different but analogous theories that justify why voting rights are confined to shareholders.[138] Explaining this, boards are able to reach consensus more easily where directors represent shareholders united by a common aim of share value rather than more heterogeneous employees and stakeholders. This represents an argument against diversity. Such preference for group decision-making over individualist processes[139] is often justified with reference to greater friction, slower procedures and the higher costs involved, where heterogeneous groups allegedly falter.[140] An overriding urge to reach consensus,[141] which culminates in advocacy for homogeneous and cohesive groups,[142] is in stark contrast to allegers of group-think. Reluctance that perceives diversity as a potential threat to group harmony arises because: "we like the idea of diversity so long as we need not live too close to it".[143]

To respond to the above apprehensions, which refer to ill-planned heterogeneity rather than diversity *per se*, and which seem rather misplaced in modern times,[144] diversity does not negate group decision-making (as seems to be the basis on which apprehensions are raised). Rather, it aims at decision-making marked by self-censure and pressure,[145] or, in other words, group-think that (unless mitigated through individualist, objective, independent and critical mind-set – all of which are proven attributes of diversity)[146] would continue to intimidate such decision-making.

[137] DP Forbes & FJ Milliken, 'Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups' (1999) 24(3) Academy of Management Review 489–505, 494.
[138] SM Bainbridge, 'The Case for Limited Shareholder Voting Rights' (2005-06) 53 UCLA Law Review 601–636, 612.
[139] SM Bainbridge, 'Why a Board? Group Decision-making in Corporate Governance' (2002) 55 Vanderbilt Law Review 1–55, 54.
[140] H Tajfel & JC Turner, 'The Social Identity Theory of Intergroup Behaviour' in S Worchel & WG Austin (eds), *Psychology of Intergroup Relations* (Nelson-Hall 1986) 7. See also, KY Williams & CA O'Reilly (n 74) 77.
[141] BN Lizotte, 'The Diversity Rationale: Unprovable, Uncompelling' (2005–06) 11 Michigan Journal of Race and Law 625–669, 637, 667.
[142] DC Lau & JK Murnighan, 'Demographic Diversity and Faultlines: The Compositional Dynamics of Organizational Groups' (1998) 23(2) Academy of Management Review 325–340, 331.
[143] PH Schuck (n 70) 1959. See also, DC Langevoort, 'Puzzles about Corporate Board and Board Diversity' (2011) 89 North Carolina Law Review 841–857.
[144] PH Schuck (n 70) 1959.
[145] DP Forbes & FJ Milliken (n 137) 496.
[146] Kroon, van Kreveld, & Rabbie (n 113) 450.

- Board Functions

As well as having susceptibilities to group-think, gender diversity has proven its effects in terms of enhancing overall board functions and effectiveness. For instance, gender-diverse boards are found to have positive impact in firms with weak governance.[147] More particularly, it was observed that female directors improve overall attendance of directors, senior executive turnover depending on stock performance, monitoring committees, directors' compensation (with the exception of chief executive officer ("CEO") compensation as female representation in compensation committees was rare) and levels of preparation by male directors in board meetings.[148]

Most of these find corroboration from an industry review undertaken post-quota in Norway, which also revealed enhanced dialogue, better decision-making, more effective risk and crisis management, improved monitoring, a more collegial boardroom environment and culture, more streamlined board functions and improvements in how men behaved in the boardroom.[149] Likewise, it was found in French boardrooms that women could improve board decision-making through a more innovative and critical approach, better consideration of stakeholders, reduced hostilities, more accurately calculated risks and avoidance of unchallenged assumptions or complacency.[150] Although described as "erratic", decision-making in diverse boards was found to bring greater innovation and long-term performance.[151]

Further, female directors are proven to be better risk managers.[152] Their presence in the boardroom is found to help mitigate and balance the more extreme and riskier

[147] RB Adams & D Ferreira, 'Women in the Boardroom and their Impact on Governance and Performance' (2009) 94(2) Journal of Financial Economics 291–309, 306.
[148] *Id* at 292.
[149] AA Dhir, 'Norway's Socio-Legal Journey: A Qualitative Study of Boardroom Diversity Quotas' in AA Dhir, *Challenging Boardroom Homogeneity – Corporate Law, Governance, and Diversity* (Cambridge University Press 2015) chapter 4, 123.
[150] D Rosenblum & D Roithmayr, 'The Effect of Gender Diversity on Board Decision-making – Interviews with Board Members and Stakeholders' (Conference Board, January 2017) 2, 12.
[151] M Giannetti & M Zhao, 'Board Diversity and Firm Performance Volatility' (Finance Working Paper N° 462/2016, ECGI, March 2016) 27–28.
[152] R Schubert, 'Analyzing and managing risks – on the importance of gender differences in risk attitudes' (2006) 32(9) Managerial Finance 706–715, 712.

strategic decisions of male members,[153] and the idea is more firmly established in the financial sector where female managers are found to be more consistent and less volatile performers.[154] Notwithstanding a few diverging views[155] and mindful of not spilling over to stereotyping women as risk averse (as is commonly done),[156] it is widely observed that female directors are more cautious and detailed in their assessments – a factor that is often cited to explain why they "shine in a downturn".[157]

Finally, measured on leadership effectiveness, women are rated better than men[158] at all levels. This difference increases at higher levels of the organisational hierarchy.[159] Found to be less hierarchical, more deliberative, more co-operative and collaborative, oriented towards enhancing others' self-worth and more interpersonally oriented and democratic, as well as possessing attributes such as intellectual stimulation and individualised consideration, women's leadership is reckoned to be transformational and democratic, as opposed to task awareness and the transactional approach taken by men.[160] For effective corporate leadership, boards require a combination of, *inter alia*, both such styles,[161] or, in other words, gender diversity.[162]

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[153] R Croson & U Gneezy, 'Gender Differences in Preferences' (2009) 47(2) Journal of Economic Literature 448–474, 454.

[154] 'Empowering Productivity: Harnessing the Talents of Women in Financial Services' (HM Treasury, March 2016) 17 – 'Gadhia Review'.

[155] JA Nelson (n 122); and 'Women in Business' (Grant Thornton, March 2017) 14. Further, despite gender differences in risk preferences and related strategies, not much of a difference in ability to perform in financial decision-making could be found – M Powell & D Ansic, 'Gender Differences in Risk Behaviour in Financial Decision Making: An Experimental Analysis' (1997) 18(6) Journal of Economic Psychology 605–628, 623.

[156] R Schubert (n 152) 712.

[157] M Ferrary, 'Soapbox: Why Women Managers Shine' (Financial Times 2009) <https://www.ft.com/content/27836d74-04e4-11de-8166-000077b07658> accessed 10 July 2018.

[158] AH Eagly & LL Carli, *Through the Labyrinth: The Truth about how Women Become Leaders* (Harvard Business Press 2007) 129–130.

[159] J Zenger & J Folkman, 'A Study in Leadership: Women do it Better than Men' at <http://www.zengerfolkman.com/media/articles/ZFCo.WP.WomenBetterThanMen.033012.pdf> accessed 20 August 2016.

[160] Hackman, Furniss, Hills, & Paterson, 'Perceptions of Gender-Role Characteristics and Transformational and Transactional Leadership Behaviours' (1992) 75(1) Perceptual and Motor Skills 311–319, 312. See also, SM Ross & LR Offermann, 'Transformational Leaders: Measurement of Personality Attributes and Work Group Performance' (1997) 23 Personality & Social Psychology Bulletin 1078–1086. Notably, these findings, upon further investigation, reveal more complexities, as a result of which such straight-jacket compartmentalisation of leadership styles may not hold universal relevance – AH Eagly & LL Carli (n 158) 124, 131, 134.

[161] AH Eagly & LL Carli (n 158) 124, 129–130. See also, Hackman, Furniss, Hills, & Paterson (n 160) 318–319; and B Gunter (n 117) 88.

[162] M Luckerath-Rovers, 'Women on Boards and Firm Performance' (2013) 17(2) Journal of Management and Governance 491–509, 507.

Having enumerated various attributes/styles that are observed as distinct, if not exclusive, to women, and which explain, in terms of value addition, why a mix of genders should be put in place in male-dominated boardrooms, a warning against spill-over to the risky zone of gender stereotyping[163] (discussed later in this chapter) becomes crucial at this stage. Whatever differences women and men are perceived to bring are justified by their social construct[164] – i.e., through the different patterns of contexts, roles, relationships and development with which they have lived and worked since birth,[165] and the experiences which then configure how they behave, react, respond and set priorities.[166] For instance, the historically ingrained social status of men as breadwinners, family heads and owners of property is seen as a reason why male thinking is found to be more oriented to "independence, rights, justice, and non-interference", while that of women is argued to be confined to the home and family care, focused in "embeddedness in lives of relationship, their orientation to interdependence, their subordination of achievement to care, and their conflicts over competitive success".[167] This biosocial theory of gender differences[168] is in contrast to gender essentialism,[169] where such difference is instead explained by anatomy – i.e., women are born different from men.[170] The latter runs a greater risk of re-instating stereotyped perceptions and gender segregation.[171]

While mindful of this warning and with extensive evidence asserting that female presence adds to decision-making and leadership (particularly objectivity and a culture

[163] M Powell & D Ansic (n 155) 624.
[164] 'General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures' paragraph 8.
[165] CM Koggel, 'A Feminist View of Equality and Its Implications for Affirmative Action' (1994) 7 Canadian Journal of Law and Jurisprudence Review 43–59, 48–49.
[166] C Seierstad, 'Gender Quotas on Corporate Boards in Norway, Necessary but Not Ideal' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing 2013) chapter 20, 138.
[167] C Gilligan, *In a Different Voice* (Harvard University Press 1993) 6, 170–171.
[168] AA Dhir, 'Lessons from Norway: Successes and Limitations of the Quota Model' in AA Dhir, *Challenging Boardroom Homogeneity – Corporate Law, Governance, and Diversity* (Cambridge University Press 2015) chapter 5, 147, 157.
[169] M Becker, 'Patriarchy and Inequality: Towards a Substantive Feminism' (1999) 1 University of Chicago Legal Forum Article 3, 21-88, 27.
[170] D Rosenblum, 'Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions' (2006) 39(3) University of California Davies Law Review 1119–1187, 1124, 1136.
[171] Eagly, Johannesen-Schmidt, & van Engen, 'Transformational, Transactional, and Laissez-faire Leadership Styles: A Meta-analysis Comparing Women and Men' (2003) 129 Psychological Bulletin 569–591, 572–573.

of constructive criticism/dissent),[172] gender diversity is arguably quintessential for boardrooms where "independence" has long since been sought as an overarching aptitude[173] not just for those formally designated as independent directors, but for entire corporate leadership teams.[174] However, given the relational approach to gender contributions, the following questions emerge, the answers to which will be known only with time: would such differences wither away as women are socially uplifted or with a reversal of social roles?; would women brought up in societies or countries founded on gender egalitarianism exhibit fewer of such distinctive attributes/styles?; and, so, would business rationale, once women attain a social status equal to men, gradually lose its relevance?

(C) Corporate Profits

Although the correlation between boardroom gender diversity and profits has been re-visited quite frequently, particularly in the past two decades, an out-an-out result on this issue seems highly improbable. A few prominent results are therefore handpicked below:

- Positive Results

1. Catalyst[175]

This popularly cited study of Fortune 500 companies during 2004–2008 reveals a positive correlation between boardroom gender diversity and corporate financial performance, measured through return on sales, return on invested capital and return on equity.

[172] AA Dhir (n 168) chapter 5, 153.
[173] D Higgs, 'Report on Review of the Role and Effectiveness of Non-executive Directors' (The Department of Trade and Industry, January 2003); and 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (London Business School, June 2003).
[174] E Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?' (2007) 86 Oregon Law Review 373–412, 375. See also, SA Ramirez (n 128) 841; and 'Beyond Independent Directors: A Functional Approach to Board Independence' (2005–06) 119 Harvard Law Review 1553–1575, 1554.
[175] NM Carter & HM Wagner, 'The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)' (Catalyst 2011) <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008> accessed 20 July 2015.

2. Carter, D'Souza, Simkins and Simpson[176]

Analysing the relationship between diversity of board committee and corporate finance in Fortune 500 companies (1998–2002), Carter, D'Souza, Simkins and Simpson identified a positive correlation. More specifically, gender diversity was found to have a positive impact through audit function.

3. American Management Association[177]

Based on a survey of 1,000 managers and executives of US companies, the study concludes that diverse (including gender-diverse) senior management relates to superior financial performance and productivity in terms of sales, market share, shareholder value, asset value, net operating profits and worker productivity.

4. McKinsey & Co[178]

The study, primarily based on a world-wide survey of business leaders, asserts that more female representation in top management positions results in better performance in terms of return on equity and operational results.

5. Credit Suisse[179]

Measured since 2008 across the US, Europe and Asia, and over a wide cross-section of more than 3,000 companies with varying tiers of female senior managers (from 15%, 25% to 33%, and up to 50%), gender diversity has increasing effects on share price, returns on equity, assets and sales growth.

6. MSCI ESG Research[180]

Based on an analysis of companies in the MSCI World Index between 2009 and 2015, those with strong female leadership (defined as boards with three or more (or above

[176] Carter, D'Souza, Simkins, & Simpson, 'The Diversity of Corporate Board Committees and Financial Performance' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106698&download=yes> accessed 1 April 2015.
[177] American Management Association, 'Senior Management Teams: Profiles and Performance' (1998) 87(8) Management Review 37–44.
[178] Desvaux, Devillard, & Sultan, 'Women Matter 2010' (McKinsey & Co, March 2011).
[179] Dawson, Kersley, & Natella, 'The CS Gender 3000: The Reward for Change' (Credit Suisse, September 2016).
[180] Lee, Marshall, Rallis, & Moscardi, 'Women on Boards – Global Trends in Gender Diversity on Corporate Boards' (MSCI, November 2015).

country average) female directors, or with a female CEO and at least one female director) were found to generate a return on equity of 10.1% per year, against 7.4% for those without.

7. Sabatier[181]

From a sample of French companies in anticipation of mandatory quotas, this study revealed that female directorship, with a significant negative correlation to inefficiency, can help attain optimal performance, defined as such performance that companies should attain if they were to utilise their resources/inputs perfectly.

8. Peterson Institute for International Economics[182]

A global survey of companies across 91 countries revealed a positive nexus between women in senior management and corporate profitability, suggesting creation of a pipeline theory, as opposed to random placement of women at the top for gender diversity. This is further corroborated by Fortune magazine's analysis of data, which asserts that only 5% of Fortune 1000 companies, which have female CEOs, generate 7% of Fortune 1000 total revenue.

- Mixed/Indeterminate/Negative Results

1. Adams and Ferreira[183]

This 2009 study of a sample comprising 1,939 US firms and 86,714 directorships found that female directors have a detrimental effect on firm value in well-governed corporations with robust shareholder rights. This is attributed to the strong monitoring characteristics of female directors which prove counter-productive in such firms. On the contrary, such monitoring is found to be at optimum levels with beneficial effects on firm value where governance and shareholder rights are weak.

[181] M Sabatier, 'A Women's Boom in the Boardroom: Effects on Performance?' (2015) 47(26) Applied Economics 2717–2727, 2724.
[182] Noland, Moran, & Kotschwar, 'Is Gender Diversity Profitable? Evidence from a Global Survey' (Peterson Institute for International Economics, February 2016).
[183] RB Adams & D Ferreira (n 147).

2. Ahern and Dittmar[184]

Based on a review of 248 public listed Norwegian companies during the period 2001 to 2009, mandatory gender quotas are found to have a negative impact on firm value, particularly in terms of less experienced board members, directors with increased outside engagements, family connections, more debt-financed acquisitions, less cash flow and increased cost to shareholders. However, as the study coincided with the imposition of mandatory quotas only then introduced in Norway, it is less likely to have captured the real effects of diversity.

3. Dobbin and Jung[185]

The study finds a negative effect of boardroom gender diversity on share prices, notably without any impact on corporate profits. The observations are based on 400 large US firms from 1997 to 2006. The study, however, attributes such impact to gender stereotyping and shareholders' bias against female directorship.

4. Conley, Broome and Krawiec[186]

Based on periodic interviews of directors of US companies, Conley, Broome and Krawiec found that, while diversity has universal and almost unanimous endorsement across the board, no concrete causal example connecting diversity to corporate performance is illustrated, except in respect of employee relations. Nonetheless, diversity as a business case emerges clearly from the industry feedback, with reliance on social justice or moral grounds rare from a practical standpoint.

[184] KR Ahern & AK Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' (2012) 127(1) Quarterly Journal of Economics 137–197.
[185] F Dobbin & J Jung, 'Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?' (2011) 89(3) North Carolina Law Review 809–838.
[186] Krawiec, Conley, & Broome (n 73). See also, Krawiec, Conley, & Broome (n 85); and Krawiec, Conley, & Broome, 'A Difficult Conversation: Corporate Directors on Race and Gender' (2014) 26 Pace International Law Review 416–425.

5. Matsa and Miller[187]

Establishing a relationship between female directors and corporate decisions/strategies, this study of Nordic companies from 2003 to 2009 reveals that the gender quota in Norway results in reduced layoffs, increased employment levels, increased labour costs and reduced short-term profits, more significantly in firms with no female directors prior to the introduction of the mandatory quota rule. Once again, the observed effects can be attributed to industry adjustments immediately linked to the mandatory quota then imposed, rather than the real effects of such diversity.

6. Randoy, Thomsen and Oxelheim[188]

Randoy, Thomsen and Oxelheim studied the effects of boardroom gender diversity on financial performance in the 500 largest Scandinavian countries, finding no significant correlation (positive or negative). This absence of a link is also revealed in a study of Danish listed firms undertaken from 1998 to 2001.[189]

7. Nygaard[190]

This work is based on a study of the Norwegian quota and reveals that, while increased board gender diversity enhances firm value where there is low information asymmetry with fewer female directors, it is detrimental in similar situations but has higher information asymmetry.

- Positive or Negative?

Empirical reviews examining the effects of gender diversity on corporate profits fall short of establishing any conclusive direct or causal link between the two. This is more so as all of the studies that yield positive outcomes succumb to certain methodological shortcomings on the grounds of causation/reverse causation. As no evidence

[187] DA Matsa & AR Miller, 'A Female Style in Corporate Leadership? Evidence from Quotas' (2013) 5(3) American Economic Journal: Applied Economics 136–169.
[188] Randøy, Thomsen, & Oxelheim, A Nordic Perspective on Corporate Board Diversity (Nordic Innovation Centre November 2006) <http://www.nordicinnovation.org/Global/_Publications/Reports/2006/The%20performance%20effects%20of%20board%20diversity%20in%20Nordic%20Firms.pdf> accessed 10 March 2015.
[189] C Rose, 'Does Female Board Representation Influence Firm Performance? The Danish Evidence' (2007) 15 Corporate Governance: An International Review 404–413.
[190] K Nygaard, 'Forced Board Changes: Evidence from Norway' (Norwegian School of Economics and Business Administration – Department of Economics, March 2011).

establishes profit as a direct consequence or effect of gender diversity, a converse possibility that an increase in corporate profits attracts more female directors (and not *vice versa*) cannot arguably be ruled out.[191]

Given the complex interplay of coinciding and overlapping board dynamics, and the interaction of simultaneous forces – internal and external to organisations – establishing a direct and exclusive link is improbable.[192] This challenge applies equally to negative results – no direct link between gender diversity and unfavourable outcomes can be established either. Nonetheless, allegations of reverse causation and incongruent results,[193] find counter-protests which assert that the direction of effects flows from (and not to) diversity, and the ratio of women to men in boardrooms therefore has a positive correlation with firm value, where the former impacts the latter, and not the other way round.[194] This finds support from the rankings in Fortune magazine's "Diversity Elite", which triggered a subsequent rise in the return on equity of such listed companies, only after publication.[195]

Moreover, many adverse outcomes attributed to gender diversity actually emanate from bias.[196] For instance, falls in share prices are triggered by shareholder bias or pre-conceived assumptions of gender roles,[197] disassociating women from boardrooms. Given that this decline does not correspond with a similar reduction of corporate profits and is more typical to non-blockholders seeking easy exit, such bias becomes

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[191] F Dobbin & J Jung (n 185) 818.

[192] Dale-Olsen, Schone, & Verner, 'Diversity among Norwegian Boards of Directors: Does a Quota for Women Improve Firm Performance?' (2016) 19(4) Feminist Economics 110–135, 113.

[193] M Szydlo, 'Constitutional Values Underlying Gender Equality on the Boards of Companies: How Should the EU Put these Values into Practice?' (2014) 63(1) International and Comparative Law Quarterly 167–196, 175.

[194] K Campbell & A Mínguez-Vera, 'Gender Diversity in the Boardroom and Firm Financial Performance' (2008) 83 Journal of Business Ethics 435–451, 446.

[195] Keys, Turner, & Friday, 'Shareholder benefits of diversity' (Eastern Finance Association Meeting, April 2002) <http://www.ibrarian.net/navon/paper/Shareholder_benefits_of_diversity.pdf?paperid=1178807> accessed 2 November 2015.

[196] F Dobbin & J Jung (n 185) 828.

[197] CJ Suter, 'The Essence of Gender Fairness' (1992–93) 19 Ohio Northern University Law Review 557–612, 557. See also, *Stender v Lucky Stores*, 803 F Supp 259 (ND Cal 1992) – involving a class action initiated on behalf of, *inter alia*, female employees against discrimination in job placements, work hours, classification of part-time vis-à-vis full-time positions, and promotions in a retail store. The court rejected the store's argument premised on stereotyped notions of female tasks that women prefer jobs not on the professional track and not involving serious commitments or night hours.

irrefutable.[198] This is in contrast to an emergent encouraging attitude towards gender diversity from institutional investors or blockholders.[199] For instance, the California Public Employees' Retirement System (CalPERS) hosts the CalPERS Diversity Forum to explore the representation of women in business.[200] Further, TIAA-CREF recommends that "the board should reflect a diversity of background and experience".[201] On a similar note, the Council of Institutional Investors recommends, *inter alia*, a gender-diverse board for enhanced corporate performance,[202] and the Diversity Project, with its 10-point action plan, seeks to create a more inclusive savings and investment industry in the UK.[203]

In view of the outlined mixed results,[204] the effects of gender diversity on corporate profits appear unconvincing and in a state of flux. This does not, however, reject the case for boardroom gender diversity, which remains stable, steady and firm on the pillars of governance, corporate performance and overall board functions (if not profits).[205] The industry also affirms that:

> *Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. … Amici need the talent and creativity of a workforce that is as diverse as the world around it.*
>
> *First, a diverse group of individuals … has the ability to facilitate unique and creative approaches to problem-solving arising from integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to*

[198] F Dobbin & J Jung (n 185) 828. See also, MA Fields & PY Keys, 'The Emergence of Corporate Governance from Wall St. to Main St.: Outside Directors, Board Diversity, Earnings Management, and Managerial Incentives to Bear Risk' (2003) 38(1) Financial Review 1–24.
[199] Krawiec, Conley, & Broome (n 85) 947–948.
[200] SA Ramirez (n 128) 847.
[201] Teacher's Insurance Annuity Association-College Retirement Equities Fund, 'Policy Statement on Corporate Governance' (TIAA-CREF 2011) 10.
[202] Council of Institutional Investors, 'Policies on Corporate Governance' (CII, 1 April 2015) <http://www.cii.org/corp_gov_policies#BOD> accessed 3 November 2015.
[203] 'Diversity Project' < https://diversityproject.com/2017-09-20/sign-diversity-projects-diversity-10-point-action-plan> accessed 18 November 2018.
[204] M Szydlo (n 193). See also, S Ghosh, 'Why is it a man's world, after all? Women on bank boards in India' (2017) 41 Economic Systems 109-121, 117-120- Focusing on India and based on a review of publicly listed banks during 2003–2012, the study failed to find conclusive results of female directorship (except of executive directorships on bank stability to an extent).
[205] SE Page (n 133) 226, 232.

> *market offerings in ways that appeal to those consumers. Third, a diverse group of managers … is better able to work with business partners, employees and clientele … around the world… Thus, Amici urge here that diversity is important.*[206]

Forming an optimum board[207] that adds a competitive advantage to business bottom lines,[208] and which then (subject to other intervening forces) influences performance,[209] this resembles independent directorship, which also remains devoid of any concrete proof of effects on profits, but has nonetheless been institutionalised as essential to boardrooms.[210]

I.3B Social Justice Rationale

Proponents of this rationale claim that, as boardrooms need to reflect the social environment and demographics in which they are situated, they ought to be gender balanced.[211] This advocacy rests primarily on three grounds, namely: (a) equality of men and women, (b) challenging the stereotype that disassociates women with corporate leadership, and (c) gender pay parity.

(A) Equality

Justifying gender from an equality standpoint begins with a claim for an equal or balanced society, or, in other words, a society in which there is a just distribution of power and resources, participation and influence between men and women. With boardrooms as chambers of social and economic power, gender representation and

[206] Brief for *Amicus Curiae* 65 major American businesses, and Brief for *Amicus Curiae* General Motors Corporation, in *Grutter v Bollinger*, 539 US 306 (2003), 5–6, 7, 9.
[207] M Woryk (n 88) 25.
[208] NM Carter & HM Wagner (n 175). See also, 'Impact of Diversity Initiatives on the Bottom Line' (Society for Human Resource and Management 2001) 11.
[209] SA Zahra & JA Pearce, 'Boards of Directors and Corporate Financial Performance: A Review and Integrative Model' (1989) 15 Journal of Management 296–334, 296, 322. See also, DP Forbes & FJ Milliken (n 137) 492.
[210] J Lawrence & G Stapledon, 'Do Independent Directors Add Value?' (1999) Centre for Corporate Law and Securities Regulation, The University of Melbourne <http://law.unimelb.edu.au/__data/assets/pdf_file/0020/1710254/143-IndependentDirectorsReport2.pdf> accessed 5 February 2017.
[211] N van der Walt & C Ingley (n 115) 232.

participation within them is seen as a vital stride to social equality.[212]As an antithesis of unequal treatment,[213] equality can be (i) symmetric/formal, or (ii) substantive.

The former enunciating treatment of like with like manner, and that of unlike in an unlike manner,[214] is individualist in nature. Formal equality argues that an individual must not bear any obligation to compensate for social ills not directly caused by or attributable to it.[215] As this targets obvious forms of discrimination in law, without any singling out, it necessarily overlooks the effects, which could be serious discriminatory consequences, notwithstanding that the law is otherwise patently neutral. Also known as pluralistic or numerical equality,[216] this rigid notion of equality was soon criticised as the "snake in the legal grass"[217] owing to its ignorance of the differences and distinct needs existing in society. As a result of the unfair implications that formal equality through uniform laws had for one group against another situated in different societal circumstances,[218] a transition was made to equality in substance over form.[219]

In contrast to formal equality, which categorically holds all differential treatment as discrimination in law,[220] substantive equality requires the elimination of historically rooted discriminatory practices through preferential treatment (or affirmative measures) to bring the prejudiced and disadvantaged group to a level playing field with others.[221] Through measures favouring the disadvantaged group as means (and not exceptions) to equality,[222] this approach represents a results-oriented approach that

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[212] AA Dhir, 'Conclusions: Ongoing Inquiry into Quotas and Disclosure Regimes as Regulatory Models' in AA Dhir, *Challenging Boardroom Homogeneity – Corporate Law, Governance, and Diversity* (Cambridge University Press 2015) chapter 8, 281.
[213] C O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) 1 UCL Human Rights Review 80–102, 87.
[214] Aristotle, *The Politics* III.IX (Penguin 1962) 195–196.
[215] P Kapotas, 'Gender Equality and Positive Measures for Women in Greece' (2nd LSE PhD Symposium on Modern Greece: Current Social Science Research on Greece, 10 June 2005) <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/2nd_Symposium/Panagiotis_Kapotas_paper.pdf> accessed 30 March 2015.
[216] RHD Sian Elias, 'Equality under Law' (2005) 13 Waikato Law Review 1–11, 8.
[217] *Id* at 2.
[218] A Treble, 'Permissible Discrimination' (1995) 20 Alternative Law Journal 117–122, 117–118.
[219] NI Idris, 'Rethinking the Value of Preferential Treatment' (2009) 15 UCL Jurisprudence Review 45–71, 47.
[220] D Parfit, 'Equality and Priority' (1997) 10(3) Ratio 202–221, 214.
[221] S Deakin & GS Morris, *Labour Law* (Hart Publishing 2009) 515.
[222]'International perspectives on positive action measures - A comparative analysis in the European Union, Canada, the United States and South Africa' (European Commission, 14 May 2009) 6.

internalises group dimensions.[223] In the context of gender, substantive equality makes "deliberate use of gender-conscious criteria for the specific purpose of benefiting women as a social group that has previously been disadvantaged or excluded from important areas of the public sphere on grounds of gender".[224]

Deviating from the conventional rule of sameness of treatment, the approach legitimises different treatment.[225] It goes over, above and beyond ostensible parity to reverse systemic discrimination suffered by disadvantaged groups by compensating them for such past discrimination.[226] This is because the effects of such discrimination, unless reversed,[227] might spill over and cause its institutionalisation and continuation in perpetuity.[228] Where there is a history of disadvantage, marginalisation and discrimination, mere removal of unfair practices, without remedying the damage done, is less likely to suffice.[229] Seeking fairness in opportunities and outcomes,[230] substantive equality is now widely preferred over its rigid formal predecessor.[231]

From the following fundamentals of substantive/*de facto* equality as an inalienable human right, finding its origins in moral legitimacy,[232] advocacy for gender balance within boardrooms emanates.

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[223] MD Vos, 'Beyond Formal Equality – Positive Action under Directives 2000/43/EC and 2000/78/EC' (Director-General for Employment, Social Affairs and Equal Opportunities – European Commission, October 2007) 11.

[224] P Kapotas, 'Positive Action in EU Law' (2014) ERA – Academy of European Law 1–13, 3 <http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2014_Nov_Kapotas.pdf> accessed 17 June 2016.

[225] R Dworkin, *A Matter of Principle* (Harvard University Press 1985) 190–198, 205–213, 301.

[226] A McHarg & D Nicolson, 'Justifying Affirmative Action: Perception and Reality' (2006) 33(1) Journal of Law and Society 1–23, 17.

[227] SS Fredman, 'Reversing Discrimination' (1997) 113 Law Quarterly Review 575–600.

[228] M Rosenfeld, *Affirmative Action & Justice* (Yale University Press 1993) 29. See also, CM Koggel (n 165) 47.

[229] OM Fiss, 'Groups and the Equal Protection Clause' (1976) 5 PhILO sophy and Public Affairs 107–77, 144. SS Fredman, *Discrimination Law* (Oxford University Press 1976). C O'Cinneide, 'Fumbling towards Coherence: The Slow Evolution of Equality and Discrimination Law in Britain' (2006) 57 Northern Ireland Legal Quarterly 57–101, 93. L Barmes, 'Equality Law and Experimentation: The Positive Action Challenge' (2009) 68 Cambridge Law Journal 623–654, 623.

[230] *Connors v United Kingdom*, [2004] 40 EHRR 189; and *DH v Czech Republic*, (App No 57325/00) Judgment of 13 November 2007, ECtHR.

[231] J Rawls, *A Theory of Justice* (Oxford University Press 1971) 60–90. See also, CE Baker, 'Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection' (1982–83) 131 University of Pennsylvania Law Review 933–998.

[232] B Choudhury (n 77) 521.

(B) Gender Stereotype

Beginning with classification of individuals into groups/categories, stereotypes are opinions or perceptions formed based on presumed characteristics. Imposing certain values even before an actual assessment is undertaken, stereotypes precede the use of logical reasoning.[233] Stating this simply, stereotypes are generalisations drawn upon an individual based on presumed characteristics of a group with which an individual is associated, but which are often inaccurate.

More particularly, for gender, stereotype arises with a reflexive tendency to classify at the first instance an individual as a man or a woman, following which certain assumed characteristics ordinarily linked with that gender are then automatically allocated without further introspection as regards whether or not they actually apply or have relevance to the individual in question.[234] Strongly embedded and consistently and authoritatively transmitted over generations, gender stereotype comes to represent almost a biological or anatomical fact.[235] For instance, women are presumed to be caring, honest and good-looking, and to have greater skills in household and/or repetitive work, while being excessively sensitive, less rational, less technical, less willing to travel, not inclined to lead, having less physical strength, and not having any significant need for income.[236]

A combined matrix of such stereotypes (which extend to and influence how men and women are expected to behave, what rights and powers they have, and the types of roles each will play) vis-à-vis what is perceived that a profession/occupation must have explains why jobs that involve interpersonal or care-giving skills are classified as feminine,[237] in contrast to those associated with use of physical strength, long working

[233] Powell, Butterfield, & Parent, 'Gender and Managerial Stereotypes: Have the Times Changed?' (2002) 28(2) Journal of Management 177–193, 177.
[234] MR Poirier, 'Gender Stereotypes at Work' (1999) 65 Brooklyn Law Review 1073–1124, 1087.
[235] J Pilardi, 'The Changing Critical Fortunes of the Second Sex' (1993) 32(1) History and Theory 51–73, 59–60. See also, R Anker, *Gender and Jobs: Sex Segregation of Occupations in the World* (ILO 1998) table 2.1.
[236] R Anker (n 235) 23, table 2.1. See also, Spinelli-de-Sá, Lemos, & Cavazotte, 'Making a Career in a Male-dominated Field: The Meaning of Work for Women Employed in the Financial Markets' (2017) 18(4) Revista de Administração Mackenzie 109–136, 111.
[237] B Burton, 'Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice?' (2014) 43(2) Industrial Law Journal 122–148, 141.

hours, risk-taking or decision-making, which are considered masculine.[238] Such gendering of roles has culminated in occupational/professional segregation, which explains why men are concentrated in some jobs (such as surgery, logistics/carriers, construction, factories, piloting, architecture, engineering, managerial roles, auditing, production, supervisory roles, carpentry, driving, plumbing, hotel and chef work and porter roles), while women are found in other occupations (nursing, teaching, steno, typing, clerical work, maid roles, beauty, cabin crew roles and care-giving).[239] The absence or paucity of women in corporate leadership is just another example of interplay between stereotypes and gendered definitions of roles (i.e., directorship).[240]

A director is perceived as someone with agentic qualities: someone assertive, competitive, rational, resilient, decisive, intelligent, forceful, and who defines success in terms of profit, market share, status, influence and use of formal authority – all of which are presumed to be masculine characteristics.[241] This is why women, who are largely believed to be communal, participative, flexible, emotional, empathetic, intuitive, compassionate, and relationship-oriented, do not fit within the defined contours of leadership.[242] As it is difficult to displace these presumptions,[243] any deviation is thought to be only an exception or looked upon with suspicion, such that if a woman does not conform to so-called masculine attributes, she is not found to be a good leader and, if she conforms, she is considered not to be acting as a proper woman.[244] Likewise, assertiveness and confidence, which are sought in an ideal leader, are unfavourably treated if exhibited by a woman, who is then labelled as "dominating" or "overconfident".[245] These reactions grow even stronger in "culturally tight"

[238] 'Women at Work' (ILO 2016) 39.
[239] R Anker (n 235) 252.
[240] Brenner, Tomkiewicz, & Schein, 'The Relationship between Sex Role Stereotypes and Requisite Management Characteristics Revisited' (1989) 32(3) The Academy of Management Journal 662–669, 667. See also, Powell, Butterfield, & Parent (n 233) 178.
[241] N Jain & S Mukherji, 'The Perception of Glass Ceiling in Indian Organizations: An Exploratory Study' (2010) 17(1) South Asian Journal of Management 23–42, 26.
[242] G Morgan, *Images of Organisation* (Berrett-Koehler Publishers 1998) 129. See also, JB Rosener, 'Ways Women Lead' (1990) Harvard Business Review <https://hbr.org/1990/11/ways-women-lead> accessed 18 January 2017.
[243] MR Poirier (n 234) 1081.
[244] N Jain & S Mukherji (n 241) 27.
[245] *Id* at 28. See also, KH Bjarnadóttir & J Bartholdy, 'Gender Diversity in Boardrooms – Does it Matter for Firms' Financial Performance? Evidence from Denmark and Norway' (June 2013) 11–12 <http://pure.au.dk/portal/files/54541102/Thesis_KHB_gender_diversity_in_boardrooms_final.pdf> accessed August 2016.

surroundings – i.e., where cultural perceptions are strong and tolerance for deviance is low.[246] To avoid this, men and women seek to retain the status quo, and, consequently, such stereotypes and gender segregation continue to run in a vicious cycle.[247] Given that, to become a leader, it is necessary first to be seen by others as a leader, such stereotypical perceptions that disassociate women from leadership roles act as a barrier to their entry to corporate directorship. This field therefore remains under male dominance.[248]

It is clear that such stereotyping and segregation operates at two levels- when women are placed in low skilled jobs and their potential remains underutilized, and when the work that women do is undervalued or not recognized.[249] Through gender balancing or increased representation and interaction in boardrooms, the social justice rationale seeks to break the traditional grasps of such gender stereotypes holding women back from leadership roles. [250]

(C) Pay Parity

The pay gap between men and women is wide, as women continue to be paid almost half of what men receive globally, and with little chance of reaching senior roles,[251] so much so that the World Economic Forum forecast a timeline of 170 years as required to close the difference.[252] Given that childbirth and family responsibilities have contrasting consequences on payments made to men and women, the gender pay gap is observed to have an incremental effect with age.[253] The gap further increases with a rise in the ranks or corporate hierarchy.[254]

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[246] SM Toh & GJ Leonardelli, 'Cultural Constraints on the Emergence of Women Leaders: How Global Leaders Can Promote Women in Different Cultures' (2013) 42 Organizational Dynamics 191–197, 192.
[247] R Anker (n 235) 7.
[248] 'Cracking the Code' (KPMG, 30%club, YSC, March 2014) 13 <https://home kpmg.com/content/dam/kpmg/pdf/2015/04/Cracking-the-code.pdf> accessed 10 June 2016.
[249] Horrell, Jill, & Brendan, 'Unequal Jobs or Unequal Pay?' (1989) 20(3) Industrial Relations Journal 176 –191, 189-190.
[250] S Basu, *Gender Stereotypes in Corporate India* (SAGE Publications 2008) 45.
[251] 'Global Gender Gap Report' (n 134).
[252] 'Global Gender Gap Report' (World Economic Forum 2016) 24.
[253] 'Women at Work' (n 238) 58.
[254] L Frank, 'How the Gender Pay Gap Widens as Women Get Promoted' (Harvard Business Review, 5 November 2015) <https://hbr.org/2015/11/how-the-gender-pay-gap-widens-as-women-get-promoted> accessed 11 May 2017.

Much of the above stems from stereotypes and professional/occupational segregation,[255] as discussed in section I.3B(B). Accordingly, the gap looms large in the male-dominated sectors of finance and insurance, mining, scientific and technical services, transportation and warehousing, manufacturing, and construction, as against education, food services, arts and recreation, and business support services.[256] Likewise, within organisations, the gap is more prominent in the upper echelons where men outnumber women, as the latter remain largely confined to support functions rather than revenue generating ones.[257] Thus, with pay disparities across sectors/industries, and across functions within organisations,[258] women find fewer incentives to continue in such roles, more so when this comes at a cost of childcare and family conventionally ascribed as a responsibility almost exclusive to women. Eventually, women's exits from undervalued wage-earning roles, noted as a "risk-weighted cost-benefit decision",[259] reinforces stereotyping and re-triggers a further cycle of segregation and pay gaps.[260] Dispersing the gender segregation that prevails in boardrooms represents the means by which social justice rationale seeks to redress the cyclical occurrences of stereotypes and pay disparities between men and women.

[255] 'Women at Work' (n 238) 48.
[256] 'What is the Gender Pay Gap?' (PayScale 2016) <http://www.payscale.com/data-packages/gender-pay-gap> accessed 11 May 2017. See also, 'Women at Work' (n 238) 22–24.
[257] 'What Is the Gender Pay Gap?' (n 256). See also, 'Women at Work' (n 238) 25, 41–42, 52.
[258] T Petersen & LA Morgan, 'Separate and Unequal: Occupation–Establishment Sex Segregation and the Gender Wage Gap' (1995) 101(2) American Journal of Sociology 329–365, 329–330.
[259] 'Women in Financial Services' (Oliver Wyman 2016) 36.
[260] V Grybaite, 'Analysis of theoretical approaches to gender pay gap' (2006) 7(2) Journal of Business Economics and Management 85-91, 89-90.

(D) Feminists' Advocacy

Feminism, and more specifically the social construction theory of feminism, interprets gender with respect to power, societal structures, and its context.[261] It relies upon the historical and cultural constructs to explain how gender is assigned, learned and lived.[262] Quite naturally then, it raises resistance to the above persistent concerns of gender inequality, gender roles and stereotypes, segregation and pay gaps, characterized by power influences and social oppression.[263] Rather, the feminist side of the story regardless of any era[264] rests upon all of these far-reaching adversities ingrained and pervasive in the institutions of marriage, family, education, employment, power, property, society and culture.[265] Hence, its advocacy for gender diversity essentially draws upon welfare feminism (where women are seen as superior in mother and care-giver roles), the equal rights feminism (seeking to accord equal status to men and women), and modern feminism (emphasizing upon transformation of traditional gender roles, families and relations between men and women) as the cornerstones,[266] or in other words, the rationale of social justice. In particular, it seeks to address traditionally marginalized, oppressed and excluded women, as an ultimate and end objective.[267] Early attempts to attain this can be observed in the communitarian feminist movement seeking community-based alternatives to independent family unit system, which could take the responsibilities of household and child bearing from the individual to the community at large.[268] More recently, the emphasis and the debate has been on gender mainstreaming, i.e., considering gender and its adverse effects in all aspects of policy-making. To this end, the modus operandi which they suggest is one that works on a bottom-up approach such that the mainstreaming framework is culturally approved at the outset, and involves all stakeholders (ranging from the government, policy-makers, the industry, and to private players).[269]

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[261] J Lorber, *The Variety of Feminisms and Their Contributions to Gender Equality* (Bibliotheks- und Informationssystem der Univ. Oldenburg 1997) 29.

[262] C Bacchi & J Eveline, 'Gender mainstreaming or diversity mainstreaming? The politics of 'doing'' in C Bacchi & J Eveline (eds), *Mainstreaming Politics* (University of Adelaide Press 2010) chapter 13, 316.

[263] M Karamessini & E Ioakimoglou, 'Wage determination and the gender pay gap: A feminist political economy analysis and decomposition' (2007) 13(1) Feminist Economics 31-66, 34. See also, C Bacchi & J Eveline, 'What are we mainstreaming when we mainstream gender?' in C Bacchi & J Eveline (eds), *Mainstreaming Politics* (University of Adelaide Press 2010) chapter 4, 92.

[264] While these objectives convey the dominant feminist movements, one can find opposing emphasis on women's paramount duties as wives and mothers in early views of 1850s and 60s- O Banks, *Faces of feminism : a study of feminism as a social movement* (St. Martin's Press 1981) 83.
[265] J Lorber (n 261) 8.
[266] O Banks (n 264) 156, 219-220.
[267] *Id* at 204.
[268] *Id* at 38-42.
[269] O Hankivsky, 'Gender vs. Diversity Mainstreaming: A Preliminary Examination of the Role and Transformative Potential of Feminist Theory' (2005) 38(4) Canadian Journal of Political Science 977-1001.

While the above seems more obvious and expected stance of feminism, a more interesting and debatable perspective, in particular, for gender "diversity" (over equality) comes from those who diverge from the traditional approach treating gender or "women" as a single social collective group. Conventionally and most often, feminism reckons women as a homogenous group with common experiences, values, perspectives, and situations. As a natural consequence, it works homogeneously for the benefit of this group as a collective (rather than the individuals in it), and which explains its strong reliance on affirmative actions as a popular tool to attain social justice in favour of women. However, this conventional line of thought is challenged by proponents who criticize such universalization or normalization within each gender category, or any false essentialism.[270] Instead, they identify the diverse attributes, backgrounds, experiences and identities existing within, and intersecting with such category. Emphasising that individuals grow in relation with one another, this relational theory of feminism suggests that "the sense of self develops and matures through the process of relationship-differentiation",[271] and "any theory that does not acknowledge the diversity of experiences is greatly limited in its validity and usefulness".[272] It is this individualized and intersectional perspective of feminism which finds more consistency and relevance to gender "diversity" (over and above equality and non-discrimination).[273]

On a final note, it may be worthwhile to understand if feminist advocacy, majorly driven by the objective of social justice, is devoid of the business rationale in its entirety? As such, this thesis does not undermine the feminist condemn of the business rationale on grounds that it commodifies and visualizes women/gender from the lens of profits, material benefits, or as an object.[274] Having said that, feminism may be found in support of the business rationale too. Referred as "neoliberal feminism",[275] it argues for gender diversity for economic and market-driven reasons of resource/talent utilization, competitiveness, and improved governance.[276] With a shift in focus to corporatization of the gender discourse, this limb of feminism can be witnessed more recently in the country specific approaches to boardroom gender diversity, more particularly the United Kingdom and the European Union (discussed at length in the following chapter II).

Thus, feminist advocacy offers a firm case for gender diversity. Undoubtedly, it does so by reinstating the objective and constituents of the social justice rationale. However, one must not lose sight of the newer perspectives and reflections which have been evolving to provide for more intersectional and individualized interpretations, and which expand the contours of feminism to include neo-liberal or market centric discourses (or in other words, the business rationale), to further refine and strengthen the advocacy.

I.3C Which Rationale? Business or Social Justice?

Each of these two rationales has its own set of limitations which have been criticised. For instance, for business, as well as its uncertain links to corporate profits, it attracts criticism from feminist activists for, *inter alia*, commodifying the female gender. The basis of functional advantages upon which the business case rests allegedly treats women as objects, which is unfair, unethical and cannot reverse their suppression.[277] Arguing that gender should be seen as an end in itself[278] and not a means to an end as the business rationale seeks, proponents of the social justice rationale fear its displacement from a failed instance of business judgment: "The argument for the moral case based on the human rights of all employees and job seekers must not be abandoned for the current fashion of diversity and the business case".[279]

Although worth noting, the allegation of commodification does not discriminate across genders, as it would then apply to every single hire in a company. Considering that every role in the corporate hierarchy, whether occupied by a man or a woman, is

[270] IM Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19(3) SIGNS 713-738, 733.
[271] S Freedberg, 'Re-examining Empathy: A Relational–Feminist Point of View' (2007) 52(3) Social Work 251- 259, 254.
[272] CK West, 'The Map of Relational-Cultural Theory' (2005) 28 Women and Therapy 93-110, 98.
[273] Some contrary views in feminist literature, however, perceive such emphasis on individual differences as a way to conceal the continuing systemic inequalities - C Bacchi & J Eveline (n 262) chapter 13, 320.
[274] LM Fairfax, 'The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards' (2005) 795 Wisconsin Law Review 798–850, 854.
[275] A Elomäki, 'Gender Quotas for Corporate Boards: Depoliticizing Gender and the Economy' (2018) 26(1) NORA - Nordic Journal of Feminist and Gender Research 53-68, 65.
[276] C Bacchi & J Eveline, 'Mainstreaming and neoliberalism: A contested relationship' in C Bacchi & J Eveline (eds), *Mainstreaming Politics* (University of Adelaide Press 2010) chapter 2, 48.
[277] LM Fairfax (n 274) 798–850, 854.
[278] C McCrudden, 'Rethinking Positive Action' (1986) 15 Industrial Law Journal 219–243, 226.
[279] M Noon, 'The Fatal Flaws of Diversity and the Business Case for Ethnic Minorities' (2007) 21 Work, Employment and Society 773–784, 781.

equivalent to its market value, a female appointee in that sense is no more commodified than a male appointee. Moreover, questioning reliance on gender *per se*, particularly where female directors share a similar background, exposure and experience with their male colleagues such that they are more likely to search for similarities or things in common rather than differences,[280] and where such commonalities (not differences) tend to dictate their behaviour, the worth of the gender balance that the social justice rationale seeks to attain is challenged.[281] Further, as an "only gender" advocacy that stems from compelling moral and human right obligations necessitates state intervention, it is largely seen as a trespass into commercial space or business autonomy.[282] Citing the irrelevance of social justice laws to corporate board members, US courts have routinely held that rules concerning civil rights do not apply to corporate directors.[283] Further, distinguishing between discrimination-free or neutral decision-making relating to diversity, the extension of state control to business judgment confronts recurring protests.[284] Criticism against an "only gender" approach is found even within the rationale itself, as an over-emphasis on female representation as an end objective or an outcome of law runs the risk of re-instating stereotypes, subordination of intended beneficiaries[285] and group politics,[286] all of which are likely to displace their participation and voice in a real sense within boardrooms. Lastly, as affirmative measures under the aegis of the social justice rationale must withstand the test of proportionality and limited timeframes, "gender only" has come under much censure and appears difficult to sustain in the long term.[287]

In view of the above arguments and counter-protests, neither rationale disparages the other altogether. Rather, without undermining fairness and balanced representation,[288]

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[280] LL Dallas, 'The New Managerialism and Diversity on Corporate Boards of Directors' (2001–02) 76 Tulane Law Review 1363–1407, 1404–1405.
[281] Bolsø, Bjørkhaug, & Sørensen, 'Gender-balanced Corporate Boards' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing 2013) chapter 19, 136–137.
[282] E Hickman, 'Boardroom Gender Diversity: A Behavioural Economic Analysis' (2014) 14(2) Journal of Corporate Law Studies 385–418, 416.
[283] *Chavero v Local, 241, Div of the Amalgamated Transit Union*, 787 F 2d 1154, 1157 (7th Cir 1986).
[284] *Regents of the University of California v Bakke*, 438 US 265 (1978); *Grutter v Bollinger*, 539 US 306 (2003). See also, *Ricci v Destefano*, 129, S Ct 2658 (2009).
[285] *Lommers v Minister van Landbouw, Natuurbeheer an Visserij*, Case C 476/99 [2002] ECR I-2891.
[286] *Ladele v Islington LBC*, [2010] 1 WLR 955 (CA).
[287] T Jones, 'The Diversity Rationale: A Problematic Solution' (2005) 1 Stanford Journal of Civil Rights and Civil Liberties 171–215, 188.
[288] PY Gomez & H Korine (n 86) 747. See also, S Machold & K Hansen (n 86) chapter 24, 167.

caution is raised against sole reliance on such social justifications or business reasons in exclusion of the other. Instead, "only gender" advocacy can be substituted with a "gender plus" assessment of, *inter alia*, skills, competencies and attributes suited to what directorship demands.[289] It is not either/or, rather both/and – i.e., when the assessment is objectively undertaken based on individual characteristics (forward-looking and not just retrospective),[290] along with gender, only then is it optimum.[291] This finds support in the industry, which more recently calls for considering intersectionality of diversity in gender issues.[292] Also, as echoed in the words of Julie Bishop: "… the approach I have taken is that if I want something I will work hard and set my mind to it and it comes off that is great. If it does not I am not going to blame the fact I am a woman. I am not going to look at life through the prism of gender".[293] Even feminist arguments driven by strong social justice motives acknowledges that gender is not a self-contained constituency characterized by the same experiences and backgrounds.[294] Not all women live in similar oppressive situations or social/cultural conditions, and hence, the intersection of other relevant demographics which underpin the social and cultural institutions and practices must be factored. What is needed is a "way of thinking about women as a social collective without requiring that all women have common attributes or a common situation".[295] More significant would be to consider the confluence of factors that can produce desirable outcomes for "gender diversity", and not just "gender" as the focal point. The idea is to make individual assessment part of the diversity conversation (and not converse – making diversity part

[289] A Durbin, 'Optimizing Board Effectiveness with Gender Diversity: Are Quotas the Answer?' (Global Corporate Governance Forum- International Finance Corporation, January 2011) 8.
[290] NJ DeSario, 'Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law' (2003) 38 Harvard Civil Rights-Civil Liberties Law Review 479–510, 486.
[291] K Hansen, 'Concluding Remarks to Part IV' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing 2013) chapter 23, 161, 162.
[292] 'Gender-Based Analysis: Building Blocks for Success, Report of the Standing Committee on Status of Women' (House of Commons Canada, April 2005) 24.
[293] UN Women, 'Re-thinking Merit: Why Meritocracy is Failing Australian Businesses' (National Committee Australia, 11 May 2015) 10 <https://unwomen.org.au/wp-content/uploads/2015/11/Rethinking-Merit-Whitepaper.pdf> accessed 5 January 2016.
[294] O Hankivsky (n 269) 977- 1001, 987.
[295] IM Young (n 270) 713-738, 723.

of the system of meritocracy[296] – often labelled as fallacious,[297] a myth,[298] and biased with gendered presumptions).[299] As meritocracy is linked to a just world phenomenon[300] and is often found to disfavour women,[301] the term "merit" has been consciously avoided as a criterion while suggesting some of the other criteria for this "gender plus" assessment above.[302]

With a focus on board members who happen to be women, rather than women board members, what is sought then exceeds (not omits) numerically balanced representation of gender to create more functionally diverse boards or, in other words, "gender diversity" over and above gender equality.

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[296] A Lawton, 'The Meritocracy Myth and the Illusion of Equal Employment Opportunity' (2000–01) 85 Minnesota Law Review 587–662, 590. See also, V Valian, 'The Cognitive Bases of Gender Bias' (1999) 65(4) Brooklyn Law Review 1037–1061, 1059.

[297] R Murray, 'Merit vs Equality? The Argument that Gender Quotas Violate Meritocracy is based on Fallacies' (The London School of Economics and Political Science, 7 December 2015) at <http://blogs.lse.ac.uk/politicsandpolicy/merit-vs-equality-argument/> (last accessed 10 February 2017).

[298] DL Rhode, 'Myths of Meritocracy' (1996–97) 65 Fordham Law Review 585–594, 586. See also, M Kenny, 'Gender Quotas and the Myth of "Merit"' (Women 50:50, 20 August 2015) at <https://women5050.wordpress.com/2015/08/20/gender-quotas-and-the-myth-of-merit/> (last accessed 5 February 2017).

[299] M Thornton, ''Otherness' on the Bench: How Merit is Gendered' (2007) 29 Sydney Law Review 391–413, 402. See also, SJ McNamee & RK Miller, 'The Meritocracy Myth' (2004) 2(1) Sociation Today <http://www.ncsociology.org/sociationtoday/v21/merit.htm> accessed 10 February 2016; and N Gibson, 'Julie McKay on Quotas, the Merit Myth and Preventing Violence against Women' (Right Now, 7 September 2015) <http://rightnow.org.au/topics/education/julie-mckay-on-gender-quotas-merit-and-preventing-violence-against-women/> accessed 8 February 2016.

[300] 'Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination' (2007–08) 121 Harvard Law Review 2156–77, 2157. See also, DL Rhode, 'Diversity and Gender Equity in Legal Practice' (2013-14) 82 University of Cincinnati Law Review 871–900.

[301] ME Heilman, 'Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder' (2001) 57(4) Journal of Social Issues 657–74, 663. See also, J Whelan, **'**The Myth of Merit and Unconscious Bias' (The Conversation, 16 October 2013) <http://theconversation.com/the-myth-of-merit-and-unconscious-bias-18876> accessed 25 January 2016.

[302] It is, however, worthwhile to note here that the term "merit", if used in this context, is not in any way affected by the merit-myth debate. This is because the criteria of merit, proficiency and experience used here apply to female gender alone – i.e., selection of a female candidate over another based on, as well as gender, her individual attributes and characteristics. The recommendation does not advocate the application of these criteria against male candidates to disfavour female participation – the issue central to the merit-myth debate. Moreover, the merit-myth debate circles around a perceived/subjective notion rather than real merit. Thus, what is problematic is the former, and not the latter (as actual merit is not opposed to equality and fairness – rather, equality and merit can reinforce one another), although they are hard to segregate- UN Women (n 293) 7. See also, S Erman & GM Walton, 'Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education' (2014–15) 88 Southern California Law Review 307–378, 311.

I.4 *Dual Case for Boardroom Gender Diversity*

To sum up, while both business and social justice offer vital reasons why a mix of gender is preferred, neither approach is immune from criticism. As a result of such limitations, the likelihood that any one approach, on a stand-alone basis, would last in the long run seems slim.[303] On one hand, veracity of the business case would continue to be doubted because of correlation to profits. This is less likely to be ascertained with precision given the complex interplay of board dynamics. With such diversity yet to become a business norm, greater certainty and motivation needs to be sourced from outside these rationales. On the other hand, if reliance is placed only upon compelling social reasons, which, although representing established norms that underly every civilised society,[304] female directorship might be looked upon with suspicion as unwarranted state intervention or a trespass into the private domain. Further, with historically ingrained gender preferences or affirmative measures that cannot run in perpetuity, reform (aiming only for gender balance) would fall short of forward-looking diversity in a real sense.[305]

Instead, the "gender plus" approach offers a more refined and stronger justification. Clearly a summation of "gender" plus "utility", or, in other words, a combination of the two rationales – social justice and business – can respond to and cover/fill up all of the missing links for which each rationale is criticised.[306] Over and above a case for demographic representation, the concept of gender diversity goes beyond and aims for a mix of attributes, skills and competencies, not represented by women alone,[307] but an optimum mix of both genders.[308] Moving from "good for women" to "women good for business",[309] it thus assumes a much more constructive, forward-looking and

[303] N van der Walt & C Ingley (n 115) 232.
[304] MB Abram, 'Affirmative Action: Fair Shakers and Social Engineers' (1986) 99 Harvard Law Review 1313–26, 1319, 1324. See also, B Choudhury (n 77) 521.
[305] T Jones (n 287) 175.
[306] DC Langevoort, 'Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit and the Corporate Promotion Tournament' (2004) 61 Washington and Lee Law Review 1615–1643, 1643.
[307] K Campbell & A Mínguez-Vera (n 194) 446.
[308] N van der Walt & C Ingley (n 115) 219.
[309] M Teigen, 'Gender Balance on Company Boards' (Institute for Social Research Report 2015). See also, *Regents of the University of California v Bakke*, 438 US 265 (1978); *Grutter v Bollinger*, 539 US 306 (2003); and *Ricci v Destefano*, 129, S Ct 2658 (2009).

functional meaning than one that seeks for symbolic or token gender representation.[310] This is affirmed by the industry,[311] which seldom makes a differentiation between the two rationales when justifying diversity from a practical standpoint.[312] Apparently only relevant to academia in nature, the distinction between the two seems to blur, more so as the industry transits from "whether diversity or not" to "how to manage diversity"[313]:

> *Our society must realize that diversity is a source of strength. Consequently, our legal system should respond to the challenge of diversity in a progressive manner and seek to facilitate the use of diversity to generate value*.[314]

No longer thought of as a soft issue,[315] boardroom gender diversity is now perceived as a "must have" good governance practice[316] – one that can no longer be overlooked or ignored,[317] both from a regulatory and industry standpoint.[318] On this assumption of a dual case for boardroom gender diversity as a concept, and without independent investigations as regards justifying it or its effects on profits and business outcomes, this thesis proceeds further.

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[310] T Jones (n 287) 188.

[311] 'Women in Financial Services' (n 259); AA Dhir (n 149) chapter 4, 129. See also, Conley, Broome, & Krawiec, 'Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say about Why Diversity Matters' in J Aritz & RC Walker (eds), Disclosure Perspectives on Organizational Communication (Fairleigh Dickinson University Press 2012) 201, 221.

[312] Krawiec, Conley, & Broome (n 73) 805. See also, M Huse & M Brogi, 'Introduction' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing 2013) 3.

[313] AG King & JW Hawpe, 'Gratz v Grutter: Lessons for Pursuing Diversity in the Workplace' (2004) 29 Oklahoma City University Law Review 41–61, 59 – Considering diversity as a reality, it advocates efforts to better enforce and manage it.

[314] SA Ramirez, 'Diversity and the Boardroom' (2000) 6 Stanford Journal of Law, Business and Finance 85–133, 133.

[315] InterOrganization Network, 'Proxy Disclosure and Solicitation Enhancements File Number S7-13-09 Release Nos 33-9052; IC-28817' (Comment Letter to SEC, 8 September 2009) 2.

[316] 'How Diverse should Boards be' (n 63). See also, 'Gender Diversity in Boardrooms' (n 63) vii.

[317] E Roberts (n 77) 309. See also, H Foust-Cummings, 'Research and Considerations regarding Women on Boards' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing 2013) chapter 10, 62; and SH Kim, 'The Diversity Double Standard' (2010–11) 89 North Carolina Law Review 945–1001, 999; N Lacy, 'Diversity is a Competitive Advantage' <http://www.pg.com/en_UK/news-views/Inside_PG-Quarterly_Newsletter/issue4/community-matters2 html> accessed 18 October 2015.

[318] Gabaldon, Mensi-Klarbach, & Seierstad, 'Gender Diversity in the Boardroom: The Multiple Versions of Quota Laws in Europe' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 10, 238.

explore how the law-making and regulation of boardroom gender diversity is strategized potential optimum policy approaches and legal strategies, specifically for India.

I.5 *Conclusion*

This chapter primarily engages in a literature review to examine "boardroom gender diversity" as a concept of corporate governance. In doing so, it emphasises upon the nuances of such diversity both, in the organizational group and boardroom contexts. These include effects in terms of corporate performances, governance, group-think, board functions, and corporate profits- all of which (except profits, which yields mixed bag results) substantiate the business rationale for such diversity. Seemingly in debate with this rationale, reasons of gender equality, stereotyping and segregation of gender roles, pay disparities, and feminist advocacy justify such diversity on grounds of compelling social justice. Although appearing to be at loggerheads, both these (business and social justice) rationales, despite citing different reasons for it, uphold boardroom gender diversity as a perceived good governance practice. This finds support from the industry too, which rather relies on a "gender-plus" or a combined case of both the rationales to justify and endorse such diversity. In other words, companies rarely differentiate between the two rationales from a practical standpoint. Instead, they seem to rely upon, what is referred in this thesis as the "dual case" for boardroom gender diversity, premised on both, the business and the social justice rationales.

Assuming this "dual case" at the concept of boardroom gender diversity, this thesis then takes a stride forward to explore how the regulatory strategies which countries adopt and implement in this regard are strategized, and whether the predominance of any one of the rationales (social justice or business, as discussed in this chapter) has any impact on their choice of policy approach, in chapter II.

CHAPTER II – DERIVING THE LEGAL STRATEGY

II.1 *Overview of the chapter*

Much has already been documented as regards the competing rationales – social justice versus business – in justifying the case for boardroom gender diversity. Based on a review of existing literature, chapter I has helped in realising that the choice of one rationale over another is not so relevant from an industry standpoint. Founded on a "gender plus" or dual case, where motives of commerce and equality intersect, female directorship is now perceived as a good governance practice.

Nonetheless, the relevance of rationale or the choice between the two is not completely obsolete. Rather, it is this choice, whether independent, predominant or an intersection, which determines the policy or strategy a country adopts and enforces. In other words, while a compelling end objective founded on equality and social justice is likely to be enacted by way of mandatory quotas, voluntary industry-facing measures are found where a country seeks such diversity not as an end in itself, but as a means to business advantage. This is clearly inferred from examples in countries such as Norway, the UK, and at the pan-European level, extensively reviewed in this chapter.

Although female directorship across countries has been reviewed before, most of these stops at statistical evidences, or summarizes the legal provisions as they currently prevail. This thesis takes it one step further, to engage in a purposive analysis of the laws in Norway, the UK, and the EU, to understand their linkages/nexus with the underlying rationales. In other words, this chapter engages in a technique of reverse engineering to *first*, enumerate the legal strategy adopted by these countries; *second*, identify how the predominance of one rationale over another at the country level determines their choice of policy approach and such strategy; and *finally*, arrive at a more broad-level and general theory as regards the law-making and strategising of regulations in this regard. By doing so, this thesis seeks to fill the vacuum that currently exists in relation to want of a foundational theory or well-defined models for regulating boardroom gender diversity.

The chapter engages in a detailed review of the Norwegian laws,[319] including, *inter alia*, section 6-11(a) of the Public Limited Liability Companies Act of 1997, which imposes the 40% mandatory quota; along with the Propositions 97 and 77 to the parliament advanced by the Norwegian Ministry of Children and Family Affairs offering related legislative discussions; the Norwegian Code of Practice for Corporate Governance of 2014; the Accounting Act of 1998; the Gender Equality Act of 1979 (now replaced by the Gender Equality Act of 2013); and various other governmental action plans and policy statements issued from time to time.

For UK too,[320] the chapter examines how gender diversity has evolved as a principle through its codes of corporate governance, with the latest one being of 2018; coupled with legislative deliberations in the House of Commons debates, and the consultation documents, feedback statements, and guidance notes issued by the Financial Reporting Council; the Companies Act 2006 (Strategic Report and Director's Report) Regulations of 2013; the most prominent Davies Report of 2011, followed up by annual reviews and the five years' summary in 2015; the Hampton-Alexander Reviews; and the industry led voluntary codes of conduct for search firms. The chapter also discusses in relation to gender diversity some of the industry and expert reviews in the financial sector following the banking crisis. On the social justice front, the Equality Act 2010, with emphasis on sections 158 and 159, alongside its various guidance notes by the Government Equalities Office, are discussed.

In relation to the EU,[321] the 2012 proposal for a Directive (not yet in effect) on improving the gender balance among non-executive directors is paramount, and has thus been examined in detail. This is supported by review of similar directives as regards disclosure of non-financial and diversity information in 2014, followed by 2017; general framework for equal treatment in employment and occupation of 2000; equal treatment between men and women in the access to and supply of goods and services of 2004; equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions of 1976 and 2006; and other working papers and recommendations for balanced participation of

[319] See section II.2 in this chapter II.
[320] See section II.3 in this chapter II.
[321] See section II.3 in this chapter II.

women and men in the decision-making process. This section also engages in a detailed assessment of certain case law relevant to understanding its rationale and interpretations of it.

To elaborate, the jurisdictional reviews establish a correlation between the predominance of the social justice rationale and the adoption of hard law policy approach or mandatory quotas (as in case of Norway). On a parallel note, where the country is inspired by business motives, the choice of policy approach and strategy is found to be soft with voluntary industry-led measures (as seen in the UK). On similar lines, where the rationale is a mix of both, social justice and business (resembling that of the EU), the approach is ideally more of a hybrid nature, i.e., intermediate between hard law and soft law approaches, or a combination of mandatory and voluntary strategies. Thus, it is the choice of rationale that decides the form and extent of regulation or strategising in this regard.

Based on the above general theory (much of which is originally contributed here), the thesis then proceeds to devise a way how an optimum strategy may be formulated, and concludes with a couple of broad-level proposals towards what may constitute a potentially optimum strategy for boardroom gender diversity.

II.2 *Norway*

As well as being a pioneer in bringing the concept to the global diaspora, Norway has been instrumental in augmenting boardroom gender diversity from being perceived as "good-to-have" to an essential requirement of law. This makes it an indispensable jurisdiction of study when formulating how such diversity can be best strategised for and enforced.

II.2A Strategy

For the first time by any country, a minimum threshold for female directors was introduced by section 6-11(a) of Norway's Public Limited Liability Companies Act of 1997 ("Norway Act"), by way of an amendment in 2003. Although initially drawn as a voluntary target, this eventually evolved into a compulsory quota for, *inter alia*, all public limited companies ("PLCs") in 2006. While the requirement was made

mandatory with immediate effect for all registering start-up ventures, a grace period of two years was given to existing companies to comply by 2008.[322]

How does the Norwegian quota work?

Notably, the quota operates depending upon the size of the board. Fixed at 40%, it works on an incremental basis – i.e., where there are two/three members, both genders must be represented. This requirement increases to two directors of each gender if there are four to five members and three directors of each gender where there are six to eight members, with, finally, a minimum of 40% in larger boards.[323] To explain how the escalation works, an illustration is provided here:

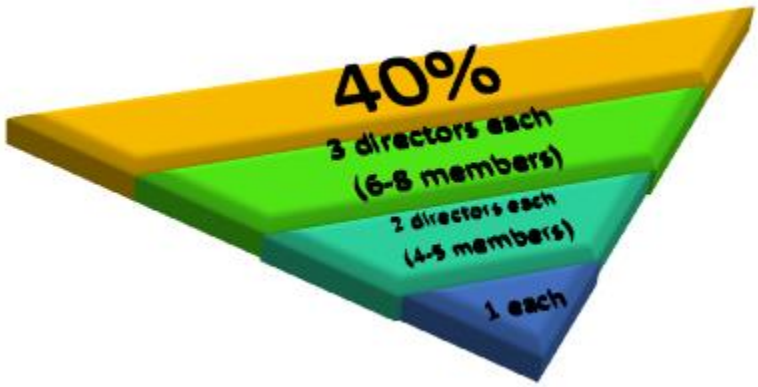

Figure 1: Norwegian Quota

As is evident, the quota, which does not work by way of fixing numbers of board seats, appears to be structured to help avoid what might otherwise result in only figurative presence or tokenism, particularly in large companies with bigger boardrooms.[324] Further, the sanctions, which have drawn attention and triggered extensive debate world-wide, constitute a crucial component of the quota. This is because compulsory dissolution of company for not complying with what is yet to be internalised as a

[322] 'Fact Sheet: The Legislation on Representation of both Sexes in Boards' (The Norwegian Ministry of Trade, Industry and Fisheries, 19 September 2011) <https://www.regjeringen.no/en/dep/nfd/contact/press-centre/fact-sheets/fact-sheet-the-legislation-on-representa/id641431/> accessed 10 February 2016.
[323] Section 6-11a of the Norway Act.
[324] A Sweigart, 'Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada' (2012) 32(4) Northwestern Journal of International Law & Business Ethics 81A– 105A, 95A–96A.

business norm was quite an unexpected form of deterrence.[325] In addition, fines can be imposed especially where the government is of the opinion that a forced dissolution would have adverse repercussions on the public interest.[326] For start-ups, registration in the Norwegian Register of Business Enterprises can be refused unless its board complies with the 40% quota.[327] The sanction thus works in a three-tier model, with a first step of warnings, followed by fines and eventually discontinuance or dissolution of the company in question.[328]

The 40% quota gathers further force from Norway's corporate governance code of 2018[329] and disclosure requirements, which oblige companies to report gender representation and related policies, if any, in their annual reports.[330]

How did the quota evolve?

Initial thoughts on quota regulation for female directorship were advanced by Valgerd Svarstad Haugland (then minister of children and families) as an amendment to the Gender Equality Act of 1979 (now replaced by the Gender Equality Act of 2013 – "Gender Equality Act").[331] Although not enacted immediately, since this announcement in 1999 proposing a quota of 25%, female representation in boardrooms remained in the regulatory hindsight. This once again resurfaced when Ansgar Gabrielsen (then minister of trade and industry), in an interview with Norway's leading newspaper, *Verdens Gang*, on 22 February 2002, expressed his discontent with the "male dominance of business life".[332] Although previously opposed by the Progress Party, the Conservative Party and the industry at large,[333] this statement from

[325] Section 16–15(1) 2 of the Norway Act.
[326] Section 16–17(3) of the Norway Act.
[327] 'Legislative Board Diversity' (Catalyst, August 2014) <http://www.catalyst.org/legislative-board-diversity> accessed 4 April 2016.
[328] M Teigen, 'Gender Quotas on Corporate Boards: On the Diffusion of a Distinct National Policy Reform' in F Engelstad & M Teigen (eds), *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald 2012) chapter 4, 115, 124.
[329] 'The Norwegian Code of Practice for Corporate Governance' (Norwegian Corporate Governance Board, 17 October 2018) 8, 32.
[330] Section 3.3 of Norwegian Accounting Act of 1998.
[331] A Storvik & M Teigen, 'Women on Board – The Norwegian Experience' (International Policy Analysis, June 2010) 7.
[332] *Ibid*.
[333] C Seierstad & M Huse, 'Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 2, 34.

Gabrielsen, published at the final session of the legislative debate immediately before the quota was put to the vote, helped in gaining tremendous levels of support.[334]

Accordingly, with ratios increased from 25% to 40%, female representation in boardrooms was introduced as a voluntary measure in 2003 by way of an amendment to the Norway Act (not the Gender Equality Act, as originally proposed).[335] However, as few changes were observed in the gender ratio of boardrooms, which stalled at around 25% (much below the earmarked 40% level),[336] voluntary measures were substituted with a compulsory quota in 2006, with a deadline of 1 January 2008 for compliance.[337]

II.2B Underlying Rationale

(A) Social Justice

The pioneering 40% quota did not come about as a one-off reform for Norway, which was, rather, continuing its strong history of gender advocacy.[338] With the enactment of the 1979 law as an outcome of rising gender consciousness ever since Norway attained its independence from Denmark in 1814,[339] a formal framework for gender equality was established, which provided for, *inter alia*, equal opportunities for both genders in the education, employment, cultural and professional fields.

- From a political standpoint

It was not until 1895 that a female's right to vote, although limited, was accorded in Norway, gradually extending to municipal and national elections by 1907.[340] Universal suffrage for women was introduced much later, in 1913,[341] which eventually led to women taking greater interest in politics. Accordingly, the first woman was elected to

[334] A Storvik & M Teigen (n 331) 7.
[335] Proposition to Parliament no 77, 2000/200 (Norwegian Ministry of Children and Family Affairs 2001).
[336] M Teigen (n 309) 8.
[337] *Id* at 9.
[338] TR Korsvik, 'Gender Equality Policies in Norway: Everybody's Job, Nobody's Responsibility?' (Working paper no 2.1, Jagiellonian University of Krakow 2014) 28.
[339] *Ibid*.
[340] *Ibid*.
[341] *Ibid*.

parliament in 1921 and, since then, there has been no looking back, with the first female minister appointed in 1945 and the first female prime minister in 1981.[342] This trend continued with the adoption of a 30% gender mandate by the Liberal Party for its constituent members, a move that was championed by Eva Kolstad, who later went on to become the first gender equality ombudsman of Norway.[343] This was followed by similar endeavours by other political parties,[344] all of which helped to form what is acclaimed as a "woman's government" with 44% of the cabinet made up of female ministers in 1986. Despite this gender progress, it was not until 1987 that female voter turnout equalled that of men.[345] More recently, in 2015, the government implemented a project called "Local Election Day", aiming to improve gender representation in municipal councils with less than 30% female presence.[346] In view of this, Norway appears to have significant and consistent gender balance, if not absolute parity, in the political context.

- From an economic standpoint

From the implementation of the Act on Craft of 1839, which enabled single women above 40 years of age to operate certain craft businesses, and followed by the Trading Act of 1842, which permitted unmarried women of 25 years and above to trade in goods (while still restricting exports), Norway has always sought engagement of women outside the household. Accordingly, all offices, barring a few ministerial positions, were opened up for women by 1938.[347] Further progress was made when separate taxation of married couples was introduced as an incentive for women to seek

[342] *Ibid.*
[343] *Ibid.*
[344] ML Krook, *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide* (Oxford University Press 2009) 7.
[345] 'Action Plan – Equality 2014' (Norwegian Ministry of Children, Equality and Social Inclusion 2011) 44.
[346] 'Norway – On Implementation of the Beijing Declaration and Platform for Action (1995) and the Outcome of the Twenty-third Special Session of the General Assembly (2000), in preparation for the 2015 global regional review and appraisal in the context of the adoption of the Beijing Declaration and Platform for Action (UN Questionnaire, 30 April 2014) 26.
[347] KB Heffermehl, 'The Status of Women in Norway' (1972) 20(4) American Journal of Comparative Law 630–646, 631.

employment.[348] Along with equality of rights relating to property and inheritance,[349] this reveals Norway's interest in strengthening the economic power of women and the country's role as an important pedestal for gender equality.

Continuing such commitments, a 40% quota in public committees, boards and councils was introduced in 1981.[350] Mirroring this, but much later in 2006, the quota was extended to the private sector (particularly to PLCs), and then to agricultural cooperatives.[351] In addition, the government crafted an action plan (2008–13) to promote female entrepreneurship.[352]

- From a regulatory standpoint

With the equality law of 1979, a duty was cast upon the public authorities to ensure equality of gender in society.[353] This has since been revised several times. For instance, the duty was extended to employers, employees and employer associations in 2002,[354] while recruitment based on conditions of pregnancy, adoption and family planning was declared impermissible in 2010[355] and, finally, the 1979 law was replaced by the Gender Equality Act enforced in 2014. Founded on substantive conception of equality, this relies heavily upon affirmative measures in favour of women.[356] To keep pace with such evolving laws, the institutional set-up too has undergone frequent overhauls. The Council of Gender Equality (replacing the council for equal pay) was, over a five-year span, taken over by the Department for Family and Gender Equality established under the then Ministry of Consumer Affairs and Administration, which then transitioned to the succeeding Ministry of Children and Family Affairs in 1990, followed by the Ministry of Children and Equality in 2006 and, finally, to the current

[348] A Ravn, 'Married Women's Right to Pay Taxes: Debates on Gender, Economic Citizenship and Tax Law Reform in Denmark 1945–83' in Melby, Ravn, & Wetterberg (eds), *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambition?* (Policy Press 2009) chapter 3, 76–77.
[349] Inheritance Act of 1854.
[350] Section 13 of the Gender Equality Act.
[351] Section 69 of the Cooperative Societies Act of 2007.
[352] 'Action Plan for More Entrepreneurship among Women (2008–13)' (Norwegian Ministry of Trade and Industry 2008). See also, K Pettersson & S Hedin, 'Supporting Women's Entrepreneurship in the Nordic Countries – A Critical Analysis of National Polices in a Gender Perspective' (Keele University, 21–23 June 2010).
[353] Section 1 of the Gender Equality Act.
[354] Section 15 of the Gender Equality Act.
[355] Section 18 of the Gender Equality Act.
[356] Sections 1, 6 and 7 of the Gender Equality Act.

Ministry of Children, Equality and Social Inclusion in 2010.[357] Similarly, the offices of "gender equality ombudsman" and "appeal tribunal" were replaced with the "equality and anti-discrimination ombud" and the "anti-discrimination tribunal",[358] with a further right to seek review in the court of law.[359] While the ombud offers guidance and monitors abidance by internal commitments,[360] the tribunal, set up as an independent public administrative agency, can make legally binding administrative decisions upon cases submitted to it by the ombud or any other party, issue orders to remedy or redress, impose fines, or prosecute failure of compliance.[361] Proposals are in process to make the tribunal the single forum by transferring all related powers from the ombud.[362] All of these ministries/departments/offices, along with regional centres, work as specialised enforcing agencies.[363]

Despite the fast-moving reforms, the findings of an expert commission revealed some noticeable levels of enforcement gaps,[364] including gender segregation, specifically in education and occupation.[365] Women were found largely in stereotyped "low wage" roles of nursing and care, education, retail trade, junior office bearers, hotel and restaurant services, cleaners, and garment and food sectors, and were paid less than men.[366] This is also reflected in the choices of discipline made at tertiary education level, primarily health, social services and education science for females, and business,

[357] Borchorst, Freidenvall, Kantola, Reisel, & Teigen, 'Institutionalizing Intersectionality in the Nordic Countries: Anti-Discrimination and Equality in Denmark, Finland, Norway, and Sweden' in Krizsan, Skjeie, & Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (Springer 2012) 59–88.
[358] Proposals are in process to make the tribunal the only individual complaint forum by transferring all related powers from the ombud – 'Proposal for Re-organization of Equality Ombud and Equality Tribunal sent for Public Hearing' (Norway, 14 December 2016) <http://www.equalitylaw.eu/downloads/3970-norway-proposal-for-re-organization-of-equality-ombud-and-equality-tribunal-sent-for-public-hearing-pdf-138-kb> accessed 22 February 2017.
[359] Section 16 of the Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (Equality and Anti-Discrimination Ombud Act) of 2018.
[360] Section 5 of the Equality and Anti-Discrimination Ombud Act of 2018.
[361] Equality and Anti-Discrimination Ombud Act of 2018.
[362] 'Proposal for Re-organization of Equality Ombud and Equality Tribunal sent for Public Hearing' (n 358).
[363] Section 1 of the Equality and Anti-Discrimination Ombud Act of 2018. See also, H Skjeie & T Langvasbråten, 'Intersectionality in Practice? Anti-discrimination Reforms in Norway' (2009) 11(4) International Feminist Journal of Politics 513–529, 513.
[364] H Skjeie, 'Gender Equality and Non-discrimination: How to Tackle Multiple Discrimination Effectively?' in F Bettio & S Sansonetti (eds), *Visions for Gender Equality* (European Commission 2015) 79.
[365] TR Korsvik (n 338) 53.
[366] KB Heffermehl (n 347) 640.

engineering, manufacturing, construction and law for males.[367] Specifically, in relation to boards of directors, the gender gap looms large in the manufacturing sector, with 61% male and 39% female directors.[368] Similar endemic segregation is visible in the construction, electricity and entertainment sectors,[369] as female representation remains conventionally linked to the education, health and consumer-oriented sectors.[370] Moreover, even within single boards, female directors are mostly confined to public relations and communication tasks, rather than technical or income-generating responsibilities. This is referred to as corporate agenda segregation.[371] Despite being acclaimed as a gender-progressive nation, gender roles and stereotyping are therefore largely prevalent in Norwegian industry.[372]

While the enforcing institutions appear to have taken cognisance of some of these concerns (including those relating to gender roles[373] and pay disparities[374]), the commission recommended further streamlining the duties of private sector employers and public authorities to promote gender equality, establishing a gender equality directorate to control and monitor the gender equality policy, devising a ten-year development plan for regional and local levels, augmenting powers of enforcing agencies and creating liaisons between them, specialised non-governmental bodies and the labour market, and enhancing government grants for voluntary initiatives.[375] These

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[367] 'Nordic Gender Equality in Figures 2015' (Nordic Council of Ministers 2015) 24 <http://norden.diva-portal.org/smash/get/diva2:790696/FULLTEXT02.pdf> accessed 10 April 2017.
[368] 'Board Representatives, by Gender, Age Groups, Level of Education, Size Groups and Economic Activity' (Statistics Norway, 1 January 2016).
[369] *Ibid*
[370] GE Fryxell & LD Lerner, 'Contrasting Corporate Profiles: Women and Minority Representation in Top Management Positions' (1989) 8(5) Journal of Business Ethics 341–352, 343. See also, KR Harrigan, 'Numbers and Positions of Women Elected to Corporate Boards' (1981) 24(3) The Academy of Management Journal 619–625, 622–623; and 'The Current Situation of Gender Equality in Norway – Country Profile 2013' (European Commission 2013) 11.
[371] A Sweigart (n 324) 91A.
[372] H Melkas & R Anker, *Gender Equality and Occupational Segregation in Nordic Labour Markets* (ILO 1998) 43. See also, 'Women at Work: Who are They and How are they Faring?' (OECD Employment Outlook 2002) chapter 2.
[373] Case LDO 06/1834 *Harstad* (Ombud) and case LDN 23/2008 (Tribunal) [comparing the traditionally female-tagged job of nurses to the work of engineers]; and Case LDO 07/406 *SFO* (Ombud) [comparing typically female-attributed jobs in care sector to industrial management roles].
[374] 'Gender and Pay Facts, Analyses and Measures to Promote Equal Pay – Summary of Official Norwegian Report 2008: 6' (Ministry of Children and Equality 2008).
[375] 'Structure for Equality' Official Norwegian Report NOU 2011: 18 (Norway Ministry of Children, Equality and Social Inclusion, 15 November 2011) – dealing with institutional aspects; and 'Policy for Equality' Official Norwegian Report (NOU) 2012: 15 (Ministry of Children, Equality and Social Inclusion, 25 September 2012) – dealing with assessment of status actually existing in practice.

recommendations formed the basis of a white paper entitled, "gender equality will not come by itself" in 2013, which was later withdrawn owing to a change of government.[376] This political change brought in, as well as a few reductions in gender welfare schemes,[377] a new proposal in 2015, which was received with much criticism as too formal and restrictive in defining the permissible limits of government intervention.[378] This was not unexpected, given that the new alliance involves the Progress Party, which also opposed the 40% quota for boardrooms.[379]

The action plan entitled "gender equality 2014", which was initiated in 2011, could, however, survive the change of government. Amidst nine objectives spread across education, health, violence, labour market/employment, family welfare, pay gap, government representation, international politics and gender stereotypes, a few notable measures proposed in relation to corporate leadership were as follows: (a) gender balance on the boards of certain large PLCs, (b) an increase in female chairs, and (c) an increase in female top managers. While the first suggestion is arguably rather ambitious, the latter two could be enforced, starting with state-owned enterprises.[380]

All of the above, in addition to many other plans/schemes in the non-commercial space,[381] resonating commitment to gender fairness and equal distribution of responsibilities, influence and power between men and women in society, explain why Norway invented the 40% quota, which for the first time extended gender balance, not until then explored, to the domain of corporate leadership.[382]

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[376] TR Korsvik (n 338) 50.
[377] SB Kamerman & P Moss, *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press 2011) 197.
[378] II Bergstrøm, 'Gender Researchers Dismiss new Norwegian Equality Report' (Kilden, 26 November 2015) <http://kjonnsforskning no/en/2015/11/gender-researchers-dismiss-new-norwegian-equality-report> accessed 28 March 2016.
[379] SB Kamerman & P Moss (n 377) 197.
[380] 'Action Plan – Equality 2014' (n 345) 34.
[381] 'Action Plans' <http://www.gender no/Policies_tools/Strategies_Action_plans> accessed 15 February 2016.
[382] L Davoy, 'Women on Board' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 2, 18.

(B) A Final Twist of Business

Given the strong egalitarian ideologies exhibited, what triggered the 40% quota was arguably demographic/gender balance. Does this mean that the business case for diversity was completely absent in Norway?

Although equality and gender fairness were the underlying reasons for which Norway commenced its advocacy for female directorship, and continues to do so, the ultimate shift in legislating the quota from what was initially proposed as an amendment to the Gender Equality Act but became enactment in company law (Norway Act) hints at what can be referred to as, "a final twist of diversity". Supported by assertions of "better strategic choices, more innovation, faster restructuring, and thereby improve profitability",[383] and that it "will lead to increased gender equality and democracy; it will strengthen the management of the corporate sector and the competitiveness of companies and enterprises",[384] the quota, although originating from, founded on and devised for gender equality, was eventually implemented with a commercial angle added to it. This appears to have been done to ensure its greater acceptance within the business community (which, barring few exceptions, largely opposed the quota), as was clarified in the parliamentary debates preceding enactment of the quota:

> *Finally, I would not call this a gender quota reform. It is diversity, we talk about, diversity in boardrooms. The Government wants to pave the way for increased value creation in business. The problem today is not that there are no qualified and suitable women. The problem is to ensure that the skills women possess, are used … Increasing the proportion of women in boards enhances diversity.* [385]

Contrary to the common belief that Norway, as a fore-runner in gender justice,[386] opposes gender utility, the country supports it.[387] What started with an emphasis upon women as an interest group, while not deviating from it, could not avoid accommodating business motives in due course, which once again reiterates the dual

[383] Proposition 97 (Norwegian Ministry of Children and Family 2002–03) 10.
[384] *Id* at 6.
[385] Parliamentary Debate (2002) – H Bjørkhaug & S Sørensen, 'Feminism Without Gender? Arguments for Gender Quotas on Corporate Boards in Norway' in F Engelstad & M Teigen (eds), *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald 2012) chapter 6, 185, 199–200.
[386] 'Global Gender Gap Report' (n 134) 10.
[387] H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 203.

case of boardroom gender diversity. Having said that, although business did intervene, it was only by way of a popularist tactic to enforce the quota – a strategy that had already been determined and devised predominantly for reasons of equality, gender fairness and social justice.[388]

II.2C Outcome of the Strategy

Following the enactment of the quota in 2006, it did not take long for Norway to reach 40% female directorship:

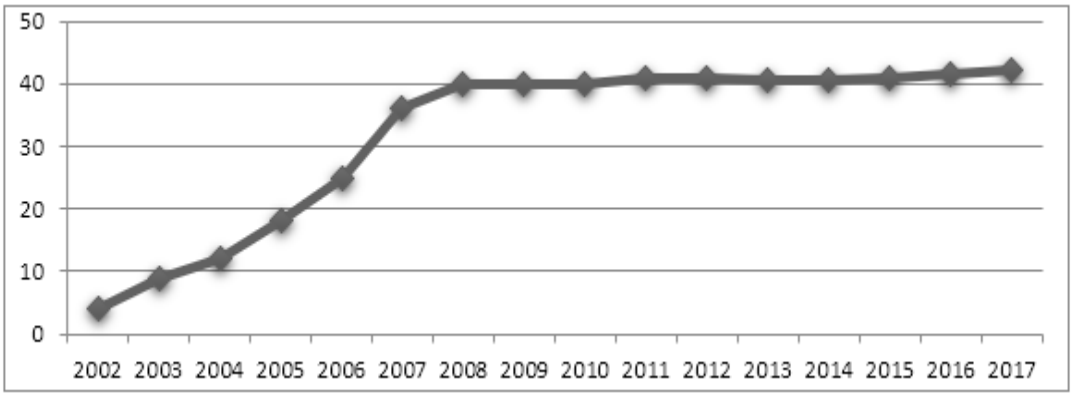

Figure 2: Female Directorships in Norway 2002–17[389]

Of the 77 companies that failed to comply by the January 2008 deadline and which were issued notices allowing a grace period, only 12 were subject to a further notice of four week.[390] 95% of the PLCs reported compliance by July 2008 and this was fully achieved before the end of the year.[391]

(A) Positive Trends

As is apparent, the most remarkable effect of the quota has been the achievement of full compliance not long after the stipulated deadline. What made it more credible was how the compliance was attained – i.e., as the target level of 40% female directorship

[388] V Heidenreich, 'Why Gender Quotas in Company Boards in Norway – And Not in Sweden?' in F Engelstad & M Teigen (eds), *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald 2012) chapter 5, 177.
[389] 'Board and Management in Limited Companies' (Statistics Norway, 8 March 2017). See also, M Teigen (n 309) 11.
[390] R Pande & D Ford, 'Gender Quotas and Female Leadership: A Review' (Background Paper for the World Development Report on Gender, 7 April 2011) 15.
[391] '95 per cent Fulfill Gender Requirements' (Statistics Norway, 11 July 2008).

was reached by replacing male members (not by simply adding women to existing boards so as to increase board sizes),[392] risks of tokenism could be mitigated. Mere addition of female directors without altering existing composition only to comply with the quota would have resulted in "tick box" compliance, while falling short of the true spirit of the law.

Another positive change noted, notwithstanding allegations of younger and less experienced boards,[393] is the increase in the levels of qualifications within boardrooms with the entry of female directors.[394] Further, the quota brought female directors, with an average of 1.19 directorships in 2013, to the forefront.[395] Before this is used to allege "golden skirt" or pressure of multiple directorships on a few selective women, which could compromise their commitment and performance levels as an excuse to defer their inclusion, a glance at the male average of 1.12[396] (not too far behind the figure for women) is helpful. If a multiplicity of positions deter female directorship, this carries almost equivalent relevance for male directors.[397] Given that male directors (who are equally or closely stressed out in terms of numbers of their directorships) do not face any similar accusations or tags akin to "golden trousers",[398] but are instead acclaimed for being "well-known businessmen",[399] the "golden skirt" accusation appears to be innately gender biased.

[392] K Carroll, 'Norway's Companies Act: A 10-year Look at Gender Equality' (2014) 26 Pace International Law Review 68–79, 71. See also, Dale-Olsen, Schone, & Verner (n 192) 110–135, 127.
[393] KR Ahern & AK Dittmar (n 184) 169–170.
[394] *Id* at 140. See also, 'Board Representatives, by Gender, Age Groups, Level of Education, Size Groups and Economic Activity' (n 368).
[395] T Løyning, 'Business Elites and Power: Board Networks during the Period from 2008–2013' in M Teigen (ed), *Gender Balance on Company Boards* (Institute for Social Research Report 2015) 38.
[396] *Ibid*.
[397] Noland, Moran, & Kotschwar (n 182) 8.
[398] M Huse, 'The Golden Skirts: Lessons from Norway' in S Gröschl & J Takagi (eds), *Diversity Quotas, Diverse Perspectives* (Routledge 2016) chapter 1, 17. See also, Noland, Moran, & Kotschwar (n 182) 8.
[399] H Alexander, 'The Golden Skirt and Norway's Boardroom Bias' (DNA, 18 March 2012).

(B) Negative Trends

Beneath an apparent success story and claims of institutionalising women in corporate leadership[400] lies some not so flagrant observations that justify why a quota as a strategy should be re-visited.

First and foremost, female directorship appears to have almost stagnated in Norway after the 40% threshold was attained. With levels hovering around 41%, no significant improvement has been noted over the past ten years since full compliance was attained in 2008 (as is clearly visible in figure 2). Further, with only a marginal rise to 18% to 2017 (when 17% was already attained by 2006, well before the quota deadline), no significant ripple effects of the quota were observed upon private companies to which the mandate does not apply.[401] While it is not known if female directorship in PLCs, had it not been for the mandatory effect backed by sanctions, would have met with a similar fate, this nonetheless clarifies that the 40% quota has not been completely successful in making it a fully fledged business norm. This can be further inferred from nearly non-existent female representation in Norwegian senior management, which remains male-dominated[402] and to which the quota does not extend. Only 7% of general managers (officers responsible for the day-to-day management of companies) in PLCs are women, a figure which has risen marginally by 2.6% since 2004.[403] Of the companies listed on the Oslo stock exchange, only 5% of the chairpersons and 2% of the general managers are women.[404] Compliance therefore appears to have been achieved through replacements primarily in the non-executive area, while executives remain barely touched by the quota.

One major factor found to be responsible for glacial progress in the executive constituent is the shortfall of women in what is termed as the "pipeline" – i.e., candidates from mainstream/line and managerial positions with first-hand exposure to

[400] S Machold, 'Institutionalizing Women's Representation on Boards: An Introduction to the Advocacy Movement' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 5, 33.
[401] Halrynjo, Teigen, & Nadim, 'Women and Men in Senior Management – Ripple Effects of Laws Requiring Gender Balance on Company Boards' in M Teigen (ed), *Gender Balance on Company Boards* (Institute for Social Research Report 2015) 21.
[402] 'Policy for Equality' (n 375) 34.
[403] 'Board and Management in Limited Companies' (n 389).
[404] A Storvik & M Teigen (n 331) 8.

the business, whether sourced from within the company or across competing businesses.[405] Emanating largely from gender stereotyping, segregation and pay gaps,[406] women are found to be missing in line positions that serve as the preparatory ground for potential executive and senior management recruits.[407] For instance, female participation is higher in the public sector (70.4% female against 29.6% male), than in the private sector (36.6% female against 63.4% male).[408] Inversely, the pay gap is wider in the private sector (women earn 84% of male earnings, as of 2008), when compared with the public sector (88%).[409] More recently, the pay gap was reported at 15% in the private sector against 10% in the public sector.[410] Such gaps are found to increase with age and educational levels as one moves up the corporate ladder, resulting in attrition of women in their mid-career stages such that only a few are able to sustain reaching up to board levels (this disparity is, however, likely to subside with men taking up a greater share of family and household responsibilities).[411]

Lastly, the 40% quota is condemned as one that can be easily evaded, with companies not always able to comply. Studies indicate that, to avoid compliance costs and regulatory constraints, many PLCs converted and re-registered as private limited companies.[412] While this might also relate to other simultaneously undertaken industry reforms, a possible connection with the quota cannot be completely dismissed.[413]

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[405] A Sweigart (n 324) 104A–105A.
[406] Halrynjo, Teigen, & Nadim (n 401) 20. See also, 'Indicators for Gender Equality 2014' (Statistics Norway, 5 April 2016).
[407] C Seierstad & M Huse (n 333) chapter 2, 15.
[408] 'Women and Men in Norway – What the Figures Say' (Statistics Norway, January 2010) <https://www.regjeringen.no/globalassets/upload/bld/rapporter/2010/cedaw_rapporten/annex_3.pdf> accessed 5 April 2016. See also, A Hole, 'Norway: A Haven for Gender Equality and Families? Politics that Pay Off in Economic Terms and the Number of Babies' (2009) <http://www.ILO .org/public/english/anniversary/90th/download/events/singapore/slide2.pdf> accessed 5 May 2016.
[409] *Ibid*.
[410] 'Women and Men in Norway' (Statistics Norway, February 2018) 16. See also, 'Unadjusted GPG by Economic Control (%)' (Eurostat 2015) <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Unadjusted_GPG_by_economic_control_(%25),_2015-T3.png#file> accessed 16 April 2017.
[411] 'Women and Men in Norway' (n 410) 16, 20.
[412] O Bohren & S Staubo, 'Does Mandatory Gender Balance Work? Changing Organizational Form to Avoid Board Upheaval' (2014) 28 Journal of Corporate Finance 152–168, 165. See also, C Seierstad & M Huse (n 333) chapter 2, 29.
[413] F Engelstad, 'The Right to Participation – How far does it Extend?' in M Teigen (ed), *Gender Balance on Company Boards* (Institute for Social Research Report 2015) 45.

Moreover, as conversions were more common among unlisted companies[414] for which cost of compliance was higher than that of conversion, such linkage is more likely.[415]

II.3 *United Kingdom*

At the opposite end of the spectrum from the mandatory quota lies the use of voluntary measures,[416] which do not succumb to any sanctions if not conformed with. The United Kingdom (UK), which relies heavily upon such measures, therefore represents an apt jurisdiction in contrast to Norway.

II.3A Strategy

The corporate governance code, first devised in 1992 following the Cadbury Committee Report,[417] has evolved and been updated periodically by the Financial Reporting Council ("FRC"), with the latest version updated in 2018 ("2018 Code").[418] As this took effect most recently in January 2019, it is worthwhile to review what it enunciates as the future principles for boardroom gender diversity in the UK, and how it has progressed from the code of April 2016 ("2016 Code").[419]

Diversity is explicitly mentioned in the principles and provisions relating to board composition, succession and evaluation.[420] Asserting gender diversity, amongst other attributes, as a necessary factor for board appointments and succession plans, the 2018 Code seeks more expansive search processes through open adverts or external search agencies, particularly for non-executive directors. Likewise, diversity is also prescribed as an evaluation criterion for annual board reviews. All of these factors, along with a diversity and inclusion policy and its objectives, linkage with the business strategy, implementation and outcomes measured against set goals, are enumerated as

[414] K Nygaard (n 190) 13–14.
[415] O Bohren & S Staubo (n 412) 165.
[416] I Natividad, 'CWDI 2010 Report: Accelerating Board Diversity' (Corporate Women Directors International 2010).
[417] 'The Financial Aspects of Corporate Governance' (The Committee on the Financial Aspects of Corporate Governance and Gee and Co Ltd, 1 December 1992).
[418] 'The United Kingdom Corporate Governance Code' (The Financial Reporting Council, July 2018).
[419] 'The United Kingdom Corporate Governance Code' (The Financial Reporting Council, April 2016).
[420] Introduction, Principles J, K and L under Part 3, clauses 17, 19, and 20 of 'The United Kingdom Corporate Governance Code' (n 418).

responsibilities of the nomination committee, which then requires disclosures in companies' annual reports.

Much of this is mirrored from the 2016 Code, which, while prescribing the over-arching governance principles and norms applicable to companies listed in the UK, in turn replicated the provisions of boardroom gender diversity from the 2012 version of the code.[421] With an explicit mention as an under-pinning principle for board composition, effectiveness and evaluation,[422] diversity was found in the main principle of clause B.1 of the 2016 Code, which encouraged the creation of diverse boards in terms of functional characteristics such as knowledge, skills, independence and experience, with respect to the board composition. Accordingly, diversity was listed as an essential attribute in relation to the search for potential candidates and their appointment to directorships.[423] The 2018 Code, however, qualifies this by adding the conditions of merit and objective criteria constituting the context within which such diversity ought to be considered. With such added connotations of "merit", which is prone to bias and subjectivity (as asserted in chapter I), how far diversity can be fructified within the 2018 Code remains to be seen in future.

As is also found in the 2018 Code, the reporting requirements under clause B.2.4 of the 2016 Code necessitated disclosure, in the company's annual report, of the board's policy on diversity with specific reference to gender, including any action plan/objectives towards implementing policies, and the review of any progress made to this end. Similarly, the nomination committee was required to explain the recruitment process adopted in relation to board appointments, including the engagement of any external search agency, and their allotted mandate. The 2016 Code went further than the 2012 version to add such diversity as a criterion for board evaluation under clause B.6, which is re-instated in the 2018 Code. As part of the appraisal of the board as a collective group, including various board committees and individual directors, this required an assessment of the balance of skills, independence, knowledge and experience, alongside diversity (including gender) of boards. Such

[421] 'The United Kingdom Corporate Governance Code' (The Financial Reporting Council, September 2012).
[422] Point 3 of the Preface to the 2016 Code (n 419) .
[423] Supporting principle of clause B.2 of the 2016 Code (n 419).

evaluation then had to be disclosed in the annual reports of the company.[424] Notably, a vital addition found in the 2018 Code over and above its preceding versions relates to emphasis on gender balance in senior management and its direct reports, which appears to be inspired from the recently set targets for executive positions in the Hampton–Alexander recommendations (discussed later in this section).[425]

The above listed provisions, although central to the UK's diversity campaign, are not self-contained. For instance, regulation 3 of the Companies Act 2006 (Strategic Report and Director's Report) Regulations of 2013[426] amends the Companies Act of 2006 to insert section 414C(8), which requires companies to publish, *inter alia*, information regarding the gender composition of their boards as part of their annual reports.[427] Given the comply-or-explain mandate of the 2016 Code and the reporting requirements detailed, it becomes clear that UK relies heavily upon disclosures as one major limb of its strategy.

At this stage, it becomes crucial to introduce the most resourceful, comprehensive and staunch advocacy found in the recommendations (not obligations) of the Davies Report on "Women on Boards" of 2011 ("Davies Report").[428] With a 25% target for FTSE 100 boards, which had to be attained by 2015, the Davies Report suggested an industry-led voluntary path for the UK. This target has since been followed up with annual reviews and a five-year summary ("Summary") revealing the progress made. With significant improvements of more than 12% rise in female directorship within these five years (against a marginal increase of 4% in the preceding seven years),[429] the Davies Report could break all inhibitions and speculations as regards the efficacy of such "soft" strategy. Once the 25% threshold was met, the target was increased to 33%, and was made applicable to a larger gamut of FTSE 350 companies, to be attained by the end of 2020.[430] In addition, the Summary places emphasis on female

[424] B.6.1 of the 2016 Code (n 419).
[425] Clause 23 of 'The United Kingdom Corporate Governance Code' (n 418).
[426] SI 2013/1970.
[427] This is parallel to the reporting requirements under Norway's Accounting Act of 1998.
[428] Lord Davies (n 80).
[429] Computed based on an analysis of 'The Female FTSE Board' Reports from 2000 to 2016, published by the Cranfield University.
[430] 'Improving the Gender Balance on British Boards – Women on Boards Review: Five Year Summary' (KPMG & Cranfield University, October 2015) 7.

participation in executive roles and in senior leadership. However, as no specific numbers were advanced in this regard, the more recent Hampton–Alexander Review of 2016[431] took up the initiative to define a 33% target for female representation across executive committees, and in direct reports to such executive committees (or immediate line positions) at FTSE 100 companies, to be attained by the same deadline of 2020.

Further backed by the code of conduct for executive search firms,[432] once again initiated by recommendation 8 of the Davies Report,[433] the voluntary strategy appears to have spread its reach much wider. Recruitment agencies can sign up for this code pursuant, as part of which they commit to a more open, transparent and wider pool of candidates with emphasis on (a) 30% women candidates, especially when drawing up shortlists;[434] (b) documentation and recording of best practices against gender bias; (c) providing support to first-time candidates in terms of preparation, guidance and induction to roles; and (d) signalling their diversity commitments to the wider corporate sector. Although voluntary, the code once adopted involves an accreditation process to assess such firms, which is measured in terms of appointments made (including first-time recruitments), creation of databases, dissemination of candidates' commitment through visible adverts and website promotions, and overall support advanced.[435] Reports are filed for every 12-month period with the Davies steering group, which is also responsible for annual reviews in relation to the UK's progress on

[431] 'Hampton–Alexander Review – FTSE Women Leaders, Improving Gender Balance in FTSE Leadership' (KPMG, November 2016) 10. Starting with FTSE 100 companies in 2016, the outreach of the target was later extended to FTSE 350 companies – Hampton–Alexander Review – FTSE Women Leaders, Improving Gender Balance in FTSE Leadership' (KPMG, November 2017). Based on the most recent assessment undertaken in November 2018, female representation in executive committees and direct reports to such positions have increased since 2016 (but not yet attained the target of 33%) across FTSE 350 companies – 'Hampton–Alexander Review – FTSE Women Leaders, Improving Gender Balance in FTSE Leadership' (KPMG, November 2018) 9.

[432] 'The Standard Voluntary Code of Conduct for Executive Search Firms' (MWM Consulting) <http://www.mwmconsulting.com/wp-content/uploads/2014/10/Voluntary-Code-of-Conduct-for-Search-Firms.pdf> accessed 25 September 2016.

[433] Lord Davies (n 80) 21.

[434] 'The Standard Voluntary Code of Conduct for Executive Search Firms' (n 432).

[435] The Enhanced Voluntary Code of Conduct for Executive Search Firms – Davies Review Accreditation (September 2014).

boardroom gender diversity. All of this finds further sympathy from industry agencies which proactively advocated in favour of such diversity.[436]

How did the strategy evolve?

The diversity reforms under the 2012 code of corporate governance find their roots in the supporting principle in the 2010 version.[437] The latter sought to open up appointments to a wider pool of candidates. Further, this code, under clause B.1, necessitated a balance of skills, experience, independence and knowledge as part of the board composition, so as to avoid dominance of any form in the decision-making process. Notably, although aiming at diversity more generically, this code made specific reference to gender, which signifies that it has always been a distinct issue for consideration.[438]

A journey thus initiated by the 2010 Code assumed a more refined form with subsequent amendments. For instance, inspired by the Davies Report, the FRC sought consultation in May 2011 regarding improving boardroom diversity.[439] As part of this, the FRC invited comments on proposals to add concrete gender-linked provisions to the code. The responses, from all sections of industry (including listed companies, investors, professional bodies, audit firms, search agencies, interest groups and individuals), supported the proposals along lines of diversity in general (rather than only gender-centric).[440] This was reiterated in the feedback statement[441] issued after the consultation, which invited comments on revisions to the 2010 Code.[442] Accordingly, the proposed amendments were re-phrased to mirror clause B.2, addressing diversity more generally. Nonetheless, a specific reference to gender was

[436] Y Chinwala, 'Women in UK Financial Services 2016: Putting the Gadhia Review and HM Treasury's Women in Finance Charter in Context' (New Financial, June 2016) 9. See also, 'Women in Finance Charter – a Pledge for Gender Balance Across Financial Services' (HM Treasury, March 2016).
[437] Supporting Principle under clause B.2 'The United Kingdom Corporate Governance Code' (The Financial Reporting Council, June 2010).
[438] *Ibid*.
[439] 'Consultation Document: Gender Diversity on Boards' (The Financial Reporting Council, May 2011).
[440] 'Feedback Statement – Gender Diversity on Boards' (The Financial Reporting Council, October 2011) 3.
[441] 'Feedback Statement – Revisions to the UK Corporate Governance Code and Guidance on Audit Committee' (The Financial Reporting Council, September 2012) 3, 10–11.
[442] 'Consultation Document: Revisions to the UK Corporate Governance Code and Guidance on Audit Committee' (The Financial Reporting Council, April 2012).

included in the final provisions – B.2, B.2.4 and B.6 of the 2012 version of the code.[443] With only one other addition of point 3 in the preface of the 2014 version,[444] the 2012 provisions were later transposed into the 2016 Code without any further changes.

On the other hand, the Davies Report (although most authoritative) was not the pioneering source of diversity in the country. Rather, the Higgs report of 2003, which preceded the Davies Report, paved the way for adoption of diversity as a tool to improve board effectiveness, although without making any direct reference to gender.[445] It advocated a diverse range of experiences, backgrounds, skills and attributes in seeking to create a cohesive and effective board. Later, similarly to the Higgs review, diversification in the non-executive constituent was suggested by the Tyson report.[446] Notably, while lengthy deliberations on diversity for overall board or non-executive positions are found, detail on executives is rare, and was perhaps not done until the Hampton–Alexander Review[447] – the outcome of which is yet to be assessed.

II.3B Underlying Rationale

(A) Business Rationale

The UK, which is historically founded on pro-market or neo-liberal ideologies,[448] did not seek any exception when formulating strategy for boardroom gender diversity. Accordingly, it has always sought to justify female directorship through reasons of value addition to business, rather than on moral or social grounds.[449] This is also evident in anti-discrimination laws, which are often attempted to be commercially rationalised with arguments of better distribution and use of resources for increased returns and greater efficiency/growth.[450] For instance, the equalities review and the

[443] 'The United Kingdom Corporate Governance Code' (n 421).
[444] 'Feedback Statement – Revisions to the UK Corporate Governance Code' (The Financial Reporting Council, September 2014) 4.
[445] D Higgs (n 173) paras 6.4, 10.1, 15.20, 17.6 and 17.12.
[446] 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (n 173) 1.
[447] 'Hampton–Alexander Review' (n 431) 10.
[448] W Brown, 'Neo-liberalism and the End of Liberal Democracy' (2003) 7(1) Theory & Event 1–27, 1. See also, B Burton (n 237) 122.
[449] 'Improving the Gender Balance on British Boards – Women on Boards Review: Five Year Summary' (n 430) 9; Lord Davies (n 80) 7; and 'Hampton–Alexander Review' (n 431) 12.
[450] 'Fairness and Freedom: The Final Report of the Equalities Review' (The Equalities Review, February 2007) 19–20.

discrimination law review, while seeking consolidated equality legislation, condemned the squandering implications of inequality and discrimination on the economy. While highlighting sustainable competitive advantages that can be generated through varied skills, understanding and experiences,[451] they further argued that only a clear link to economic benefits can enforce equality in its most effective form.[452] Such free-market tendencies emerge clearly even in the pre-legislation consultations, which did not stop at equality as an end objective, but rather went ahead to outline diversity and its economic benefits.[453] Business convenience was once again a major factor responsible for the birth of the Equality and Human Rights Commission, aiming to offer a single window for companies to approach.[454] As well as business-linked qualifications and/or experience being important constituents of the forum,[455] its role included devising flexible modes of legal compliance (against sanctions),[456] and promotion of the business case for diversity.[457] Such industry orientation extended to sections 158 and 159 of the Equality Act of 2010 ("2010 Act"), which were preceded by deliberations that included references to the benefits of a diverse workforce in terms of understanding customer needs and attracting new commercial opportunities,[458] and which were re-affirmed by the parliamentary debate held prior to the enactment of the 2010 Act announcing equality as "necessary for the economy".[459] This explains why gender preferences carved out in these provisions apply only if considered an appropriate subject for company-wise discretion and assessments. Thus, even where social justice/equality has been the central theme, commercial autonomy is safeguarded to avoid what could be detrimental to employers or onerous to business.[460] As has unequivocally been spelt out, "anyone who truly believes in equality must surely believe that people should be given jobs on merit".[461]

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[451] 'Discrimination Law Review' (Department for Education and Skills, Department of Trade and Industry, Department for Work and Pensions, Ministry of Justice, Department for Communities and Local Government, June 2007) 8, 64.
[452] *Id* at 114.
[453] 'Equality and Diversity – Making it Happen'– the White Paper (Department of Trade and Industry 2002) paras 1.20 and 3.4.
[454] *Id* at paras 7.26-7.31.
[455] *Id* at para 7.23.
[456] *Id* at para 7.33.
[457] *Id* at para 7.28.
[458] House of Commons Debate, col 603 (30 June 2009).
[459] House of Commons Debate, col 553 (11 May 2009).
[460] House of Commons Debate, col 565 (11 May 2009).
[461] House of Commons Debate, col 1147 (2 December 2009).

All of the above holds true even for female directorship, which is largely justified through benefits from an economic standpoint,[462] particularly in terms of cost repercussions and the negative implications of inequality on the business.[463] Quite clearly, the aim has been to secure transparent and unbiased board appointments based on objective assessments, to access the broadest talent pool available (not confined to the close network or circuit of existing "like-minded" directors, commonly referred to as the "old boys' network"),[464]and to develop diversity defined in terms of (beyond demographics) knowledge, experience, skills and independence on the board.[465] This emerges clearly in the country's response to the European Commission ("EC") on its proposal for strategising female directorship, which strongly recommends business flexibility for long-term and sustainable reform, while condemning Norway's mandatory quota.[466]

Finally, not leaving any scope for speculation, what establishes business and gender utility as the underlying rationale for the UK's advocacy for women in corporate leadership is the Davies Report, within which voluntary targets are premised on four key reasons as follows: (a) improvement in performance, (b) access to the widest talent pool, (c) market responsiveness, and (d) better corporate governance.[467] Reiterated in the Summary, the business standpoint is further clarified:

> *From the very beginning, we addressed the lack of gender diversity on British Boards as a key business issue, at a time when it was still being narrowly boxed by many as an equalities, diversity or women's issue.*[468]

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[462] 'Towards Equality and Diversity – Implementing the Employment and Race Directives' (Minister of State, Minister for Women, December 2001) para 1.3.
[463] *Id* at para 1.4.
[464] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures' – COM(2012) 614 Final 2012/0299 (COD) (The European Commission, Brussels, 14 November 2012) 4.
[465] Main Principle, B.1 of the 2016 Code.
[466] 'UK Response to the European Commission Consultation on Gender Imbalance in Corporate Boards in the EU' (The Government Equalities Office, department for Business Innovation and Skills, May 2012) 3.
[467] Lord Davies (n 80) 8.
[468] 'Improving the Gender Balance on British Boards – Women on Boards Review: Five Year Summary' (n 430) 9.

(B) Social Justice – How Relevant?

Equality in the UK is centred upon the formal notion of equal treatment of all individuals and elimination of all forms of discrimination.[469] Accordingly, gender preferences or affirmative measures are more of an exception (rather than a rule) to equality,[470] while positive discrimination (or automatic selection of one while eliminating the other only on ground of gender *per se*) akin to quota remains prohibited.[471] This emanates from the country's historic dependence on individualism, neutrality of the state, and an under-pinning market-driven or business-oriented ideology.[472] Endorsing absolute intolerance to discrimination regardless of gender and related historical disadvantages, the country embarks upon formal equality, as is also exemplified by cases decided by its judiciary.[473] Accordingly, courts have ruled against any and all measures of positive discrimination, stating that the question to be considered is only whether the complainant, but for his or her gender or other protected characteristic, would have been subject to the same treatment.[474] This explains why women-only shortlists for election candidature were struck down as amounting to unlawful gender discrimination,[475] and provisions to prevent any abuse of the contractual powers of the state favouring protected groups of persons were enacted.[476] Even equality legislation, which otherwise outlawed discrimination of sex, carved out only a few narrowly tailored provisions to allow for gender representation in employers'/professional organisations or in training facilities,[477] most of which enabled without creating any legally binding obligations.

[469] SS Fredman (n 229) 8–13.
[470] L Thwaites, 'The British Equality Framework is Incapable of Achieving Equality in the Workforce' (2014) 2(1) North East Law Review 137–168.
[471] K Godwin, 'Positive Action: Possibilities and Limits' (2007) 170 Equal Opportunities Review 22–23.
[472] L Thwaites (n 470) 140, 142–143.
[473] *James v Eastleigh Borough Council*, [1990] 2 AC 751.
[474] *London Borough of Lambeth v. Commission for Racial Equality*, [1990] ICR 768 (CA).
[475] *Jepson v Labour Party*, [1996] IRLR 116.
[476] *R v London Borough of Islington, ex p Building Employers Confederation*, [1989] IRLR 382 (DC).
[477] Sections 47–49 of the Sex Discrimination Act of 1975. See also, 'Discrimination Law Review' (n 451) 68.

Having said this, some concessions for affirmative (but not positive) discrimination measures were gradually made,[478] as is evident in all-women shortlists drawn up by political parties,[479] for which legislative allowance was made by the Sex Discrimination (Election Candidates) Act of 2002.[480] Particularly in the business context, preferences for persons with protected characteristics so as to enable them to overcome or minimise such disadvantages, meet deficiency, or increasingly participate in matters of employment, were allowed, specifically relating to their recruitment and promotion.[481] These measures can be adopted when the employer arrives at a reasonable opinion (not necessarily based on data or statistics) that the female gender is under-represented or disadvantaged with respect to such a role/position.[482] Thus, while discretionary, such preferences must also be exercised through proportionate means,[483] and only by way of a tie-breaker rule[484] – i.e., where the male and female candidates are found to have equal merit. Any means adopted to circumvent the prohibition of positive discrimination, such as a policy that routinely or automatically favours female candidates (without assessing the individual merits of each case), or setting artificially low thresholds for the tie-break so as to cover more preferred candidates, would be illegal.[485] However, given the largely biased perception of merit (as discussed in chapter I), which is assessed and decided upon by employers, implementation of these preferences is arguably highly subjective.

Further, whether these extend to directorships is not as yet decided in finality. If one takes hints from Scotland's enactment for gender representation on public boards,

[478] Sections 83 and 84 of the Equality Act of 2006. See also, 'Towards Equality and Diversity – Implementing the Employment and Race Directives' (n 462) chapters 4 and 5.
[479] R Kelly & I White, 'All-women Shortlists' (Briefing Paper Number 5057 – House of Commons Library, 7 March 2016). See also, MK Nugent & ML Krook, 'All-Women Shortlists: Myths and Realities' (2016) 69 Parliamentary Affairs 115–135.
[480] The term for such allowance, originally capped until 2015, has now been extended to 2030 – section 105 of the 2010 Act.
[481] Section 158 of the 2010 Act.
[482] 'Equality Act 2010: What Do I Need to Know? A Quick Start Guide to Using Positive Action in Recruitment and Promotion' (Government Equalities Office, January 2011) 7.
[483] Section 159 of the 2010 Act. See also, 'Appointments to Boards and Equality Law- Guidance, Legal Framework' (Publication GD 14 LF02, Equality and Human Rights Commission, 22 July 2014) 8.
[484] T Jarrett, 'The Equality Act 2010 and Positive Action' (SN/BT/6093, House of Commons Library, 24 October 2011) 9–15.
[485] 'Equality Act 2010: A Step-by-step Practical Guide to Using Positive Action When Making Appointments' (Government Equalities Office, January 2011) 5.

sections 158 and 159 would not apply to board appointments.[486] It becomes even more difficult to extend these provisions to non-executive positions which, unlike executive positions, are rarely defined through employment agreements. Nonetheless, it is possible to argue in favour given that recruitment is defined as including employment as well as appointment to a personal office (if that includes directorship).[487] This line of argument finds support from an earlier case, *Love v Federal Mogul Aftermarket Ltd*,[488] in which a female candidate aspiring for a director position successfully asserted inequality of opportunities against a male colleague. While the case concerned right to promotion of someone who was already employed in another role, the ruling nonetheless paved the way for similar preferences at board level. Reliance can also be placed upon the 2018 Code, which refers to the 2010 Act, while defining board composition to be drawn out factoring in diversity of gender, but within the context of merit and objective criteria.[489]

All in all, formal and individualistic equality remains the over-arching rule for the UK. This is re-affirmed by its complaints-led model of enforcement.[490] With numerous procedural safeguards in terms of notice and opportunities for making representations, and deferral of mandatory review and pay audit (despite strong advocacy for it),[491] the overall framework appears to be more employer or business friendly. This is proven by the lack of claims made so far, and the even fewer number that are successful.[492]

Given the pro-market adjustments made to equality, and that an overlap between equality/anti-discrimination and business autonomy (more so where the former impounds over the latter) is largely avoided, the relevance of the social justice rationale

[486] Section 11(1) of the Gender Representation on Public Boards (Scotland) Act of 2018.
[487] Section 159(5) of the 2010 Act. See also, 'Appointments to Boards and Equality Law – Guidance, Legal Framework' (n 483) 3; and A Belcher, 'Board Diversity: Can Sex Discrimination Law Help?' (2005) 56(3) Northern Ireland Legal Quarterly 356–372, 367.
[488] Unreported 1999, cited from A Belcher (n 487) 364.
[489] Principles under Part 3 of 'The United Kingdom Corporate Governance Code' (n 418).
[490] SS Fredman, 'Reforming Equal Pay Laws' (2008) 37 Industrial Law Journal 193–218, 203. See also, L Thwaites (n 470) 167. Notably, section 124(3) of the 2010 Act makes provision for systemic recommendations by the tribunal. However, this is not backed by enough deterrence to be effective.
[491] C McLaughlin & S Deakin, 'Equality Law and the Limits of the "Business Case" for addressing Gender Inequalities' (Centre for Business Research, University of Cambridge Working Paper no 420, March 2011) 4–5.
[492] SS Fredman (n 229) 281.

in strategising for female directorship appears remote.[493] Rather, the movement of equality seems to be parallel and not coinciding with what appears to be an independent business-driven campaign for boardroom gender diversity in the UK.

Nonetheless, the probability of a future intersection of the two rationales cannot be completely dismissed, given that the 2018 Code makes a footnote reference to the 2010 Act when enumerating the principles for board composition.[494] Similarly, Scotland has recently enacted for female preference when appointing non-executive directors on public boards if this helps in achieving (or makes progress towards achieving) gender representation.[495] Although the objectives clearly relate to gender balance and concern only the boards of public authorities, such preference is not absolute. Rather, it applies subject to considerations of the person who is "best qualified", who may not be a woman, in which case the gender preference would not apply.[496] Moreover, the enactment specifically excludes the application of sections 158 and 159 of the 2010 Act.[497] Thus, what is best for the business, although made to intersect with considerations for social justice, still over-rides the latter.

II.3C Outcome of the Strategy

Starting as low as 7.2% in 2002, female representation rose to 12.5% by 2010, and to 29% by 2018 in FTSE 100 companies.[498] Growth of 5% in the first eight years soon accelerated to 16.5% in the next eight years, with no all-male boards.[499]

[493] 'Improving the Gender Balance on British Boards – Women on Boards Review: Five Year Summary' (n 430) 9.
[494] Footnote 5 in the Principles under Part 3 of 'The United Kingdom Corporate Governance Code' (n 418).
[495] Sections 3 and 4 of the Gender Representation on Public Boards (Scotland) Act of 2018.
[496] Section 4(1) of the Gender Representation on Public Boards (Scotland) Act of 2018.
[497] Section 11(1) of the Gender Representation on Public Boards (Scotland) Act of 2018.
[498] 'The Female FTSE Board Report 2018' (AVIVA & Cranfield University, July 2018) 7.
[499] *Ibid* 7.

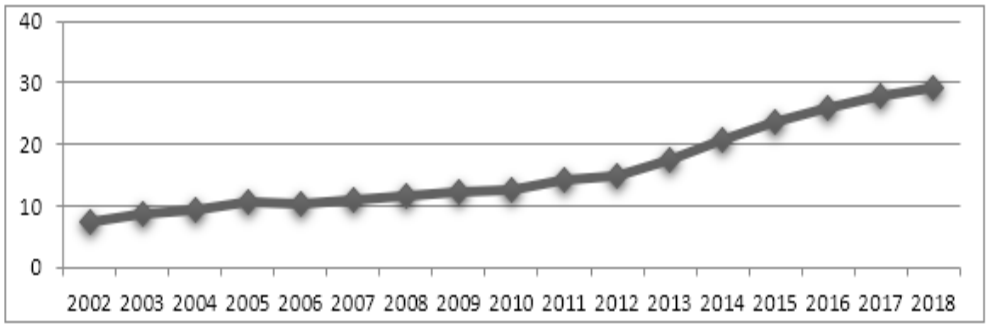

Figure 3: Female Directorships in the UK 2002–2018[500]

(A) Positive Trends

With no significant increase in total numbers of directorships, a rise in board seats occupied by women hints at an increase that has taken place through substitution of male members (and not by mere addition to the board size).[501] In terms of outcome, while the 25% target has been achieved, the next level of 33% is now in execution. As of 2018, 32% of FTSE 100 companies have reached the target.[502] Even in the next FTSE 250 companies, which have only recently been brought under the target scanner, female directorship has increased by more than 5% in past three years, and 23.6% of companies have already reached the 33% threshold.[503] Given that two more years remain until the deadline of 2020, full conformity is likely to be achieved in FTSE 100 companies 29% female directorship, while this remains uncertain for FTSE 350 companies with a few all-male boards still existing.[504]

Targets have brought more women to the corporate domain, as is apparent in the number of individuals, which almost matches the number of positions held. For instance, while female directorships in FTSE 100 companies rose from 135 in 2010 to 305 in 2018, the number of female directors/individuals sitting in these positions also

[500] Constructed by the author based on an analysis of 'The Female FTSE Board' Reports from 2000 to 2018, published by Cranfield University.
[501] Based on an analysis of 'The Female FTSE Board' Reports from 2000 to 2018, published by Cranfield University.
[502] 'The Female FTSE Board Report 2018' (n 498) 7.
[503] *Id* at 26.
[504] 'FTSE 350 Urged to Step Up to Meet 2020 Women on Boards Targets' (Press Release, 27 June 2018) <https://www.gov.uk/government/news/ftse-350-urged-to-step-up-to-meet-2020-women-on-boards-targets> accessed 10 December 2018.

increased significantly from 116 to 264.[505] Such near-to-matching ratios once again nullify apprehensions relating to so-called "golden skirt", as is also the case with Norway.

Although low at 9.7%, against the 33% target set by the Hampton–Alexander Review,[506] numbers of female executives have also increased by around 4% in the last five years.[507] Compared to the figure of 7% for female general managers in Norway, which was also attained following a 2.6% rise spread over a period of more than ten years, the position of FTSE companies appears more encouraging. This is particularly the case given the 95 chair positions held by women across board committees in such companies.[508] Having said this, when comparison is made to the 293 similar offices held by men,[509] it becomes clear that much still remains to be accomplished on the diversity frontier.

(B) Negative Trends

In view of only two years remaining for the 33% target for executives, when a figure of less than 10% has been achieved in both FTSE 100 and FTSE 350 companies, a forecast that the deadline will most likely be missed is perhaps not misplaced. Further, with average tenure significantly less than that of men, female directors entering the board appear to be rolled out at a faster pace.[510]

On another note, segregation and stereotyping arguably prevail, as only two of 85 women occupying chair positions sit on strategic "investments and brand values" committees.[511] In other words, female directors are mostly confined to support rather than revenue-generating roles.[512] Likewise, from a sector-specific analysis, female representation is found to be higher in the boards of consumer-oriented industries such as retail, banking and household, against manufacturing, mining, automobiles, utilities,

[505] Based on an analysis of 'The Female FTSE Board' Reports from 2000 to 2018, published by Cranfield University.
[506] 'Hampton–Alexander Review' (n 431) 10.
[507] 'The Female FTSE Board Report 2018' (n 498) 14.
[508] *Id* at 17.
[509] *Ibid*.
[510] 'The Female FTSE Board Report 2018' (n 498) 21.
[511] *Id* at 17.
[512] 'Gadhia Review' (n 154) 28.

construction,[513] technical, financial, media and industrial fields.[514] Such biases are also visible in the concentration of women in non-executive directorships, while executives remain male dominated, as demonstrated here:

Figure 4: Comparison of Female Non-executive versus Executive Directorships in the United Kingdom 2013–2018[515]

Much of the slow-paced progress in the executive constituent can be explained by the shortfall of women directly reporting to executive positions (something that the Hampton–Alexander Review[516] seeks to address), or the pipeline. This is a result of filtering out or attrition of the female workforce as women move up the corporate ladder,[517] as a significant gap is found from mid-management to board level.[518] Gender stereotyping, segregation and pay gaps are found to be causes creating such gaps,[519] which become more prominent in higher ranks. For instance, pay disparity for directors and executives is stated to be 33.3% against 0.5% at office clerk level.[520] As an automatic consequence, women do not find sufficient incentives or motivation to

[513] 'Women in Science, Technology, Engineering and Mathematics: The Talent Pipeline from Classroom to Boardroom' (WISE United Kingdom Statistics 2014).
[514] Lord Davies (n 80) 10.
[515] Compared and constructed by the author based on an analysis of 'The Female FTSE Board' Reports from 2000 to 2018, published by Cranfield University.
[516] 'Hampton–Alexander Review' (n 431) 10.
[517] Lord Davies (n 80) 16. See also, 'Gender Diversity in the Boardroom: Reach for the Top' (n 132) 13.
[518] 'Gadhia Review' (n 154) 28.
[519] G Holloway, *Women and Work in Britain since 1840* (Routledge 2005) 115, 196, 223–224.
[520] 'Gender pay gaps in the UK widen as one climbs the hierarchy of businesses' (WageIndicator 2016) <http://wageindicator.co.uk/main/pay/gender-pay-gap-in-the-uk/gender-pay-gaps-in-the-uk-widen-as-one-climbs-the-hierarchy-of-businesses> accessed 20 October 2016. See also, Dias, Elming, & Joyce, 'The Gender Wage Gap- IFS Briefing Note BN186' (Institute for Fiscal Studies 2016) Figure 8.

continue with their career or work commitments amidst their other family and child responsibilities, primarily attributed to women. Referred to as mid-career conflict, this eventually results in a flush-out from the organisational ladder, such that only a few can reach board level, and even fewer can enter executive roles.[521]

Finally, although no significant ripple effects on unlisted companies can be identified, there is no evidence of any forced exit, delisting or change of corporate form by companies to which the strategy applies.[522]

II.4 *European Union ("EU")*

Given the common or central framework of the EU that binds both Norway[523] and the UK (subject to what may be agreed as part of Brexit), which otherwise have strategies in extreme contrast to each other, a review of the parallel developments at EU level might help in a more holistic assessment.

II.4A Strategy

The EC drafted its first directive on boardroom gender diversity on 14 November 2012,[524] which was later confirmed by the European Parliament on 20 November 2013, with modifications ("EU Directive"). Pending enactment, this currently remains as a proposal with no legal effect.[525]

The EU Directive prescribes 40% female representation in non-executive directorships of listed companies to be attained by 1 January 2020.[526] As regards executive positions, it provides flexibility to companies to set up their own individual targets with similar

[521] 'Women in Financial Services' (n 259) 16.
[522] 'UK Family Businesses Appoint More Women Directors than Other Types of Business' (Institute for Family Business, 21 March 2011) <http://www.ifb.org.uk/share/family-business-news/uk-family-businesses-appoint-more-women-directors-than-other-types-of-business/> accessed 23 October 2016.
[523] Decision no 33/2008 of the EEA Committee (14 March 2008), OJ L 182, 10 July 2008, 30–31.
[524] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464).
[525] While the EU Directive is yet to see the light of the day, another regulation drawn up along similar lines specific to the finance sector provides for an obligation upon companies to factor diversity, including that of gender, into the composition of their management – Directive 2014/65/EU of the European Parliament and of the Council on Markets in Financial Instruments (15 May 2014) para 53 and article 45(4).
[526] Article 4.1 of the EU Directive.

timeframes. Where this is not implemented, a proposal exists for one-third female representation across the whole of the board. In addition, this emphasises periodic reporting and disclosure of the gender status of board members (between executive and non-executive), measures adopted and explanations for any omissions or defaults in compliance by companies.[527] Finally, as is typical of an affirmative measure, the directive contains a sunset clause with an expiry of 31 December 2028.[528]

Sanctions would follow in cases of non-compliance – i.e., a company that fails to attain the 40% (or one-third, as the case may be) threshold would face legal consequences,[529] to be determined by the member nations.[530] To this end, a few potential sanctions ranging from fines to annulment of board appointments are illustrated by way of guidance.[531] Nonetheless, as the EU Directive prescribes only the minimum standards, a member state can, of its own volition, adopt stricter measures or sanctions,[532] particularly as the list is non-exhaustive and only indicative in nature.[533]

While this at the outset appears to resemble a quota if enforced, it would not be so. This is because the EU Directive, unlike the Norwegian quota, does not make automatic gender preferences. Instead, it operates upon a tie-breaker rule – i.e., only in cases of equally qualified candidates will the female candidate be given preference. Further, the preference might also fade away where an objective assessment tilts the balance in favour of the candidate of the other gender.[534] Popularly termed "procedural quota",[535] this introduces a strategy premised on comparative analysis of candidates with pre-established, clear, neutrally formulated, non-discriminatory and unambiguous parameters. The objective is thus arguably not merely to increase the number of women, but rather to do so within the context of a board that is diverse and optimally functional, substantiating the "gender plus" or dual case of boardroom

[527] Article 5 of the EU Directive.
[528] Article 10 of the EU Directive.
[529] M Szydlo (n 193) 176.
[530] Article 6 of the EU Directive.
[531] Article 6.2 of the EU Directive.
[532] Article 7 of the EU Directive.
[533] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) 13.
[534] Article 4.3 of the EU Directive.
[535] 'Improving the Gender Balance in Company Boardrooms' (European Commission June 2014) 1.

gender diversity. With the obligatory 40% threshold on one hand, and the tie-break rule on the other, it can at best be described as a "binding target", mid-way between the Norwegian quota and the voluntary targets of the UK. A few ambiguities are, however, noted. *What would happen to the mandatory threshold where a company finds female candidates not equally qualified with male candidates? Would this still invoke sanctions?* These are a few examples of questions that need clarification prior to enforcement of the EU Directive.

Pending the enactment of this, it is worthwhile to review some of the other references of diversity already enforced and in effect. For instance, an obligation to describe the diversity policy applied, its objectives and manner of implementation, and the results of such policies lies in certain large undertakings classified based on their balance sheet, turnover and employees.[536] Further, in cases where such policies do not exist, companies must explain why this is the case. While mandating in this regard, the directive acknowledges diversity as an instrument of effective over-sight over the management and of successful governance. More recently, the EC has spelt out certain guidelines[537] relating to the manner in which such disclosures are to be made, which includes, *inter alia,* the criteria of diversity (incorporating gender and other factors such as age, education, professional background, geographical location, international exposure and expertise), reasons for choosing such criteria, their application conforming to non-discriminatory practices, setting up measurable targets to attain, and their implementation/results.

II.4B Underlying Rationale

(A) Business Rationale

Since the economic crisis, raising concerns over lack of objective thinking in boardrooms, group-think and gaps in monitoring and management accountability,[538]

[536] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (22 October 2014) L 330/3, paragraph 19. The obligation has been added by insertion of point (g) in Article 20 paragraph 1 of the 2013 directive.
[537] Communication from the Commission Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017/C 215/01) (5 July 2017) section 6.
[538] SA Hewlett (n 123).

conventional decision-making has come under the EU's scanner, and diversity is perceived as a potential solution for this.[539]

Notably, diversity is emphasised as a key target for the EU's 2020 strategy,[540] which seeks greater and more integrated female participation in the overall workforce as a salient constituent of growth. To follow up, the EC called upon listed companies for a voluntary oath in March 2011, aiming for female representation of 30% by 2015 and 40% by 2020 in boardrooms.[541] The voluntary pledge soon gained more teeth by the 2011 resolution,[542] which threatened mandatory enforcement if such targets were not attained through self-regulation or voluntary means. The announcement was followed up with a progress evaluation in 2012,[543] which revealed leaking pipeline and mid-level filtration, as is also commonly noted in the cases of Norway and the UK, in sections II.2 and II.3 of this chapter. Later, suggestions for mandatory enforcement were made.[544]

Simultaneously, the 2011 Green Paper on corporate governance framework, citing the positive effects of diversity on group-think, leadership, collective intelligence and overall performance, described it as an essential feature for an optimum board.[545] It proposed to implement such diversity on a comply-or-explain basis.[546] All of these, along with the resolution of March 2012,[547] paved the way for the binding targets set

[539] 'The Failure of the Royal Bank of Scotland' (Financial Services Authority, December 2011) 229.
[540] 'EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication from the Commission, Brussels, 3.3.2010 COM(2010) 2020 final, 2010) 17.
[541] 'EU Justice Commissioner Reding Challenges Business Leaders to Increase Women's Presence on Corporate Boards with Women on the Board Pledge for Europe' (EC Press Release, March 2011) <http://europa.eu/rapid/press-release_MEMO-11-124_en htm> accessed 12 April 2017.
[542] 'European Parliament Resolution of 6 July 2011 on Women and Business Leadership' (2010/2115(INI), July 2011).
[543] 'Women in Economic Decision-making in the EU: Progress Report' (EC Directorate-General for Justice, 2012).
[544] 'European Commission Weighs Options to Break the Glass Ceiling for Women on Company Boards' (EC Press Release, March 2012) <http://ec.europa.eu/justice/newsroom/gender-equality/news/120305_en.htm> accessed 10 April 2017.
[545] 'Green Paper – The EU Corporate Governance Framework' (Brussels, 5/4/2011 COM(2011) 164 final, April 2011) 5–7.
[546] 'Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies' (Strasbourg, 12 December 2012 COM(2012) 740 final, 2012) 5, read with amendment to the Directive 2013/34/EU as regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups (Directive 2014/95/EU, October 2014) 4–5.
[547] 'European Parliament Resolution of 13 March 2012 on Equality between Women and Men in the European Union – 2011' (2011/2244(INI), 13 March 2012).

out under the EU Directive. Seeking to operate with minimum interventions in day-to-day management,[548] it was drawn up in a manner that could accommodate business convenience and autonomy. For instance, by exonerating companies in which the female gender constitutes less than 10% of the workforce, the proposal demonstrates its empathy in favour of companies with a talent shortfall. This pro-business outlook finds re-affirmation from the EC report on "More Women in Senior Positions", which states,

> *An equal participation of women and men in decision-making processes is a democratic and economic necessity. In the current economic situation, it is all the more important to mobilise all talents. This is not the time to waste skills and production potential because of outdated perceptions of women's and men's roles and leadership abilities. … At the same time, the companies where women are most strongly represented are also the companies that perform best financially.* [549]

Similarly, the directive of 2014 and the guidelines of 2017,[550] while elucidating aspects relating to disclosure of the diversity policy, clarify that all such measures must yield diverse views and expertise in a way that optimises innovative thinking, challenges group-think and enables better understanding of business nuances. Companies are cautioned to implement diversity suited to the complexities and the socio-economic environment within which the business operates. Describing this as a missed opportunity from the standpoint of corporate performance, governance and the economy,[551] the EU Directive clearly relies upon the business case.

[548] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) Purpose of the Proposal, 5.
[549] 'More Women in Senior Positions: Key to Economic Stability and Growth' (EC Directorate-General for Employment, Social Affairs and Equal Opportunities, January 2010) 13, 17.
[550] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (n 536) L 330/3, paragraph 19; and the Communication from the Commission Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017/C 215/01) (5 July 2017) section 6.
[551] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) Preamble and Explanatory Memorandum.

(B) Social Justice

Originating from the EU's basic constitution,[552] what started as an over-arching formal connotation of equality eventually made way for affirmative measures.[553] For instance, the Charter of Fundamental Rights (while reiterating formal equality as the primary rule)[554] provides for[555] active participation by women in positions of power and authority.[556] More specifically in the context of work and employment, equality in practice compensates for disadvantages suffered by the under-represented gender.[557] From the phrases, "equality in practice" and the permissibility to "compensate for disadvantages", it is possible to infer the substantive notion. A more explicit mention of this is found in the council recommendation of 1984,[558] which seeks to eliminate or counter prejudices towards women in or seeking employment, arising from structural and behavioural biases and traditionally gendered roles. This is further supported by provisions relating to (a) access to employment, vocational training and promotion, and working conditions[559] and (b) access to and supply of goods and services,[560] later re-affirmed in the Recast Directive.[561]

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[552] Articles 2 and 3(3) of the Consolidated Version of the Treaty on European Union (C 326/13, 26 October 2012); and Articles 8, 10 and 19 of the Consolidated Version of the Treaty on the Functioning of the European Union (C 326/47, 26 October 2012).

[553] Positive action measures have been permitted for groups other than gender, such as race (Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC, 29 June 2000); and religion or belief, disability, age or sexual orientation (Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC, 27 November 2000)).

[554] Article 21 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (C 364/1, 18 December 2000).

[555] Council Recommendation 84/635/EEC of 13 December 1984; and Council Recommendation 96/694/EC of 2 December 1996.

[556] Article 23 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (C 364/1, 18 December 2000).

[557] Article 157(4) (earlier Article 141 of the Treaty establishing the European Community) of the Consolidated Version of the Treaty on the Functioning of the European Union (C 326/47, 26 October 2012).

[558] Council Recommendation 84/635/EEC on the promotion of positive action for women (OJ 1984 L 331, 13 December 1984).

[559] Article 2(4) of the Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions (76/207/EEC, 9 February 1976).

[560] Article 4(2) and (5) of the Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services (2004/113/EC, 13 December 2004).

[561] Article 3 of Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) (2006/54/EC, 5 July 2006).

More recently, several gender-specific programmes have lined up, wherein the EC stressed the significance of gender balance in positions of responsibility and decision-making processes. Further, the European Pact for Gender Equality 2011–20,[562] aligned to the 2020 Strategy,[563] re-instates the goal of gender mainstreaming – i.e., incorporation of a gender equality perspective in all areas and at all stages of policy-making and implementation at EU level.[564] The most recent and ongoing Strategic Engagement for Gender Equality 2016–2019, as a continuance of the objectives sought under the previous 2010–2015 plan, sets out action focused on five potential areas, namely, (a) increasing the female labour force participation, along with economic independence; (b) reducing gender pay gaps; (c) promoting equality in decision-making; (d) addressing gender violence; and (e) protecting overall female and equality rights. Such initiatives are followed up through annual progress reports.[565]

While the EU clearly relies upon gender preferences as a means to attain equality, not much clarity can be gathered as regards its permissible scope. Guidance in this regard can, however, be inferred from the march of case law, starting with a manifestation of formalistic traits where preferences in any form were not permitted.[566] The case of *Kalanke*[567] offers the most outright evidence in this regard, wherein priority accorded to women over equally qualified shortlisted men in sectors where women were under-represented was considered as a derogation from the principle of equality. The case, while enunciating a strong case for formal and individualist notions of equality, adhered to earlier decisions in *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*[568] and *Integrity v Rouvroy*.[569]

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[562] Council Conclusions on the European Pact for Gender Equality for the period 2011–2020 3073th Employment, Social Policy, Health and Consumer Affairs Council Meeting (Brussels, 7 March 2011).
[563] Communication from the Commission 'Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth' (Brussels, COM(2010) 2020 final, 3 March 2010) 16.
[564] 'Motion for Resolution to Wind Up the Debate on Statements by the Council and Commission pursuant to Rule 110(2) of the Rules of Procedure on EU 2020' (European Parliament, B7-0266/2010, May 2010) point 30 <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0266&language=EN> accessed 1 February 2017.
[565] Report on Equality between Women and Men in the European Union (SWD (2016) 54, 2016).
[566] *Government of Italian Republic v Commission of the European Economic Community*, C 13/63, [1963] ECR 165; and *Racke v Hauptzollamt Mainz*, C 283/83, [1984] ECR 3791.
[567] *Kalanke v Freie Hansestadt Bremen*, Case C 450/93 [1995] IRLR 660.
[568] C 222/84, [1986] ECR 1651.
[569] C 373/89, [1990] ECR I-4243.

However, given the near-to-improbable scope of affirmative measures elucidated in *Kalanke*, a divergence occurred soon in the *Marschall* case.[570] The court, acknowledging hindrances of gender roles and stereotyping that deter female participation, upheld such a priority, but only if backed by an objective assessment factoring in all of the individual criteria. The ruling resembles the verdict in *Commission v France*,[571] which protected measures, although discriminatory in appearance, aiming to eliminate or reduce existing discrepancies. However, it excluded any special rights for women.[572] A similar view was adopted in the *Abdoulaye* case concerning payments exclusively to female employees on maternity leave,[573] which was contested by male employees as discriminatory. The court, in view of the difficulties that female employees experience while (and even after) being away from work as a result of pregnancy, upheld such payments as a means to offset such disadvantages. Subject to the caveats of (a) objective assessment, and (b) proportionality, as was established in the *Lommers* case,[574] such preferences "must remain within the limits of what is appropriate and necessary in order to achieve the aim in view, and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued".[575] Three elements were espoused – namely appropriateness, necessity and link to the objective so pursued – as determining conditions of the proportionality test, which were ratified by subsequent cases of *Briheche*,[576] *Commission v Greece*,[577] and *Alvarez*.[578] Thwarting preferences for women, these rulings nonetheless established "proportionality" and "objective assessment" as conclusive tests to define the permissible boundaries of gender preferences at EU level.

[570] *Marschall v Land Nordrhein-Westfalen*, C 409/95, All ER (EC) 865 (1997). See also, *Lindsay v United Kingdom*, (1986) 49 DR 181.
[571] C 312/86, [1988] ECR 6315.
[572] K Cox, 'Positive Action in the European Union: From Kalanke to Marschall' (1998-99) 8 Columbia Journal of Gender & Law 101–142, 115.
[573] *Oumar Dabo Abdoulaye v Régie Nationale des Usines Renault SA*, C 218/98, [1999] ECR I-5723.
[574] C 476/99, [2002] ECR I-2891.
[575] C 476/99, [2002] ECR I-2891, para 39. See also, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, C 170/84 [1986] ECR 1607.
[576] *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, C 319/03, [2004] ECR I-8807.
[577] C 559/07, [2009] ECR I-0000.
[578] *Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA*, C 104/09, [2010] ECR 1-08661.

Does this mean that positive discrimination is prohibited in the EU, akin to the UK?

While this appears to be so from the cases outlined, it would be premature to come to this conclusion, as national rules imposing a quota for female representation for certain temporary posts and/or training positions were upheld in the *Badeck* case.[579] This allowance went close to positive discrimination, although the court advanced elaborate explanations to fit such a quota within the outstretched contours of the two-fold test to avoid calling it this.[580] While citing the proportion of female graduates and students in higher education, attempts were made to justify the quota as only preparatory in nature, such that it would not affect actual or final recruitments, and which training male candidates could otherwise procure. Accordingly, the test of objective assessment[581] continued to apply, as was witnessed in the *Abrahamsson* case.[582] In relation to a Swedish regulation that prioritised female appointments (even where they had lesser but sufficient qualifications) to certain teaching positions, the court found the element of objective or individual assessment missing, and thus ruled against the measure, declaring it one of positive discrimination. From the foregoing chain of rulings, it appears that the EU principally condemns (if not prohibits) positive discrimination. Nonetheless, the scope of permitted gender preferences is expansive, coming close to positive discrimination. Formal equality has therefore made way for substantive fairness, for which gender preferences are permitted as a means (and not exception).

The EU Directive, which finds its legal basis in its constitution, embarking upon gender equality,[583] and which is drafted keeping in view the two-fold test (as can be inferred from the sunset clause),[584] resonates preferences, which, although they cannot be squarely categorised as positive discrimination or representing an automatic quota, nonetheless derive meaning from the social justice rationale.

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[579] *Badeck v Hessischer Ministerprdsident and Landesonwait beim Staatsgerichtshof des Landes Hessen*, C 158197, [2000] ECR 1-1875.
[580] N Burrows & M Robison, 'Positive Action for Women in Employment: Time to Align with Europe?' (2006) 33 Journal of Law in Society 24–41, 31–32.
[581] *Julia Schnorbus v Land Hessen*, C 79/99), [2000] ECR I–1997.
[582] *Abrahamsson v Fogelqvist*, C 407/98, [2000] ECR 1-5539.
[583] Article 157 of the Consolidated Version of the Treaty on the Functioning of the European Union (C 326/47, 26 October 2012).
[584] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) 10.

II.5 *Comparison of Rationales*

From the jurisdictional review of Norway and the UK, and at pan-European level, it is possible to clearly decipher that, although there is a global convergence as regards the need for boardroom gender diversity (surpassing the debate on whether or not to have it),[585] underlying reasons to introduce this diverge from one country to another.[586] Running more or less independently, with some factors prevailing over others, and some at intersections with each other, reasons for such diversity range from between equality to social justice vis-à-vis business advantages.

II.5A Norway

The case for Norwegian boardroom gender diversity is founded predominantly on considerations of gender fairness and social justice, specifically substantive equality and affirmative measures for these.[587] Relying upon severe sanctions and a mandatory quota, pre-legislative debates set out reasons for division of power and democracy as follows:

> *A vibrant democracy means that women and men must be given equal rights and opportunities to participate in and influence social development in all areas of society. The Government therefore wants to strengthen the recruitment of women to senior positions and directorships. Not least in the boardroom where decisions important for economic and social development are made. Directorships provide a basis for power and influence. When we also see that women are holding a low share of these positions, this is a democratic problem and waste of resources and expertise. The low proportion of women on boards and in management is also a signal that women and men do not have the same development and career opportunities in the workplace.*[588]

[585] 'Women in the Boardroom – A Global Perspective' (Deloitte Global Centre for Corporate Governance 2017).
[586] D Ferreira, 'Board Diversity: Should we Trust Research to Inform Policy?' (2015) 23(2) Corporate Governance: An International Review 108–111, 110.
[587] KR Ahern & AK Dittmar (n 184) 142.
[588] Parliamentary Debate in 2002, cited in H Bjørkhaug & S Sørensen (n 385) chapter 6, 198.

Gender balance in corporate boardrooms, as epicentres of commercial, economic and social power, is perceived as an extension of the movement seeking fair distribution of resources and authority, or an end objective in itself.[589] What emerged later as a twist of diversity in the final stages of the enactment was an attempt to give the quota a less gendered[590] and more business-friendly appearance to mitigate resistance and for wider acceptance and receptivity. The preponderance of social justice as the primary reason for diversity is re-affirmed by the allowance of far-reaching state interventions and subsequent extreme sanctions.[591]

II.5B UK

Business motives appear to have run almost independently of the social justice rationale when it comes to boardroom gender diversity in the UK.[592] Inspired significantly by the business case, female directorship is not seen as an end objective, rather as a means to better decision-making, use of resources/talent, wider market access, harmonised organisational relationships and overall board effectiveness.[593] Diversity of personal and psychological attributes and balance of skills, experience, knowledge and independence in board composition are linked to the board's ability to strategise and work out alternatives, as well as its overall value.[594] As noted from the consultations prior to the 2012 Code, the focus lay in improving the functional characteristics of the board (measured in terms of its effectiveness, decision-making, avoidance of group-think, optimum use of the talent pool and better understanding of the workforce and customer base), against "any wider social objectives".[595] Finally, the 2016 Code (replicating the 2012 reforms), by providing for diversity as a criterion for board appointments and evaluation,[596] recognises diversity of approach and

[589] M Huse, 'The Political Process behind the Gender Balance Law' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 1, 13–14.
[590] V Heidenreich (n 388) chapter 5, 176–177.
[591] AA Dhir (n 212) chapter 8, 268, 282.
[592] E Doldor, 'The Merits and Shortcomings of a Voluntary Approach' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 2, 17, 24, 32–33.
[593] Y Chinwala (n 436) 10.
[594] 'Guidance on Board Effectiveness' (The Financial Reporting Council, March 2011) paras 4.1, 4.2, 4.3 and 5.5.
[595] 'Consultation Document: Gender Diversity on Boards' (n 439) 3.
[596] 'The United Kingdom Corporate Governance Code' (n 419) clauses B.1, B.2 and B.6.

experience as an effective tool of stakeholder management and business strategisation.[597] All of these indicate a strong nod to the business rationale.

The interplay with social or equality rationale insofar as justifying the case for female directorship was little observed until the 2018 Code, which makes, for the first time, a footnote reference to the 2010 Act,[598] hinting at what could perhaps transform into a relational approach in future. Even assuming that such an intersection occurs later, it is less likely that the country will adopt a quota given the predominance of business judgment, which would prevail over any gender preferences. This is clear from Scotland's enactment of gender representation on public boards,[599] where preferences apply only after or subservient to the "best qualified" criterion for business. This is particularly so as the UK disapproves of positive discrimination in any form.

II.5C EU

At pan-EU level, the case for boardroom gender diversity appears to have been constructed with reasons borrowed from both business and gender equality. With a wider connotation of affirmative measures (than that of the UK),[600] the EU Directive subscribes to gender equality subject to caveats of objectivity and proportionality.[601] In addition, with an emphasis on value addition to board effectiveness, corporate performance and overall economic growth,[602]consideration of business autonomy remains a prime reason why the binding targets are not as yet enforced. Overall, female directorship derives its meaning from an intersection or mix of rationales for the EU. In other words, the EU stands mid-way between the UK and Norway, with a greater level of interplay between the two rationales.[603]

With such a backdrop, it would be interesting to note how the two countries would adapt if the EU Directive was enforced. On one hand, Norway stands in contrast to the

[597] 'The United Kingdom Corporate Governance Code' (n 419) Preface.
[598] Principles under Part 3 of 'The United Kingdom Corporate Governance Code' (n 418).
[599] Sections 3 and 4 of the Gender Representation on Public Boards (Scotland) Act of 2018.
[600] C Barnard & B Hepple, 'Substantive Equality' (2000) 59 Cambridge Law Journal 562–585, 583.
[601] AA Dhir, 'Enter Legal Regulation: Quota and Disclosure Based Approaches' in AA Dhir, *Challenging Boardroom Homogeneity – Corporate Law, Governance, and Diversity* (Cambridge University Press 2015) chapter 3, 77–78.
[602] 'The Quota Instrument: Different Approaches across Europe' (European Commission's Network to Promote Women in Decision-making in Politics and the Economy, June 2011) 4.
[603] AA Dhir (n 601) chapter 3, 77.

EU's compassion for business considerations, providing leeway for objective assessments and proportionality.[604] Accordingly, how far the 40% quota (which does not have any fixed tenure or expiry) can be sustained within the EU's framework, which principally condemns automatic preferences, is uncertain, especially in view of the ruling in *EFTA Surveillance Authority v The Kingdom of Norway*.[605] Considering that reservation of certain academic positions exclusively in favour of female candidates was held to be an infringement,[606] an exclusive threshold of 40% for women in boardrooms might also come under the EU's radar. Likewise, how the UK (subject to Brexit), with a broad-level inclination for individualist or formal equality banning positive discrimination and restricting gender preferences,[607]adjusts to the EU's mixed case of binding targets is worth noting.

II.6 *Comparison of Policy Approach*

From a review of the examples of Norway, the UK and pan-European level, the expanse of regulatory strategies is arguably derived on a scale between binding/mandatory and voluntary,[608] or "hard law" and "soft law" policy approaches.[609] The "hard" versus "soft" distinction reflects upon their polarised nature, derived from their effects and the severity of enforcement – i.e., the more binding and compulsory and the greater the legal ramifications, the harder it is. Conversely, the more flexible and discretion/judgment-based, the softer the approach. While hard law emanates from the state, soft law is more industry facing and relies largely upon self-regulation.[610] The distinguishing criteria[611] thus lie in their mandatory/normative

[604] A Belcher (n 487) 360.
[605] Case E-1/02 (22 April 2002).
[606] 76/207/EEC of 9 February 1976, now replaced with the Council Directive 2006/54/EC – on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – OJ L204/23 (Directive 2006/54/EC, 5 July 2006) – Recast Directive.
[607] 'Women on Boards: Commission Proposes 40 per cent Objective' (EU Focus 2013). See also, A Belcher (n 487) 361.
[608] Klettner, Clarke, & Boersma, 'Strategic and Regulatory Approaches to Increasing Women in Leadership: Multilevel Targets and Mandatory Quotas as Levers for Cultural Change' (2016) 133 Journal of Business Ethics 395–419, 396, 405.
[609] S Machold & K Hansen (n 86) chapter 24, 167.
[610] P Spender, 'Gender Diversity on Boards in Australia – Waiting for the Great Leap Forward?' (2012) 27 Australian Journal of Corporate Law 22–38, 23.
[611] Abbott, Keohane, Slaughter, & Snidal, 'The Concept of Legalization' (2000) 54(3) International Organization 401-419, 401 - mentions the conventional conceptual division between hard and soft law on the parameters of obligation, precision and delegation.

character, precision and consequent sanctions.[612] More specifically, in the corporate governance context, such contrasting approaches can be illustrated through Farrar's concentric circles,[613] slightly adapted to capture some of the more progressive regulations of contemporary governance, as below:

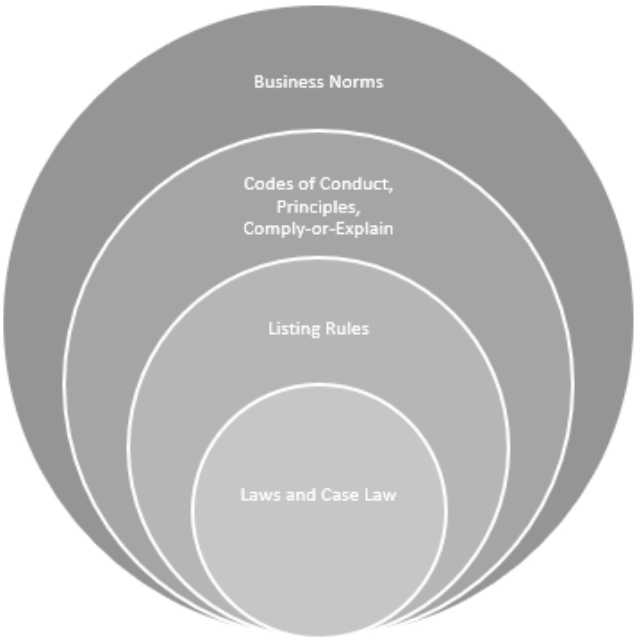

Figure 5: Corporate Governance Regulation[614]

In this figure, the innermost circle, comprising state enactments, legislation and binding judicial precedents, depicts the approach of hard law. Such coercive effects reduce as one moves to the outer circles, with the least (or none at all) in the outermost circle of business norms most often determined through industry customs/practices.[615] This contrast is discussed in greater detail below.

[612] J Klabbers, 'The Redundancy of Soft Law' (1996) 65 NORDIC Journal of International Law 167–182, 168. See also, DL Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) Introduction, 10–13. Such binary distinction, although disputed by rationalist and constructivist thinkers, remains the most conventionally applied and reiterated idea. Thus, the thesis adopts and proceeds relying upon this perspective of the distinction.
[613] J Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press 2008) 4.
[614] *Ibid* (Adapted).
[615] *Ibid* 4.

II.6A Hard Law

Drawn from the positivist school of jurisprudence[616] that considers it as the only formal law, hard law can be defined in the simplest terms as "legally binding obligations".[617] Also referred to as "traditional black letter law",[618] it comprises a system of rules prescribing certain standards of conduct, which, if not complied with, meets with legal consequences. Thus, the fear of sanctions compels compliance with the law. The main actor responsible for effecting this approach is the state (or its delegated authority), from whence flows the command of law, described as "command and control" or the "top-down" regulation.[619] Significant levels of state intervention and over-sight are therefore involved in such a prescriptive approach, operating within a hierarchical governance set-up.[620] This explains why this approach is more common in co-ordinated and mixed-market systems over liberal ones.[621]

(A) Why Hard Law?

The first and foremost advantage lies in its outcome or results.[622] Hard law seeks to attain compliance, which helps in faster and more radical reforms.[623] Norway's full compliance with the 40% quota within a span of two years represents apt evidence of this. While female directors in PLCs increased from 4% in 2002 to around 18% in 2005, their representation was far from what was desired. Only with the advent of the compulsory sanction-backed quota in 2006 did the numbers multiply to reach 40%. This finds support from examples of other countries such as France, which had potential to attain female directorship nearing 37% in 2016 from only 8% in 2006,

[616] It propagates the idea that the law is one derived from the binding command of the sovereign, and which is obeyed through the threat of force or coercion – B Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia Law Review 1138–1164.
[617] KW Abbott & D Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421–456, 421.
[618] J Zadkovich, 'Mandatory Requirements, Voluntary Rules and Please Explain: A Corporate Governance Quagmire' (2007) 12(2) Deakin Law Review 23–39, 26.
[619] DE Rupp & CA Williams, 'The Efficacy of Regulation as a Function of Psychological Fit: Re-examining the Hard Law/Soft Law Continuum' (2011) 12 Theoretical Inquiries in Law 581–602, 586.
[620] AA Dhir (n 212) chapter 8, 268, 269.
[621] S Machold & K Hansen (n 86) chapter 24, 168–169.
[622] AA Dhir (n 212) chapter 8, 268, 269.
[623] Y Chinwala (n 436) 16.

after legislating for a similar quota in 2011.[624] As a quota expedites the process to open up doors[625] and create opportunities, which would otherwise be difficult, it finds support as "the way in which many talented women meet their opportunity".[626] This further explains why hard law is often resorted to when softer options fail,[627] as it once again follows from the Norwegian experience. Only when desired results cannot be attained with the threshold of 40% as a voluntary target, was the idea was altered into a mandatory quota along with sanctions.[628]

Such effects of hard law, although not specific to gender diversity, were also observed during the financial crisis when the failure of the boards of leading banks and financial institutions called into question the effectiveness of voluntary measures of governance. International financial regulation, otherwise a species of soft law,[629] was then sought to be replaced with stronger laws.[630] With the felt need for institutional-building,[631] hard law was seen as an imperative, and several erstwhile recommendations were sought to be revamped into more aggressive regulations.[632] There was also a call for greater legal formality through binding treaties (akin to some of the other international sectors like trade), and the establishment of a global financial regulatory body[633] for a

[624] V Reding, 'Winning the Board Game: Europe's Economy Needs More Women in Business' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 29, 205. See also, 'Gender Parity on Boards Around the World' (Harvard Law School Forum on Corporate Governance and Financial Regulation, 5 January 2017) <https://corpgov.law harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/> accessed 18 May 2017; and A Thomson, 'French Boards Rush to Meet Quotas for Female Membership' (Financial Times, 22 March 2016) <https://www ft.com/content/5b542782-ee9e-11e5-aff5-19b4e253664a> accessed 18 May 2017.

[625] M Schulz-Strelow, 'Women on Boards: Lessons Learnt from Norway' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 25, 182.

[626] M Brogi, 'Italy's Lessons Learnt from Norway' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 27, 190.

[627] D Rosenblum (n 170) 1124, 1136.

[628] 'Fact Sheet: The Legislation on Representation of both Sexes in Boards' (n 322).

[629] C Brummer, *Soft Law and the Global Financial System- rule making in the 21st century* (Cambridge University Press 2015) 120.

[630] 'The Failure of the Royal Bank of Scotland' (n 539). See also, 'Treasury Report' (n 118).

[631] *Id* at 124.

[632] *Id* at 155.

[633] DW Arner & MW Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?' (2009) 32(2) UNSW Law Journal 488-512, 511. See also, C Brummer (n 629) 328.

more extensive oversight.[634] It was alleged that excessive dependence on soft law, without the precision and standards of hard commitments left leeway for arbitrage and minimization of compliances,[635] ultimately leading to the crisis.

Similar notions are shared in relation to gender diversity too, where it is believed that hard law can compel change and deter non-compliance, which is not done as forcefully in softer regulations.[636] This is particularly felt in relation to boardrooms, where soft law is thought to be too weak to break through the "cosy male elite club".[637] In such surroundings, deterrence of sanctions is seen as a preferred choice to compel a search of candidates beyond familiar and cohesive networks.[638]

Nonetheless, quotas can work only where they find enabling social, political, economic and cultural environments, as Norway offers.[639] Despite the deregulation of the national corporate set-up since the 1990s, the Norwegian government, having retained significant ownership of the national market,[640] continues to retain extensive economic powers as an investor and decision-maker.[641] With the state enjoying legitimacy and positioned more strongly in the business domain, the otherwise dispersed business community of Norway could not stand for long against the former's intervention.[642] A tradition of gender-centric policies, strong state influence in the business sector and a weaker private commercial community facilitated the 40% quota.[643] Encouraging

[634] E Avgouleas, & J Cullen, 'Market Discipline and EU Corporate Governance Reform in the Banking Sector: Merits, Fallacies, and Cognitive Boundaries' (2014) 41(1) Journal of Law and Society 28-50, 33.
[635] C Brummer (n 629) 235.
[636] D Weber-Rey (n 79) chapter 26, 185.
[637] 'Treasury Report' (n 118) para 151.
[638] AA Dhir, 'Norway's Socio-legal Journey: A Qualitative Study of Boardroom Diversity Quotas' (Osgoode Legal Studies Research Paper Series – Paper 21 2014) 30. See also, M Brogi (n 626) chapter 27, 188.
[639] M Teigen (n 328) 4.
[640] Dale-Olsen, Schone, & Verner (n 192) 112.
[641] The Value of the State's Direct Ownership of Shares Listed on the Oslo Stock Exchange as of 2014 was NOK 549.2 billion- 'The State Ownership Report 2014' (Norwegian Ministry of Trade, Industry and Fisheries 2014) 7.
[642] H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 204.
[643] V Heidenreich (n 388) chapter 5, 147, 177.

female participation[644] in the labour force[645] and education also added strength to this.[646] Having conventionally relied upon egalitarian ideologies, and with gender mainstreamed into every domain, the stage was readily set with most of what the quota could ask for.

(B) Riders to Hard Law

What accounts as the foremost advantage of hard law can also add some negative scores to it. For instance, its push for compliance might backfire if it results in an over-emphasis on numbers, while not factoring in its quality. It can so happen that companies succumb to regulatory pressure to comply, while real or fundamental changes remain absent.[647] In other words, hard law is perceived to bring in changes that are only ostensible or superficial, without any real or practical effects. Widely criticised for being formal while lacking effectiveness in terms of behavioural or substantive reforms, it is considered not so appropriate for corporate governance.[648] It is also linked with what is termed as the "crowding out" problem,[649] where rewards and punishments imposed by external forces over-ride and suppress an organisation's own initiative or motivation for value changes. Much of this emanates from institutional complacency – i.e., where disparities beyond compliance are treated with indifference, as the organisation reaches the belief that it has already done enough by way of compliance.[650] Norway arguably substantiates this. One of the most conspicuous negative implications observed has been the stagnation of female

[644] AF Libertella, *Business Education and Training: A Value-laden Process* (University Press of America 2003) 216. See also, '2016 Global Board of Directors Survey' (Spencer Stuart and WomenCorporateDirectors Foundation 2016) 11.
[645] 'Labour Force Survey, Q4 2016' (Statistics Norway, January 2017) <https://ssb no/en/arbeid-og-lonn/statistikker/aku> accessed 22 February 2017. See also, 'Labor Force, Female (% of total labor force)' <http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS> accessed 25 March 2016.
[646] 'Policy for Equality' (n 375) 31. See also, 'Students at Universities and Colleges' (Statistics Norway, 1 October 2014) – In 2014, 110,000 male students and 162,500 female students registered for higher education, with the increase by 3,400 students from 2013 resulting from a rise in female students alone.
[647] M Schulz-Strelow (n 625) chapter 25, 182.
[648] D Higgs (n 173) 11–12.
[649] EH Atiq, 'Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives' (2014) 123 Yale Law Journal 1070–1116, 1079.
[650] 'Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination' (n 300) 2156–2177, 2176.

participation at around 40% over the past ten years since compliance was attained,[651] which reflects upon such institutional complacency.

On another note, the glory of compliance that quotas bring is premised on complex statistics, which may not always reflect the correct facts. For instance, the much applauded full compliance reported by PLCs comprises only board representatives.[652] A typical Norwegian board that sits between unitary and dual structure (commonly referred to as a "one-and-a-half string system")[653] excludes employee representatives and executive directors, who are otherwise normally included within the generic meaning of the board.[654] As they do not fall within the statistics of a quota,[655] reports of full compliance relate only to a sub-category of the board. To state this simply, if statistics are drawn up after including all of such constituents, female representation falls far below the acclaimed 40% level.

Further, unmatched representation in executive or senior management denotes that the quota has not been successful in creating a stir by way of behavioural or cultural reforms within PLCs.[656] This is further proven by the absence of any ripple effect of the quota upon companies to which it does not apply, and where female representation continues to be in the minority.[657] This finds affirmation in a review where almost two-thirds of interviewee directors believed that female representation in Norwegian boardrooms would fall from the current 40% level if the quota law was rescinded,[658] reflecting an industry attitude of forced imposition.

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[651] Halrynjo, Teigen, & Nadim (n 401) chapter 3, 21.
[652] 'Board and Management in Limited Companies, 1 January 2016 – About the Statistics' (Statistics Norway, 11 March 2016).
[653] IM Hagen, 'Employee-elected Directors on Company Boards: Stakeholder Representatives or the Voice of Labour' in R Blanpain (ed), *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value* (Kluwer 2011) 121, 128.
[654] Dale-Olsen, Schone, & Verner (n 192) 114–115.
[655] J Voβ, 'The Impact of Gender Diverse Boards on Firm Financial Performance in Norway' (5th IBA Bachelor Thesis Conference – The Netherlands, 2 July 2015), <http://essay.utwente.nl/67280/1/Vo%C3%9F_BA_Management%20and%20Governance.pdf> accessed 11 January 2017.
[656] 'Women at Work: Who are They and How are they Faring?' (n 372) chapter 2. For some minority views with contrary findings, see M Wang & E Kelan, 'The Gender Quota & Female Leadership: Effects of the Norwegian Gender Quota on Board Chairs and CEOs' (2013) 117 Journal of Business Ethics 449–466.
[657] Halrynjo, Teigen, & Nadim (n 401) chapter 3, 21.
[658] AA Dhir (n 638) 30.

Furthermore, hard law or the quota system, which treats women as a separate class,[659] comes with the risk of further stereotyping and segregation, as women then carry the stigma of entering leadership not by merit or undeservedly.[660] This emerges clearly in protests against the quota, which argue that it would result in less competent boardrooms.[661] Although perceptions appear to be changing and the "quota woman" is no longer perceived as a flaw to a business,[662] apprehensions cannot be denied.[663]

In addition, the strength of a quota depends a great deal upon the nature of sanctions.[664] For instance, Norway's success can be largely attributed to the fear of dissolution, to which PLCs could have been subject if the quota was not complied with.[665] Likewise,, France, Belgium and Italy rely heavily upon sanctions (although not as severe as Norway's) including nullification of appointments, suspension of benefits to existing board members, fines and mandatory restructuring/dissolution of the board.[666] In contrast, quotas in the Netherlands and Spain, where there are no material sanctions, operate more like recommendations.[667] The question of the extent to which Spain's slow progress (with female representation still hovering at around 19%)[668] results from lack of sanctions is worth investigating. Considering that such sanctions involve greater state/administrative involvement and infrastructural expense, as well as limitations on managerial discretion, enforcement of hard law brings additional costs to both the regulator and the business.[669]

Another critique, although not linked specifically to the hard law approach, relates to quotas from an affirmative action perspective. On one hand, sustenance in the long run

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[659] V Heidenreich (n 388) chapter 5, 162–148.
[660] A Durbin (n 289) 8. See also, 'Gender Diversity in the Boardroom: Reach for the Top' (n 132) 10.
[661] AA Dhir (n 638) 13.
[662] K Hansen & S Machold, 'Conclusions' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) 218.
[663] 'Sweden Rejects Quotas for Women on Boards of Listed Companies' (The Guardian, 12 January 2017) <https://www.theguardian.com/world/2017/jan/12/sweden-rejects-quotas-women-boardroom-listed-companies> accessed 2 April 2017.
[664] K Hansen & S Machold (n 662) 221.
[665] § 16-15(1) 2 of the Norway Act.
[666] M Landfors & V Berglund, 'Gender Balance on Corporate Boards – The Development amongst the European Member States' (Jönköpings International Business School, May 2015) 28.
[667] V Reding (n 624) chapter 29, 205.
[668] 'Gender Diversity on European Boards – Realizing Europe's Potential: Progress and Challenges' (A European Women on Boards Study, April 2016) 20.
[669] B Black & R Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 Harvard Law Review 1911–1982, 1931.

is doubtful, as the legitimacy of quotas is founded on the principle of proportionality to time and the cause that it seeks to remedy.[670] While gender equality as an undeniable human right[671] offers a forceful/compelling reason for female representation in positions of corporate power, preferences so accorded to women must, however, withstand the test of proportionality. In other words, such preferences must remain within the limits of what is appropriate and necessary to achieve the objective of placing women on a level playing field with men, so as not to culminate in discrimination against men.[672] This implies that the social reasons for boardroom gender diversity are essentially temporary or short-lived[673] – i.e. they must prevail only until the objective of remedying past discrimination against women and consequent functional equality is attained, and not beyond that.[674] A quota in favour of female directors can work only as a temporary or short-term relief, and not as a permanent measure – a quick fix rather than a sustainable solution.[675] On the other hand, a gender quota is condemned as an "anti-male militant feminist agenda"[676] – i.e., discriminatory against the male gender,[677] and, thus, difficult to justify where the country principally condemns positive discrimination, as in the UK.[678]

A final argument from a governance standpoint condemns the "one size fits all" assumption on which quota or hard law is premised[679] as incorrect and not suitable for the varying corporate needs, structures and forms involved. As Hess describes, "the challenge the law faces is to … support internal change initiatives that may be unique to any particular corporation".[680] Such a "one size" approach, which is seen as a

[670] N Burrows & M Robison (n 580) 31.
[671] A Kirsch, 'Women's Access to Boards in Germany – Regulation and Symbolic Change' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 9, 223.
[672] N Burrows & M Robison (n 580) 31–32.
[673] 'General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures' (n 164) paragraph 14.
[674] T Jones (n 287) 200–201.
[675] A Durbin (n 289) 12.
[676] AA Dhir (n 601) chapter 3, 71, 81.
[677] Mai-Lill Ibsen, 'Women's Quota- The Norwegian Experience' (3 December 2014) <http://www.nordichorizons.org/2014/12/arne-selvik-and-mai-lill-ibsen-on-womens-quotas html> accessed 10 April 2016.
[678] 'Equality Act 2010: A Step-by-Step Practical Guide to Using Positive Action When Making Appointments' (n 485).
[679] O Bohren & S Staubo (n 412) 153.
[680] D Hess, 'The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development' (2008) 18 Business Ethics Quarterly 447–482, 452.

trespass against private rights,[681] shareholder democracy,[682] corporate autonomy,[683] and a serious threat to the long-standing tradition in which the state should refrain from intervening in the private sector,[684] normally meets vehement resistance.[685] Accordingly, companies tend to seek evasion or escape from it,[686] as was apparent in the exit of PLCs following the announcement of the 40% quota in Norway.

It is possible to infer from the above that, although quotas have successfully paved the way for the entry of women into boardrooms,[687] the value of gender diversity continues to be under-rated. While this can help in formal compliance with the letter of the law, how far it can equate to its spirit in terms of evolving such diversity as a business norm remains challenged.

II.6B Soft Law

Defined as, "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects",[688] soft law consists of non-binding standards and principles (as against statutes and precedents) which are driven by voluntary initiative (rather than deterrent sanctions).[689] More technically, soft law constitutes "regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions".[690]

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[681] D Rosenblum, 'Loving Gender Balance: Reframing Identity-based Inequality Remedies' (2007–08) 76 Fordham Law Review 2873–2892, 2880. See also, F Engelstad, 'Limits to State Intervention into the Private Sector Economy: Aspects of Property Rights in Social Democratic Societies' in F Engelstad & M Teigen (eds), *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald 2012) chapter 8, 259.
[682] M Teigen (n 328) 9.
[683] F Engelstad (n 681) chapter 8, 235.
[684] C Holgersson & A Wahl, 'Sweden: Work for Change and Political Threats' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 6, 149.
[685] M Szydlo (n 193) 175. See also, 'The Quota Instrument: Different Approaches across Europe' (n 602) 10.
[686] Dale-Olsen, Schone, & Verner (n 192) 119.
[687] 'Women in Financial Services' (n 259) 6. See also, C Seierstad (n 166) chapter 20, 143.
[688] L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112.
[689] RS Karmel & CR Kelly, 'The Hardening of Soft Law in Securities Regulation' (2009) 34(3) Brooklyn Journal of International Law 883–951, 884.
[690] AD Robilant, 'Genealogies of Soft Law' (2006) 54 American Journal of Comparative Law 499–554, 499.

Behavioural change, and not mere compliance, is the real benchmark of success.[691] It is on this popularly acknowledged premise that soft law operates. The focus of soft law on the process of creating change (rather than on compliance results) means that it is also popularly described as management-based regulation[692] – i.e., an approach that "involves firms developing their own process and management system standards, and developing internal planning and management practices designed to achieve regulatory or corporate goals".[693] It thus follows that soft law, although voluntary, works towards certain objectives that could be motivated by regulatory laws, or standards/best practices external or internal to organisations.[694] Where hard law exists, ascertaining the goals of soft law becomes an easier process. Complexity, however, arises where no hard law is present, and soft law operates as an independent legal strategy. This explains a situation where companies must realise that conformity to certain standards or best practice translate into advantage or improvement, and so they seek to attain them.[695] It therefore becomes imperative that such standards or best practice referred to as "norms" are well defined.[696]

Also referred to as "observed behavioural regularity",[697] norms are rules or standards of behaviour, which, although not legally binding, are instrumental in creating corporate culture.[698] Defined as "informal rules of conduct that constrain self-interested behaviour but are not enforced by any authoritative body that can impose a sanction",[699] norms involve internalising inspired by what is described as "carrot or

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[691] A Klettner, 'Corporate Governance Regulation: Assessing the Effectiveness of Soft Law in relation to the Contemporary Role of the Board of Directors' (University of Technology – Sydney 2014) 7.
[692] C Coglianese & D Lazer, 'Management-based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) Law & Society Review 691–730.
[693] N Gunningham & D Sinclair, 'Organizational Trust and the Limits of Management-Based Regulation' (2009) 43 Law & Society Review 865–899, 865.
[694] B Hannigan (n 124) 370.
[695] AA Dhir, 'Contextualizing the Content Analysis Results: Norms, Expressive Law, and Reform Possibilities' in AA Dhir, *Challenging Boardroom Homogeneity – Corporate Law, Governance, and Diversity* (Cambridge University Press 2015) chapter 7, 220.
[696] E Bardach & R Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press 1982) 224.
[697] EB Rock & ML Wachter, 'Islands of Conscious Power: Law, Norms, and the Self-governing Corporation' (2001) 149 University of Pennsylvania Law Review 1619–1700, 1641.
[698] EB Rock & ML Wachter, 'Symposium: Norms & Corporate Law: Introduction' (2001) 149 University of Pennsylvania Law Review 1607–1618, 1608. See also, EB Rock & ML Wachter (n 697) 1641.
[699] JC Coffee, 'Do Norms Matter? A Cross-Country Evaluation' (2001) 149 University of Pennsylvania Law Review 2151–2177, 2171.

stick theory" – i.e., rewards for abiding and penalties for not.[700] Although not deriving any force from the authority of law,[701] such norms operate through shaming,[702] gain or loss of reputation or goodwill, peer pressure, and/or industry or the firm's own internal customs and practices.[703] Given the stark resemblance to the definition of soft law, the close (but complex) nexus within which the two operate becomes clear. Without seeking to debate which of the two comes first – i.e., whether soft law evolves into norms or norms generate soft law[704] – this thesis instead proceeds by relying upon what seems to be the established view that norms and soft law are mutually reinforcing.[705] Thus, while governance norms may legitimise soft regulation, the opposite is also possible.[706]

Given the minimalist state role, soft law does not operate within a hierarchical set-up, as is needed for hard law.[707] Rather, it works upon a horizontal co-ordination of the regulator and/or private parties – shareholders, investors, labour, organisations, markets and the industry – with the state assuming the role of a facilitator.[708] The decision or choice of regulation shifts from the regulator to those who are regulated.[709] For this, an environment of mutual trust and "a restructured and more collaborative relationship between the State and regulated entities, based on the recognition that regulation may operate most effectively when it incorporates private actors' context-specific experience and relevant expertise" is needed.[710]

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[700] M Kahan, 'The Limited Significance of Norms for Corporate Governance' ((2001) 149 University of Pennsylvania Law Review 1869–1900, 1873.
[701] J Black, 'Financial Markets' in P Cane & H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 168.
[702] DA Skeel, 'Shaming in Corporate Law' (2001) 149 University of Pennsylvania Law Review 1811–1866.
[703] JC Coffee (n 699) 2171.
[704] U Morth, 'Introduction' in U Morth (ed), *Soft Law in Governance and Regulation* (Edward Elgar Publishing 2004) 4.
[705] EN Veasey, 'Should Corporation Law Inform Aspirations for Good Corporate Governance Practices – Or Vice Versa?' (2001) 149 University of Pennsylvania Law Review 2179–2191, 2189.
[706] *Ibid*.
[707] J Black (n 701) 168.
[708] AA Dhir (n 601) chapter 3, 71, 96.
[709] C Coglianese & E Mendelson, 'Meta-regulation and Self-regulation' in R Baldwin, M Cave & M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 153.
[710] C Ford & M Condon, 'Introduction to New Governance and the Business Organization: Special Issue of Law & Policy' (2011) 33 Law & Policy 449–458, 450.

Owing to its reflexive or responsive characteristic,[711] and a democratic and collaborative approach, soft law forms a sub-set of what is termed "new governance".[712] Marking a change from the command style of hard law to less traditional forms of collaborative, participative, innovative and adaptive regulation,[713] the focus lies in finding tailored/situation-specific solutions to complex issues, for which "one size" may not fit.[714] It is here where the main distinction from hard law lies – i.e., in the levels of flexibility and autonomy in terms of setting and conforming to their own standards, and devising their own internal procedures rather than universally applicable rigid rules not allowing for any context-specific adjustments. Accordingly, most common strategies that emanate from this policy approach are voluntary in nature.[715]

(A) Why Soft Law?

Owing to its capacity to accommodate contexts and individual peculiarities, soft law is considered as the optimum approach for matters that are complex, dynamic and still evolving.[716] Presupposing a fixed solution when uncertainty and new or unforeseen situations demand constant experimentation and adaptation, seeking for uniformity when diversity is embedded, and resisting change when evolution is essential- all of which enumerate the limitations of hard law, would neither be prudent nor desirable.[717] This explains why soft law has come to form the core of international regulation,[718] where often precision and certainty need to be compromised for the sake of flexibility

[711] J Braithwaite & C Parker, 'Conclusion' in Parker, Scott, Lacey, & Braithwaite (eds), *Regulating Law* (Oxford University Press 2004) 285.
[712] D Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency' (2007) 17(3) Business Ethics 453–476, 454.
[713] BC Karkkainen, 'Reply: "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 Minnesota Law Review 471–497, 473.
[714] A Klettner (n 691) 107.
[715] V Reding (n 624) chapter 29, 206. See also, Y Chinwala (n 436) 9. See also, AA Dhir (n 601) chapter 3, 83–84.
[716] A Keay, 'Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?' (2014) 34 Legal Studies 279–304, 280.
[717] GC Shaffer & MA Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706-799, 719.
[718] P Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 Michigan Journal of International Law 420- 435.

and freedom to adapt to constant changes,[719] national interests, and fast globalization.[720] In view of the wide range and fast evolving modalities of the international legal order, use of only the typical legislative processes or conventional treaties is no longer found adequate. Rather, it is widely acknowledged that international law must draw upon the wide array of choices in soft law, more so for the newer subjects and issues emerging with time.[721]

For quite similar reasons, soft law appears to be perfect for gender diversity too, much of which depends upon the dynamism of interpersonal forces within boardrooms,[722] and for which no "one size" can fit all. This is more so as regulation of such diversity must keep pace with its fast-evolving contents. Deriving rigid rules with precision for such reforming issues would not only be difficult, but also not desirable. Instead, what is needed is reform of the under-pinning culture, practices and value system, or, in other words, substantive change over and above descriptive change:[723]

> *The behavioural changes that may be needed are unlikely to be fostered by regulatory fiat, which in any event risks provoking unintended consequences. Behavioural improvement is more likely to be achieved through clearer identification of best practice and more effective but, in most areas, non-statutory routes to implementation so that boards and their major owners feel ownership of good corporate governance.*[724]

The advantages of this approach become clear when comparing female directorship in executive roles for Norway to the UK, where the latter fares comparatively better.[725] Given that there exists no hard regulation on this issue in either country, it is possible

[719] RB Builder, 'Beyond Compliance: Helping Nations Cooperate' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 67.
[720] ME O'Connell, 'The role of Soft Law in a Global Order' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 102.
[721] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) International and Comparative Law Quarterly 850-866, 866.
[722] NF Sharpe (n 76) 1437, 1452.
[723] AA Dhir (n 695) chapter 7, 215.
[724] 'Walker Review' (n 124) 9–10.
[725] At 9.7% and with a rise by around 4% in the preceding five years, as against a 2.6% spread over a period of more than ten years in Norway.

to attribute such difference to behavioural reforms in the organisational culture or value system undertaken by companies on a voluntary basis. As well as in terms of depth of effects, soft law can have a wider outreach to issues which hard law cannot access. Once again, a useful example is executive directorship, for which hard law or quotas offer no workable solution.[726] In contrast, the voluntary 33% target suggested by the Hampton–Alexander Review[727] is expected to fill in the missing gap where traditional approaches could never reach.[728] Thus, with a greater ability to penetrate within the organisation and influence behavioural change,[729] the approach is also seen as a potential remedy for more innate challenges[730] of stereotyping, segregation, pay disparities and mid-career crises – all of which are found to be responsible for why women are not able to reach up to board levels (commonly noted for Norway, the UK and the EU in sections II.2, II.3, II.4 above). Thus, while soft law may not offer options for immediate enforcement or remedies for breach in the short-run, it may nonetheless help generate the expectations for future conformity. Its normative characteristics can offer the flexibility to reduce uncertainty over time, gather learnings through experiences, and work out more practicable solutions- an approach that is perhaps more suitable for concerns of gender,[731] especially when intersecting with law and business.

From a cost-saving standpoint too, soft law has an edge over hard regulations.[732] An evidence can be found once again in the context of international law, where soft law enables countries to avoid unexpected sovereignty costs, ceding of control and authority, and conflicts.[733] While duly considering and providing for the differing national interests and regulatory philosophies, soft law also makes way for global coordination and cooperation without the added burden of institutional set-up, long-

[726] A Rafiq, Member of Parliament (Parliamentary Debate 2002) – H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 201.
[727] 'Hampton–Alexander Review' (n 431) 10.
[728] D Hess (n 680) 450.
[729] DK Smith, 'Governing the Corporation: The Role of Soft Regulation' (2012) 35 University of New South Wales Law Journal 378–403, 399.
[730] SK Majumdar & AA Marcus, 'Rules versus Discretion: The Productivity Consequences of Flexible Regulation' (2001) 44 Academy of Management Journal 170–179, 176.
[731] KW Abbott & D Snidal (n 617) 421–456, 443.
[732] *Id* at 421–456, 434, 436.
[733] Trubek, Cottrell, & Nance, 'Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity' (2005) University of Wisconsin Legal Studies Research Paper no 1002, 27-28.

drawn negotiations, breach and retaliations, and related costs. This is comparable to the ceding of business autonomy, regulatory and compliance costs for companies subject to mandatory quotas, which they would not be willing to comply with unless such quota works in their commercial sense or is not overly burdensome.

Another significant advantage of soft law emanates from how such regulation is formed or crafted; usually an outcome of more participative and engaging processes of consultations and interactions between the regulator and/or industry players, as was witnessed in rounds of extensive consultations with companies, investors, professional bodies, audit firms, search agencies, interest groups and individuals when finalising diversity provisions for the UK.[734] This approach, which builds upon first-hand knowledge and expertise,[735] can therefore have a more specific and direct bearing on finding a cost-effective solution suitable for each context than what the state or the regulator could do at macro level. Such solutions are often found to be more legitimate, innovative, expeditious and adaptive to changes than routine and formal compliance,[736] as "when those who implement requirements play an active role in their design, the results are better".[737] Moreover, soft policy approach can help reconcile the seemingly contradictory opinions, if any, on an issue.[738] This is of much relevance to boardroom gender diversity, considering that the effects of female directorship are often still debated, and it is yet to take shape as a business norm. This further explains why soft law, referred as a "tool of compromise",[739] seldom meets resistance[740] or fares better in terms of receptivity.[741]

As a sub-set of new governance, its advantages can be summed up as follows:

> *an approach … that focuses on how change occurs within social and legal systems, linking the complexities of common and statutory law and legal process with aspects of social, political,*

[734] 'The United Kingdom Corporate Governance Code' (n 421).
[735] SK Majumdar & AA Marcus (n 730) 176.
[736] N Haskovec, 'Codes of Corporate Governance – A Review' (Millstein Center for Corporate Governance and Performance, June 2012) 4.
[737] SK Majumdar & AA Marcus (n 730) 171.
[738] KW Abbott & D Snidal (n 617)421–456, 450.
[739] *Id* at 421–456, 434, 444.
[740] N Haskovec (n 736) 7. See also, RR Thomas, 'From Affirmative Action to Affirming Diversity' (1990) March/April 68(2) Harvard Business Review 107–117 <https://hbr.org/1990/03/from-affirmative-action-to-affirming-diversity> accessed 2 February 2017.
[741] 'Report on Women in Decision-making Positions' (Special Eurobarometer 376, March 2012).

> *and economic interaction. It suggests that ongoing deliberation through formal and informal deliberative processes can be an effective means of enhancing policy design and practice in highly dynamic social and legal environments…. may offer a means to address increasingly complex issues that require innovative problem solving by stakeholders with the knowledge and experience to effect such change.*[742]

(B) Riders to Soft Law

What accounts for the biggest advantage of hard law culminates in a converse disadvantage of soft law – i.e., outcome or compliance. Normally, soft law is more gradual and subtle, causing an incremental change rather than immediate results. The absence of formal sanctions casts doubts over the pace of soft law. This can be proven through female directorship levels in Norway and France, which are almost double what is attained in Denmark, Finland and the UK.[743]

In addition, strong opposition comes from the angle of enforcement. Given the restricted state interventions and lack of role for sanctions, much depends upon market forces.[744] Not capable of being defined by any standardised formula, incentives for adherence, which primarily rest upon "naming and shaming",[745]differ from one company to another.[746] Harmonising such incentives with regulatory goals often becomes a challenging task,[747]especially where such incentives are not tangible or convertible directly into business profits, as is the case with boardroom gender diversity.[748] Having said this, soft law does not completely lack enforcement. Rather, it derives its strength from the norm that it seeks to enforce. The question that arises is therefore whether such diversity "has become so entrenched, so internalized" to qualify as an independent business norm,[749] which might trigger communal (industry

[742] J Sarra, 'New Governance, Old Norms, and the Potential for Corporate Governance Reform' (2011) 33 Law & Policy 576–602, 576.
[743] 'Women in the Boardroom – A Global Perspective' (n 585) 79. See also, M Landfors & V Berglund (n 666) 24.
[744] S Machold & K Hansen (n 86) chapter 24, 168.
[745] L Thwaites (n 470) 158. See also, 'Women in Financial Services' (Oliver Wyman 2014) 40.
[746] Fanto, Solan, & Darley (n 90) 911. See also, R Sealy & S Vinnicombe (n 95) chapter 28, 199.
[747] J Black (n 701) 166.
[748] C Coglianese & E Mendelson (n 709) 153.
[749] AA Dhir (n 695) chapter 7, 215.

or market) reactions if infringed.[750] In view of the post-compliance stagnancy observed in Norway, and lack of significant changes in the executive constituent even after targets were spelt out by the Hampton–Alexander Review[751] for the UK, it appears that such a norm has not yet taken its final shape.

As a result, excuses such as,[752]

> *"I don't think women fit comfortably into the board environment."*
>
> *"There aren't that many women with the right credentials and depth of experience to sit on the board – the issues covered are extremely complex."*
>
> *"Most women don't want the hassle or pressure of sitting on a board."*
>
> *"Shareholders just aren't interested in the make-up of the board, so why should we be?"*
>
> *"My other board colleagues wouldn't want to appoint a woman on our board."*
>
> *"All the 'good' women have already been snapped up."*
>
> *"We have one woman already on the board, so we are done – it is someone else's turn."*
>
> *"There aren't any vacancies at the moment – if there were I would think about appointing a woman."*
>
> *"I can't just appoint a woman because I want to."*

could mean that market forces will be slow and not react as strongly to non-adherence, resulting in deferred timelines.[753] This does not, however, reject soft law outright as a choice of policy approach for gender diversity. Rather, given the mutually re-enforcing

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[750] RA Posner, 'Social Norms and the Law: An Economic Approach' (1997) 87(2) American Economic Review 365–369.
[751] 'Hampton–Alexander Review' (n 431) 10.
[752] 'Revealed: The Worst Explanations for not Appointing Women to FTSE Company Boards' (Department for Business, Energy & Industrial Strategy (United Kingdom), 31 March 2018) <https://www.gov.uk/government/news/revealed-the-worst-explanations-for-not-appointing-women-to-ftse-company-boards> accessed 5 June 2018.
[753] A Klettner (n 691) 32.

nexus between soft law and norms,[754] the former can go on to strengthen such diversity as a future business norm. This finds support in the nearly competing impact of soft law and that of hard law at global level:

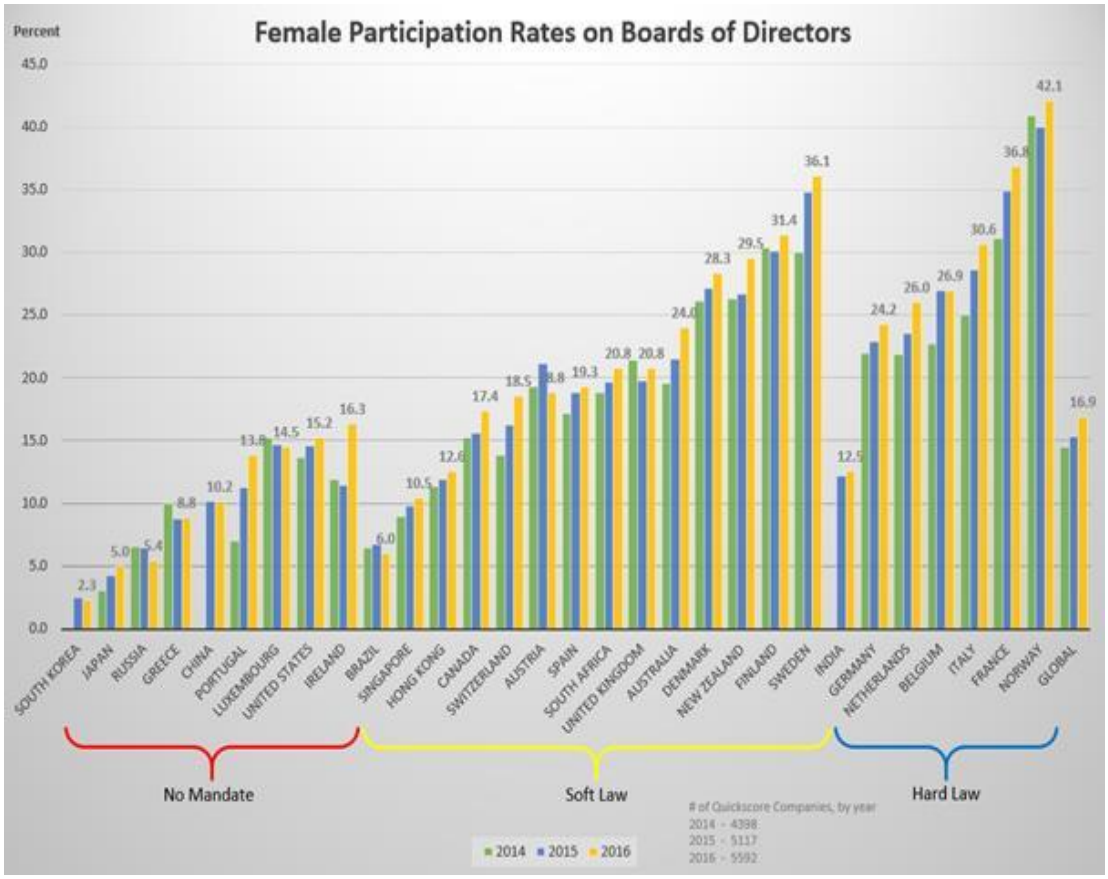

Figure 6: Competing Impact of Policy Approaches to Gender Diversity[755]

This chart illustrates that countries with soft policies, while progressing significantly more than countries that lack regulation on this front, do not lag far behind those with hard regulations. This establishes the impact of soft law even while the norm is evolving.

Next, given the multiple parties involved in the formulation of soft law, conflicts of interest can be an obstacle. Alleged as "a cynical attempt by self-interested parties to give the appearance of regulation (thereby warding off more direct and effective government intervention) while serving private interests at the expense of the

[754] EN Veasey (n 705) 2189.
[755] 'Gender Parity on Boards Around the World' (n 624).

public",[756] soft law is regarded as vulnerable to being exploited for personal gains.[757] Where parties do not have equal bargaining capabilities, soft law might succumb to difficult negotiations and power play, both internal and external to companies.[758] This is particularly so in view of the wide range of interests of different stakeholder groups within a company, which may not always coincide.[759] This can result in regulations that are biased or favouring the more influential group at the expense of the minority.[760]

Finally, the ability of soft law to survive on a stand-alone basis, or as an alternative to hard law, is looked upon with suspicion. Described as "pre-law"[761] or a testing field for hard regulation,[762] it is often considered an intermediate phase or stage of regulation.[763] Notwithstanding that soft law as a primary and independent choice of policy finds strong advocacy in corporate governance,[764] simultaneous threats of hard law as a coercion to adherence extend to the context of boardroom gender diversity. This was witnessed in Norway, where voluntary thresholds served as a stepping stone for the 40% quota. Similarly, the EU threatens mandatory law if and when voluntary efforts fail. Therefore, "to what extent should soft law be seen as a transitional mode of regulation … or can it be seen as an independent form of regulation?" continues to be a recurring concern.[765]

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[756] N Gunningham & J Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) Law & Policy 365-414, 370.
[757] J Sarra (n 742) 598.
[758] N Haskovec (n 736) 11.
[759] Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) Results of Consultations with the Interested Parties and Impact Assessments, 7. See also, K Stary, 'Gender Diversity Quotas on Australian Boards: Is it in the Best Interests of the Company?' (University of Melbourne 2015) 9 <http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1709500/2-KateStary-CorporateGovernanceandDirectorsDutiesPaper2.pdf> accessed 18 May 2017.
[760] J Sarra (n 742).
[761] L Senden (n 688) 120.
[762] A Kun, 'From Transnational Soft Law to National Hard Law? – regulating supply chains' (2015) 8 Pecsi Munkajogi Kozlemenyek 53–67, 60.
[763] J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 University of British Columbia Law Review 475- 520, 488.
[764] U Morth (n 704) 3.
[765] *Id* at 4.

To sum up, for soft law to operate in its fullest form, certain enabling conditions are needed, which include, *inter alia*,[766] (a) industry participation and balance of power/bargain in the formulation process; (b) harmonisation of the regulatory objectives vis-à-vis the private goals; (c) incentives for regulation to be formulated and enforced, preferably by way of an established norm; (d) well-defined and measurable parameters for evaluation; and (e) mutual trust and transparency between the regulator and the regulated entities.[767]

II.7 *Deriving an Optimum Legal Strategy*

II.7A How to Derive the Legal Strategy?

Although debating over rationale may not have relevance in justifying boardroom gender diversity from a conceptual or industry standpoint, it does assume significance from a regulatory perspective. Drawing inferences from examples of Norway, the UK and pan-EU level, a link is apparent between predominance of rationale and the regulatory strategy adopted by each country. For instance, preponderance to social justice (emanating from compelling causes of equality, gender fairness and human rights) tends to approve a more stringent hard law policy approach strategised in the form of mandatory quotas and deterring sanctions. This is opposed to voluntary measures operating upon market forces and industry-based incentives or a soft law approach, where business assumes predominance.

It is clear that the motivation for the Norwegian quota stemmed from low female participation in corporate leadership,[768] and that this continues to equate diversity largely with gender balancing.[769] Accordingly, this was enforced as a mandatory quota for PLCs,[770]with a focus on women as an interest group different from men.[771] Thus, Norway's adoption of hard law and imposition of a mandatory quota can be traced to

[766] C Coglianese & E Mendelson (n 709) 153.
[767] Fung, Graham, & Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press 2007) 174.
[768] Proposition 97 (n 383).
[769] 'The Norwegian Code of Practice for Corporate Governance' (Norwegian Corporate Governance Board, 30 October 2014) 32.
[770] *Id* at 8.
[771] C Seierstad (n 166) chapter 20, 142.

its command and control or significant state interventionist social justice rationale.[772] This link can be further corroborated by the examples of Iceland, where the aim has been to "work towards a more equal ratio of women and men in influential positions";[773] Italy, which seeks to reverse historical gender discrimination;[774] the Netherlands, where attempts are being made to re-introduce a lapsed quota with "the purpose of a balanced division of the seats on the board of directors";[775] France, where amendments have been made to enable equal access for men and women to professional responsibilities (in addition to public offices), and to improve gender balance in the private sector;[776] Spain;[777] and Slovenia,[778] where quotas have been or are being contemplated for legislation respectively. In most of these jurisdictions, companies are considered to be social partners of the state, and, accordingly, their responsibility for gender balance in boardrooms comes by way of a legitimate public policy.[779]

Contrary to this, voluntary measures associated with a soft law approach emanate from the UK's pro-business or neo-liberal motives.[780] Similarly, despite its egalitarian national image and values of gender democracy, Sweden has not enacted a quota for

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[772] M Teigen (n 328) 8.
[773] AA Arnardottir & TO Sigurjonsson, 'Gender Diversity on Boards in Iceland: Pathway to Gender Quota Law Following a Financial Crisis' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 4, 76.
[774] A Rigolini & M Huse, 'Women on Board in Italy: The Pressure of Public Policies' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 6, 136.
[775] SA Kruisinga & L Senden, 'Gender Diversity on Corporate Boards in the Netherlands: Waiting on the World to Change' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 8, 188.
[776] A Masselot & A Maymont, 'Balanced Representation between Men and Women in Business Law: The French 'Quota' System to the Test of EU Legislation' (2014) 3(2) Centre for European Law and Legal Studies – University of Leeds 1–25, 15.
[777] P Gabaldon & D Giménez, 'Gender Diversity on Boards in Spain: A Non-mandatory Quota' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 1: The Use of Different Quota Regulations* (Palgrave Macmillan 2017) chapter 3, 61.
[778] AK Mrčela, 'Gender Diversity on Boards of Directors in Slovenia: Impending Legislation to Establish Quotas' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 4, 84, 87, 93.
[779] AA Dhir (n 601) chapter 3, 79.
[780] M Szydlo (n 193) 176. See also, S Terjesen & L Trombetta, 'Gender Diversity on Boards in the United States, Australia, and Israel' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 10, 239.

reasons of business autonomy and private ownership rights.[781] In disagreeing with the quota as a goal in itself, the country argues that what concerns companies and their boardrooms should be decided by shareholders based on merit and competence.[782] The same applies to Austria, which has kept a quota in abeyance for the private sector.[783] With an emphasis on greater flexibility and trusting that companies will independently discover the benefits that a diversified board can bring, Denmark requires companies to set their own targets.[784] Similarly, to attain the necessary abilities for critical exchanges and independent decision-making, Switzerland takes recourse to targets for boards and senior management.[785] Imposition of a mandatory quota where the motives are linked to business would lead to an anomaly where companies are forced to realise disguised "commercial" objectives that do not otherwise form their priority.[786] In other words, such an approach would infringe upon corporate wisdom and autonomy, replaced by what the state thinks is commercially best and imposes upon the business.[787]

Although countries appear to diverge in how they articulate the precise contents of their strategies, it is possible to observe a clear convergence as regards how underlying rationale paves the way for their choice of policy approach and consequent type of strategy. The nexus so drawn seems to suggest, and it can also be more generally theorised, that predominance of one rationale over others is relevant and bears significance when determining policy approach and legal strategy. Having inferred the

[781] V Heidenreich (n 388) chapter 5, 176–177. See also, N Magnusson & J Carlstrom, 'Swedish Board Gender – Quota Proposal Killed by Opposition Parties' (Bloomberg, 9 September 2016) <https://www.bloomberg.com/news/articles/2016-09-09/swedish-government-plans-40-gender-quota-for-corporate-boards> accessed 17 April 2017; 'Swedish Government Drops Plans for Gender Quota Bill for Company Boards' (Reuters, 12 January 2017) <http://www.reuters.com/article/us-sweden-board-equality-idUSKBN14W2AM> accessed 18 May 2017.
[782] C Holgersson & A Wahl (n 684) chapter 6, 145.
[783] H Mensi-Klarbach, 'Gender Diversity in Austrian Boards – Combing Soft and Hard Law Regulations' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 5, 113.
[784] A Gregorič & JL Hansen, 'Women's Path to the Boardroom: The Case of Denmark' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 7, 173.
[785] F Villesèche & E Sinani, 'Gender Diversity on Boards in Switzerland' in Seierstad, Gabaldon, & Mensi-Klarbach (eds), *Gender Diversity in the Boardroom Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017) chapter 8, 193.
[786] H Bjørkhaug & S Sørensen (n 385) chapter 6, 197–198. This thesis therefore disagrees with diversity as a compelling state interest.
[787] M Szydlo (n 193) 177. See also, H Bjørkhaug & S Sørensen (n 385) chapter 6, 205.

above linkage from how countries have consciously or not so consciously made use of rationale, the formula for deriving regulatory strategy can be set out as follows:

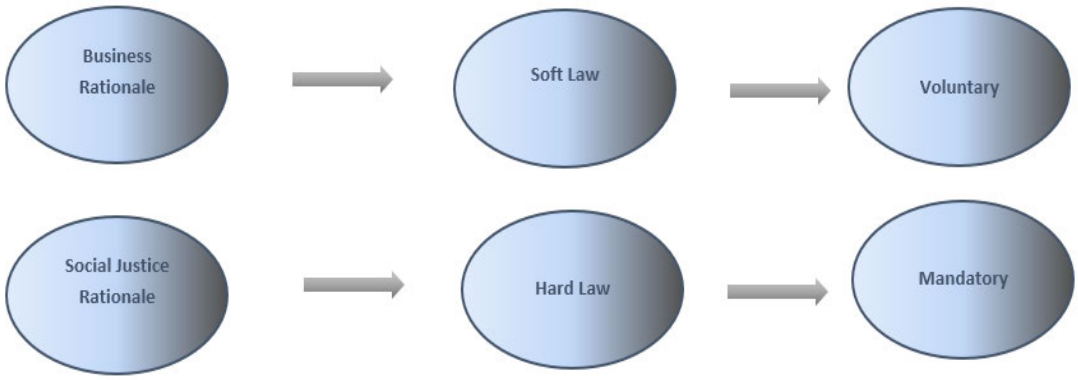

Figure 7: Link between Rationale vis-à-vis Policy Approach vis-à-vis Legal Strategy

Having expounded this broad-level formula, this thesis proceeds to "optimise" it – i.e., working out what could be an "optimum" strategy.

II.7B How to Derive the "Optimum" Legal Strategy?

While the Norwegian example lures one to hard law or a quota, which have advantages in terms of immediate results and expanding the horizon of candidature to meet with such compliances,[788] it is not considered appropriate as a long-term strategy. Not significantly contributing to intrinsic reforms, "quotas are an effective tool if you only focus on the statistics and figures. But to get more talented female executives and board candidates, it is all about changing attitudes. This requires long-term efforts".[789] A more responsive form of regulation is therefore needed.[790] While soft law can help with innovative solutions and gradual behavioural change, its effectiveness depends upon maturity of the market and industry forces, which cannot be predicted with certainty or precision. Attainment of such pre-conditions necessary for soft law remains a major challenge, and differs from one country to another.[791]

In view of the advantages and riders of each of the two policy approaches (hard law and soft law) discussed in section II.6 of this chapter, a choice of one over another is

[788] AA Dhir (n 638).
[789] H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 197.
[790] A Klettner (n 691) 356.
[791] S Machold & K Hansen (n 86) chapter 24, 173.

not prudent, and even lesser desirable. This is particularly so for boardroom gender diversity, as it rests upon the dual case of social and business justifications, both conceptually and practicably (as concluded in chapter I). Even where countries may have chosen one rationale predominant over the other, it may not be possible to sustain a strict bifurcation of the two rationales or policy approaches for long. This is apparent from the examples of Norway and the UK, which, although setting their priorities on different and contrasting rationales of equality and business (classically seen as anti-theses of one another)[792] respectively, ultimately seek to look beyond these. Therefore, to cater to such dual characteristics, an ideal strategy can potentially be derived where the two rationales or policy approaches coincide or intersect (rather than compete) with each other. If otherwise, while less formal regulation is likely to be ignored, evaded or abused,[793] too stringent laws can add to regulatory costs,[794] as well as erode the entrepreneurial aptitude upon which the market economy survives.[795]

To decide upon what could be the optimum regulation in this case (and its extent and form), it would thus be necessary to strike a trade-off or balance between such compelling concerns of social justice but without transgressing into the private space of corporations, their autonomy and business judgement. Whilst engaging in this assessment at this stage, one may find some resemblance to the seminal Hart-Devlin debate,[796] which (although in an unrelated domain of criminal law) offers a valuable discussion as regards to what extent should people's behaviour and conduct be regulated, and when such regulation must draw a line such that it does not intervene into the private choices, life and liberty of individuals. To elaborate, Hart (endorsing a reasoning akin to Mill's "harm principle") argued that causation of harm to others is a necessary condition to trigger legal enforcement, such that activities that do not

[792] Duarte, Gray, & McAllister, 'Corporate Social Responsibility in a Dialectical Frame: The HIH Collapse in Australia' in KT Caliyurt & D Crowther, *Globalization and Social Responsibility* (Cambridge Scholars Publishing 2008) chapter 3, 77. See also, D Jamali & Y Sidani, 'Classical vs Modern Managerial CSR Perspectives: Insights from Lebanese Context and Cross-Cultural Implications' (2008) 113(3) Business and Society Review 329–346, 331.
[793] R Tomasic & F Akinbami, 'Towards a New Corporate Governance after the Global Financial Crisis' (2011) 22(8) International Company and Commercial Law Review 237–249, 241.
[794] L Thwaites (n 470) 162. See also, J Voβ (n 655).
[795] R Barker, 'Responding to the Crisis: A UK Corporate Governance Perspective' (2011) Company Law, Corporate Governance and the Banking Crisis – Special Issue, 12–14, 13.
[796] P Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 The Journal of Ethics 21-51, 22.

involve such effects must be excluded from regulation.[797] The principle idea being, "principle": "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to other".[798] Opposed to this, Devlin was of the view that law is not only to protect individuals, but also the society, and hence, it should not be limited to regulating conduct only when there are direct adverse effects on other individuals.[799]

Notwithstanding that the debate so triggered following the 1957 Wolfenden Report in the United Kingdom has been revisited and modified several times by subsequent scholars and academicians,[800]it stands no less relevant when it comes to determining the necessary contours of regulations even in contemporary times- when and how enforcing a certain pattern of conduct or behaviour might spill over further than what is necessary to be regulated, and so intervene into private liberty. For instance, limits drawn by Mill over society's authority over individual- "He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right… The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute"[801] is much relevant for companies when arguing against a hard law imposition where the rationale cited is substantially one of business. Companies cannot be compelled to have a mandatory quota for female directors, if the only motive is "good for business" as the private share owners would be the best to judge that. This would have sufficed if boardroom gender diversity stood exclusive to the social nuances of it. Considering its dependency on the social justice rationale too, a probable settlement lies in a compromise of the two views. In other words, as the "regulatory architecture relating to companies … depends crucially on striking the right balance between giving the business the flexibility to operate and protection

[797] BE Harcourt, 'The Collapse of the Harm Principle' (1999-2000) 90 Journal of Criminal Law and Criminology 109-194, 114.
[798] JS Mill, *On Liberty* (Batoche Books Limited 2001) 13.
[799] P Cane (n 796) 21-51, 22.
[800] J Allan, 'Revisiting the Hart-Devlin Debate: At the Periphery and by the Numbers' (2017) 54(2) San Diego Law Review 423-440.
[801] JS Mill (n 798) 13.

against exploitation and underperformance by corporate management",[802] the right approach is one that lies mid-way between the two- strict regulation as opposed to discretion.

To combine hard and soft policy approaches is not novel as such,[803] as there have been debates and deliberations more recently on endorsing what is referred as "hybridity".[804] One can observe its examples across various domains- one being fiscal regulation, where interests and methods may vary even where the common goal of fiscal sustenance is sought for. More specifically in the realm of corporate governance, some of the clear and prominent examples being, *firstly*, the Global Compact launched in 2000, and the OECD Guidelines for Multinational Enterprises, which although adopted and implemented on a non-binding basis, serve as a model code of conduct for corporations; *secondly*, the United Nations Guiding Principles on Business and Human Rights of 2011, which set out a "global standard of expected conduct";[805] and more recently, the 2014 EU Directive which casts an obligation to disclose non-financial information by certain corporations,[806] but in a non-prescriptive manner while allowing flexibility to such companies to disclose only the relevant information and in a manner that they consider most useful.[807] Broadly, as one can observe from the above, use of a combination of the two policy approaches is found more often where the issue involves a societal or humanitarian element alongside commercial

[802] E Ferran, 'Corporate Law, Codes and Social Norms- Finding the Right Regulatory Combination and Institutional Structure' (2001) 1 Journal of Corporate Law Studies 381–409, 385.
[803] RH Weber, 'Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises' (2012) 1(1) Journal of Governance and Regulation 8-14.
[804] Trubek, Cottrell, & Nance (n 733) Research Paper no 1002, 31, 33.
[805] J Eijsbouts, 'Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement' (2017) 24(1) Indiana Journal of Global Legal Studies 181-205, 192-193.
[806] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (n 536) L 330/3.
[807] Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Consultation Document: Non-Binding Guidelines for Reporting of Non-Financial Information by Companies* (2016) < http://ec.europa.eu/finance/consultations/2016/non-financial-reporting-guidelines/docs/consultation-document_en.pdf> accessed 5 May 2019.

motives,[808] or in other words, for interdisciplinary concerns of governance found at the intersection of law, business and society.[809]

Boardroom gender diversity, premised on its twin rationales, too stands at such an intersection of social justice and business. This calls for a policy approach that is something more than a complete omission of commitment or free-play, but less than strict prescriptive rules. This is more so because much depends upon the anthropology within boardrooms, where interplay of power, control, money, interpersonal interactions and connections, decision-making, conflict management and group dynamics, over and above structural composition, determines behaviour.[810] If regulation could do it all, all companies would have narrated equally successful or failed stories of governance. Given that "one size" cannot capture such differences,[811] seeking a balance of hard law and soft law (rather than a strict compartmentalisation) is a preferred choice of policy approach. This allows for necessary innovation and flexibility for both the regulator and the industry to adapt to changing/evolving surroundings, while also offering some degree of certainty and predictability. This makes companies more internally responsible not because they follow what the regulator directs, but because they directs their own actions towards legally responsible behaviour, which might then strengthen the law itself.[812]

This recommendation is supported by proponents of new governance, which, instead of making a divide between hard law and soft law, use "instruments with varying degrees of obligation, precision and delegation".[813] Too strict a law is problematic and akin to too much discretion, and an optimum balance is more desirable. As "the modern era is witnessing what prominent regulatory scholars describe as the new regulatory state, accompanied by the decentring of regulation into many more strands than simply self-regulation, on one hand, and government-mandated command and

[808] RE Cirlig, 'Business and Human Rights: From Soft Law to Hard Law' (2016) 6(2) Juridical Tribune 228-246, 234.
[809] M Filipovic & S Buncic, 'Global Economic Governance: A New Regime through Soft Law?' (2015) 11(44) International Relations 101-120, 112.
[810] R Leblanc & J Gillies, *Inside the Boardroom* (John Wiley & Sons 2005) 25.
[811] *Id* at 27, 155.
[812] M Cominetti & P Seele, 'Hard Soft Law or Soft Hard Law? A Content Analysis of CSR Guidelines Typologized along Hybrid Legal Status' (2016) 24 Umwelt Wirtschafts Forum Springer 127–140, 132.
[813] SI Karlsson-Vinkhuyzen & A Vihma, 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework' (2009) 3 Regulation and Governance 400–420, 402.

control regulation in the form of regulation by the State through the use of legal rules backed by sanctions on the other",[814] the need arises for crafting of legal strategies that allow flexibility, but within a system of constraints defined by law.[815]

Further developing upon the formula set out here, the "optimum" can therefore be strategised in the following manner:

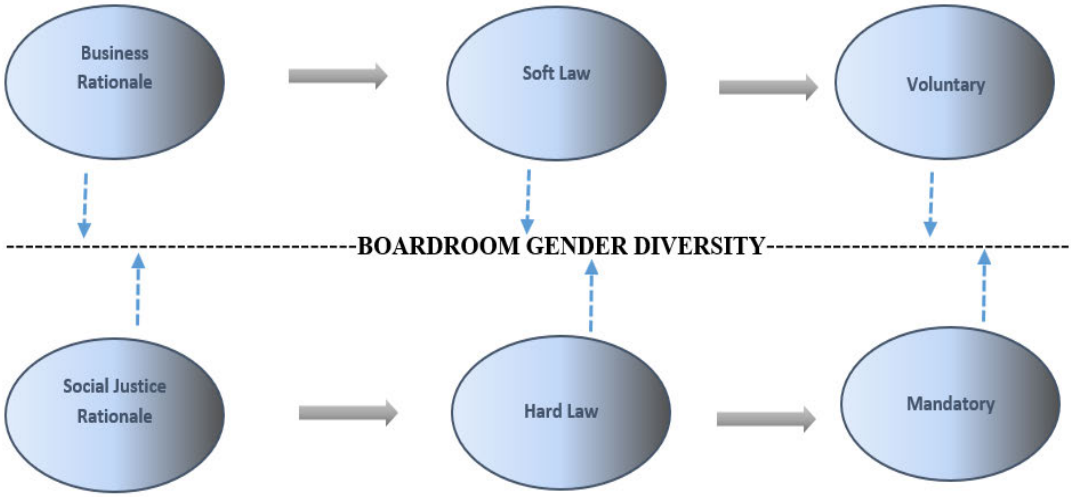

Figure 8: Formula for an "Optimum" Policy/Legal Strategy

Moving one step ahead, such combinations must then be placed within what a befitting governance framework can offer. Naturally, a strategy with such mixed characteristics cannot work if placed in a strict rule-based system.[816] A voluntary target would then become an overlay of rules, contrary to its intended effects.[817] Moreover, as the regulatory infrastructure (which is more extensive and far-reaching, and entails higher costs in a rule-based system) would not then match with the policy adopted, it would yield incongruent repercussions.[818] For instance, comply-or-explain could, if enforced within a strict or rigid rule-based governance, culminate in "comply-and-explain",

[814] B Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar Publishing 2010) 59.
[815] SK Majumdar & AA Marcus (n 730) 176.
[816] S Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 Regulation & Governance 485– 506, 486.
[817] J Black, 'Forms and Paradoxes of Principles-based Regulation' (2008) 3(4) Capital Markets Law Journal 425–457, 440, 452.
[818] N Haskovec (n 736) 6.

which is not what the strategy contemplates.[819] In contrast to rules that mostly originate from hard law,[820] principle-based governance aims for flexibility and value-oriented behavioural change, akin to soft law.[821] Such pluralistic governance, comprising broad-level outcomes, while leaving detailed processes to be determined individually or locally, is more adaptable to changes in the long run.[822] While rules that necessitate state intervention[823] are therefore more suited for issues that are simple and stable over time, "as the regulated phenomena become more complex, principles deliver more consistency than rules".[824] Such notions of soft law to principles rather than rules, and hard law to rules rather than principles are (although not axiomatic) commonly prevalent and fairly established phenomena.[825] Accordingly, a balancing strategy[826] so derived for the dual case of boardroom gender diversity – a conception that is still evolving – is likely to work better if placed within a framework of principle-based or intermediate governance.[827]To conclude, what is fast reforming, dynamic, behavioural and not discernible with precision cannot be externally regulated or accessed by hard law alone. On the other hand, for what is not supported by a forceful business norm, exclusive use of market forces or soft law may not suffice. Similarly, what needs to accommodate business autonomy/judgment and peculiarities on a case-to-case basis cannot be regulated by over-arching mandatory laws. On the contrary, what has a social or human rights limb to it cannot be left to an entirely discretionary approach. Accordingly, an optimum strategy sits mid-way between the two policy approaches, representing a balance of the two.

[819] *Id* at 17, 22.
[820] AA Dhir (n 695) chapter 7, 240.
[821] AL Dempsey, *Evolutions in Corporate Governance: Towards an Ethical Framework for Business Conduct* (Greenleaf Publishing 2013) 83. See also, J Casson, 'A Review of the Ethical Aspects of Corporate Governance Regulation and Guidance in the EU' (Institute of Business Ethics Occasional Paper 8, June 2013) 13, 41.
[822] J Black (n 817) 430–432. See also, N Haskovec (n 736) 13.
[823] R Tomasic & F Akinbami (n 793) 240.
[824] J Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal PhILO sophy 47–82, 47.
[825] N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014) 856–857.
[826] R Tomasic & F Akinbami (n 793) 238, 241.
[827] N Haskovec (n 736) 24.

II.7C Proposals for Optimum Legal Strategy

A good strategy depends much upon the political, economic and cultural conditions[828] peculiar to a country.[829] Deriving an optimum strategy that can work universally is therefore neither possible nor suggested. Nonetheless, based upon the broad contours of the formula invented above, some guidance as regards how such balance and synergy can be interweaved is provided here.

There may be several ways and means to attain the recommended balance of hard and soft policies. One way involves enforcing a single strategy with hybrid characteristics, such as comply-or-explain.

(A) Single Strategy of Comply-or-explain

As a regulation that requires mandatory disclosures alongside voluntary conformity and self-assessments,[830] this strategy can serve as an effective balance of both policy approaches.[831] Described as "principles subject to exception, rather than regulation subject to penalty",[832] or "semi-soft law",[833] comply-or-explain was first introduced on experimental terms in 1992 following the Cadbury Committee Report:

> *We believe that our approach, based on compliance with a voluntary code coupled with disclosure, will prove more effective than a statutory code. It is directed at establishing best practice, at encouraging pressure from shareholders to hasten its widespread adoption, and at allowing some flexibility in implementation. We recognise, however, that if companies do not back our recommendations, it is probable that legislation and external regulation will be sought to deal with some of the underlying problems which the report identifies. Statutory measures would impose a minimum standard and there would be a greater risk of*

[828] S Machold & K Hansen (n 86) chapter 24, 168–169. See also, A Klettner, 'Corporate Governance Codes and Gender Diversity: Management-based Regulation in Action' (2016) 39(2) UNSW Law Journal 715–739, 739; and EE Clark, 'Reflecting Inward and Looking Outward' (2013) 2 Global Journal of Comparative Law 115–146, 125.
[829] S Machold & K Hansen (n 86) chapter 24, 173.
[830] A Klettner (n 691) 378.
[831] *Id* at 361.
[832] N Haskovec (n 736) 8.
[833] L Gorton, 'Corporate Governance – A Swedish Perspective' (2004–05) 7 Studies in International Financial, Economic, and Technology Law 201–209, 207.

> *boards complying with the letter, rather than with the spirit, of their requirements.* [834]

As the under-pinning mechanism through which most contemporary corporate governance codes function,[835] the strategy allows companies to make a choice between strict compliance (as required by hard law) or internal adjustments/changes conforming to regulatory goals (akin to soft law), while explaining or exonerating non-compliance on a case-specific basis.[836] Also known as the "if not, why not" mechanism, it works towards (a) fixing corporate accountability; (b) transparency and improved information exchange;[837] and (c) greater strength of enforcement.[838] Comply-or-explain seeks to influence corporate behaviour through acts of market forces,[839] but with greater force or influence flowing from mandatory disclosures and information symmetry,[840] described as "therapeutic disclosure".[841] It involves a layer of regulatory over-sight above self-regulation or voluntary conformance, aiming to over-see self-regulation but without direct intervention.[842] In other words, it is a regulatory arrangement, which requires the state to delegate authority to the regulated entities in relation to evolving their own rules for implementation, which are then monitored by the former. Thus, the state assumes a significant (but not over-powering) role in crafting and implementing this strategy.

In the context of gender diversity, the strategy enables companies to devise their own modus operandi suited to their organisational needs and/or justify their non-compliance as long as divergence from regulations is mandatorily disclosed and justified with sound reasons, and then over-seen by the regulator. Non-compliance, while undesired, would not *ipso facto* result in breach, as it may be justified through

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[834] 'The Financial Aspects of Corporate Governance' (n 417) para 1.10.
[835] 'Corporate Governance: A Survey of OECD Countries' (Organisation for Economic Cooperation and Development, Report No 53391, 13 April 2004).
[836] L Gorton (n 833) 207.
[837] BTMS Bisschop, 'The Norm of Integrity in Corporate Governance Codes: Could it be Made Enforceable?' (2015) 2 Dovenschmidt Quarterly 64–78, 67.
[838] LF Spira & M Page, 'Regulation by Disclosure: The Case of Internal Control' (2010) 14 Journal of Management and Governance 409–433, 410.
[839] N Haskovec (n 736) 20.
[840] LF Spira & M Page (n 838).
[841] SM Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford University Press 2012) 21, 34.
[842] M Cominetti & P Seele (n 812) 132.

company-specific explanations. However, where non-compliance is coupled with non-disclosure, it could come under the regulatory scanner.[843] Standing mid-way between the two extreme policy approaches, comply-or-explain shares merits from both, and can make up for the disadvantages. For instance, while not over-emphasising numbers, the strategy offers a choice between compliance and flexibility.[844] This might further mitigate some of the risks in terms of stigma and gender stereotyping emanating from hard law.[845] On the other hand, the approach can survive as an independent strategy (a concern that is often raised against soft law).[846]

Having said this, to ensure that the strategy works in its fullest form, institutional misgivings must be avoided.[847] For example, flexibility and choice may not be used by companies if they succumb to external pressures to comply (even where business prudence warrants otherwise).[848] The result may be standardisation or lack of innovation/uniqueness,[849] where the initial tendency to conform (rather than diverge) gradually moves towards strict compliance or otherwise some standardised boiler-plate explanations[850] not fully relevant to the company.[851] With increasing regulatory costs,[852] this might deprive the strategy of its core hybrid characteristic[853] and effectiveness.[854] To avoid such "pooling equilibrium" or "herding" effect,[855] a strong

[843] C Parker, 'Meta-regulation: Legal Accountability for Corporate Social Responsibility' in McBarnet, Voiculescu, & Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 208.
[844] AA Dhir (n 601) chapter 3, 98.
[845] SS Fredman (n 229) 586.
[846] 'When is Comply-or-explain the Right Approach' (The Institute of Chartered Accountants in England and Wales 2013).
[847] *Ibid*. See also, I MacNeil & X Li, 'Comply or Explain: Market Discipline and Non-compliance with the Combined Code' (2006) 14 Corporate Governance: An International Review 486–496, 492.
[848] R Hooghiemstra & H van Ees, 'Uniformity as Response to Soft Law: Evidence from Compliance and Non-compliance with the Dutch Corporate Governance Code' (2011) 5 Regulation & Governance 480–498; Cankar, Deakin, & Simoneti, 'The Reflexive Properties of Corporate Governance Codes: The Reception of the Comply-or-Explain Approach in Slovenia' (2010) 37 Journal of Law and Society 501–525, 522.
[849] R Hooghiemstra & H van Ees (n 848) 480. See also, A Keay (n 716) 293.
[850] AA Dhir (n 695) chapter 7, 233-234.
[851] 'Green Paper – The EU Corporate Governance Framework' (n 545) 18. See also, Arcot, Bruno, & Faure-Grimaud, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working?' (2010) 30(2) International Review of Law and Economics 193–201.
[852] AA Dhir (n 695) chapter 7, 261.
[853] R Hooghiemstra & H van Ees (n 848) 483.
[854] 'Corporate Governance: A Survey of OECD Countries' (n 835) 52. See also, Arcot, Bruno, & Faure-Grimaud (n 851) 193–201.
[855] Cankar, Deakin, & Simoneti (n 848) 524.

industry judgment that attributes value to female directorship is needed,[856] such that "shareholders will consider non-compliance or unsatisfactorily explained non-compliance negatively" and "the market responds not just to disclosure or not, but also its content".[857] As is evident from widespread investor initiatives,[858] voting and investment decisions,[859] and rating agencies, [860] this perception appears to be gradually (but steadily) evolving into a rather positive one.[861] The strategy is, thus, expected to gain further strength with time. Even otherwise, "the form and content of the disclosure may be less important than the internal process by which the disclosure is produced".[862] Considering that "the knowledge that disclosure is required may have an earlier and equally important effect on management behaviour",[863] comply-or-explain is associated with benefits from enhanced internal processes,[864] such as awareness, inquiries, collation of data, audit and control. Based on principles rather than prescriptive rules,[865] and resonating a reflexive style of governance, this strategy can help cultivate gender diversity through mechanisms of self-scrutiny and a culture of transparency.[866]

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[856] L Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge 2013) 151.
[857] DK Smith (n 729) 396.
[858] 'Responsible Capitalism and Diversity' (Hermes Investment Management, October 2015) 3.
[859] M Marriage, 'All-male Boards in the US face Investor Backlash' (Financial Times, 16 April 2017) <https://www.ft.com/content/2b915d48-1f81-11e7-a454-ab04428977f9> accessed 18 May 2017.
[860] RK Mishra & S Jhunjhunwala, *Diversity and the Effective Corporate Board* (Academic Press 2013) 19.
[861] '30% Club launches Investor group to mark one year anniversary' (30% Club, 16 November 2011) <https://30percentclub.org/press-releases/view/30-club-launches-investor-group-to-mark-one-year-anniversary> accessed 19 May 2017. See also, L Armitstead, 'Investors Demand Chairmen Reveal Plans for Employing Female Directors' (The Telegraph, 22 September 2011) <http://www.telegraph.co.uk/finance/jobs/8780223/Investors-demand-chairmen-reveal-plans-for-employing-female-directors.html> accessed 18 May 2017. See also, 'Enhancing Gender Diversity on Boards' (State Street Global Advisors, 7 March 2017) <https://www.ssga.com/na/us/institutional-investor/en/investment-goals/environmental-social-governance-esg/enhancing-gender-diversity-on-boards.html> accessed 18 May 2017.
[862] LF Spira & M Page (n 838) 429.
[863] *Id* at 411.
[864] N Haskovec (n 736) 23. See also, L Talbot (n 856) 151–152.
[865] A Klettner (n 828) 720.
[866] 'Comply-or-explain – 20th Anniversary of the UK Corporate Governance Code' (Financial Reporting Council 2012). See also, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (European Commission, 23 September 2009); and 'Corporate Governance: A Survey of OECD Countries' (n 835).

(B) Mix of Strategies

An alternate (or additional) means is a mix of more than one strategy procured from each approach that could eventually result in an overall balance, or what is referred to as an integrative regulation.[867] While variations of policy/strategy are visible across countries and at times even within a single country, they are seldom applied within boardrooms. Here, this thesis seeks to diverge from conventional methods and propose a mix of strategies that could operate for different constituents within a single board – i.e., for non-executive and executive directors.

As the nomenclatures suggest and as is general governance practice, non-executive directors are vested with the responsibility of supervising and monitoring management, who in turn are in charge of day-to-day corporate functions.[868] Thus, the former are not expected to engage in the core tasks of running companies or generating revenue/profits, rather being vigilant that the management does these tasks, exercising this role through occasional meetings for a fee or commission.[869] On the other hand, executive directors, who are also part of senior management teams or C-suites,[870] are normally employed as functional heads on a full-time basis and serve on the pay-roll of companies for hefty remuneration.[871] Executive directors therefore have more "hands-on" involvement in decision-making, in the formulation and development of business strategies, and in influencing outcome.[872] While non-executives are linked to compliance (i.e., checking if the business is running in order), executive directors are creators or stimulators of performance.

Owing to the different functions, attributes, competencies and skill-sets expected for the two, their constituents also quintessentially differ. While there can be no static formula as regards what constitutes an ideal boardroom (and much less for its constituents), non-executive directors are expected to be generalists when compared

[867] AA Dhir (n 695) chapter 7, 260.
[868] CB Carter & JW Lorsch, *Back to the Drawing Board* (Harvard Business School Press 2004) 24–26.
[869] 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (n 173) 3–4. See also, N Calderon & S Stautberg, *Women on Board – Insider Secrets to Getting on a Board and Succeeding as a Director* (KPMG 2014) 162; and R Barratt & N Korac-Kakabadse (n 14) 34.
[870] G Mills, *On the Board* (George Allen & Unwin 1985) 120.
[871] A Durbin (n 289) 10. See also, J Corkery & S Medarevic, 'Executive Remuneration under Scrutiny: The Cutting Edge of the Shareholder Spring' (2013) Corporate Governance eJournal 1–16, 2.
[872] R Leblanc & J Gillies (n 810) 148.

to executive directors, who must have more direct expertise pertinent to the company, its business and its inside matrices.[873] While broad-level awareness of industry/sector/company is therefore considered enough for the former, this is not the case for executive directors, who must strive for "more" – more specialised skills, more knowledge, more proximate competencies, and more expertise or proficiency, intricately linked to the company, for better and immediate business results.

Owing to such differences in roles, responsibilities, functions and eligibilities, it automatically follows that a "one size fits all" approach is less likely to work for the entire board.[874] Rather, any "one size" approach, be it hard law or soft law, or a mix of the two, as is commonly adopted by some countries, is not preferred. Instead, such strategising should connect with how boardrooms really operate and be sensitive to what is needed by each constituent in view of the variances in their purposes, composition and functions.

To subsume such innate differences[875] while also balancing policies, a good starting point is perhaps (a) voluntary measures for executive positions that can help generate an adequate pipeline through systemic reforms; alongside (b) a mandatory quota for non-executive directors.

This is because of the ability of a quota to catalyse change,[876] which explains why "quotas are currently seen as necessary".[877] A quota, with its advantages in terms of expedited results, can trigger visible change, which can then serve as a reference for future reforms and less visible or internal improvements. Deterrence against legal sanctions can signal a strong emphasis placed by the regulator upon diversity as an indispensable attribute, which might then help in the creation of similar industry perceptions. Further, by escalating diversity from an option to compulsory, the message becomes clear that corporate leadership can no longer sustain a traditional "old boys' club", which is needed more for the non-executive constituent, which concerned with monitoring and supervision of management. To extend beyond such

[873] *Id* at 223. See also, 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (n 173) 4–5.
[874] D Higgs (n 173); and 'Walker Review' (n 124).
[875] 'G20/OECD Principles of Corporate Governance' (OECD 2015) 10.
[876] AA Dhir (n 212) chapter 8, 288–289.
[877] C Seierstad (n 166) chapter 20, 144.

close circles, the compulsion of a quota might help. When companies run short of familiar or insider ties to fulfil what the quota requires, they are compelled to source candidates externally, who might be able to bring what is ideally sought – i.e., better and more critical and independent aptitudes, free from management influence. Given their supervisory and monitoring roles, the intimate connection and proximity to management that external candidates would lack would no longer hinder appointment of women, rather adding to the worth of what is sought or desired for the non-executive constituent. Quotas are therefore arguably appropriate for non-executive directors.

This is more so in view of the candidature of such directors,[878] which is potentially more broad based than that of executives.[879] Countries with overall advanced female participation as may be deciphered from, *inter alia*, their share in labour force participation/employment and education (for instance, as in Norway and the UK) are in a more advantageous position in this regard. Although leaking pipelines within companies continue to affect candidature for the executive constituent, more advanced female resources at overall broad level remove hindrances for such countries to sustain quotas for the non-executive constituent, which is functionally more generalist and less intervening. Lastly, the prominence of obligatory laws can contribute to a gradually rising acknowledgement of other diversity attributes, as was observed in the Norwegian business sector.[880]

In contrast to such externally imposed pervasive rules for non-executive directors, any similar rules for executives must be avoided. This is because, first, executive appointments are more individualistic and function-oriented, rather than representative roles;[881] and, second, leaking executive pipelines represents a common crisis,[882] even where countries (including Norway and the UK)[883] otherwise have advanced female

[878] 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (n 173) 12–14.
[879] M Huse, 'Concluding Remarks to Part III' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing Ltd 2013) 95. See also, 'Improving the Gender Balance on British Boards- Women on Boards Review: Five Year Summary' (n 430) 20.
[880] M Teigen & AH Midtbøen, 'Knowledge about Gender Balance and Diversity' in M Teigen (ed), *Gender Balance on Company Boards* (Institute for Social Research Report 2015) 16–17.
[881] H Bjørkhaug & S Sørensen (n 385) chapter 6, 201.
[882] 'Gender Diversity in the Boardroom: Reach for the Top' (n 132) 13.
[883] Halrynjo, Teigen, & Nadim (n 401) 20. See also, Lord Davies (n 80) 16; and 'Gadhia Review' (n 154) 28.

education and labour participation.[884] Diversity in such close-knit constituents can only be aspirational, and aspirations can rarely be legislated upon. Instead, what is needed to diversify this constituent is a reform in the organisational cult[885] and value system that eventually evolves into a business norm.[886] Imposition of hard law would not help:

> *If you have hard law in an area then you are effectively supposing that the same model fits every company and of course even a hard law can have exceptions built into it. But if you use hard law and you put exceptions in, either the exceptions are so wide and discretionary as to negate the point of having the hard law or you have to be sufficiently detailed in your exemptions that you try to cover every particular case – which is equally difficult I think. Having seen it from the outside and now from the inside, I think the soft law actually works much better in this area. It is not like health and safety legislation. It is not like criminal law where something is obviously wrong and something is obviously right. It is a consensus as to this is the way we think things should be done but we are prepared to accept that for some companies it may be different and provided your explanation is adequate …*[887]

A compulsory quota is definitely not the way forward for executive positions,[888]which can be verified from practical examples where countries have not regulated at all or have at best suggested voluntary targets, while avoiding quotas, for female representation in such positions.

Overall, while quotas can help regulators to retain their grasp over what is not yet a business norm and therefore might need a strong external urge to trigger action, voluntary measures for executive positions will help preserve flexibility and autonomy for constituents which need it more. This is all the more relevant in view of the distinct candidature for the two, where that of the former is more broad-based and can match up with the demands created by a compulsory quota. Thus, seeking balance in the way

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[884] 'Patterns and Trends in UK Higher Education 2015' (Higher Education Statistics Agency 2015) 23. See also, 'Board representatives, by Gender, Age Groups, Level of Education, Size Groups and Economic Activity' (n 368); T Løyning (n 395) 38; and 'Improving the Gender Balance on British Boards – Women on Boards Review: Five Year Summary' (n 430) 22, 23.
[885] A Klettner (n 828) 737.
[886] M Teigen (n 328) 4.
[887] 'Flexible or Not? The Comply-Or-explain Principle in UK and German Corporate Governance' (Centre for Business Research, University of Cambridge, Working Paper No 407, June 2010) 11.
[888] A Rafiq, Member of Parliament (n 726) – H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 201. See also, C Seierstad & M Huse (n 333) chapter 2, 38.

that the formula for the optimum strategy suggests, the proposal further helps in uprooting the "one size" conundrum, which is perceived as inappropriate for boards or rather inconsistent with the entire domain of corporate governance – "an effective corporate governance model recognises that there is no one size fits all approach. A board should have the flexibility to assess corporate governance in light of its unique circumstances".[889]

II.7D Subject to the National Context

This chapter substantially lays down the broad periphery of what could define an optimum strategy, and what could set the ball rolling for an enduring movement of boardroom gender diversity, although this still has a long way to go. Having said this, and as a final note to this chapter, it is cautioned that proposals outlined above are not conclusive, but only suggestive in nature. Much of their accuracy and suitability depends upon the particular country context where one seeks to enforce them. One must not lose sight of the fact that the workability and success of the optimum strategy so derived would depend significantly upon how well placed and coherent it is within the national social and cultural conditions of the country where it is sought to be enforced. For instance, the mandatory 40% quota in Norway, or the voluntary targets in the United Kingdom, cannot be divorced from the social and cultural evolution of gender in both these jurisdictions.

In case of Norway, the quota was imposed within strong and deep-rooted egalitarian traditions, as outlined in detail in section II.2B(A) of this chapter. Originating from household and agrarian centric family units,[890] which held a central role in the Norwegian culture, women have been perceived as important stakeholders with roles considered indispensable, if not equal to men. Over time, this has contributed to formation of what is referred as "women's sub-culture",[891] with agencies like the Norwegian Association for the Rights of Women and the Association for Women's

[889] 'Submission on the Review of the 4th Edition of the Corporate Governance Principles and Recommendations' (Arnold Bloch Leibler, 26 July 2018) 2 <https://www.abl.com.au/MediaLibraries/ABL/ABL/Insights%20and%20News/Submissions/ABL-6751809-v7-ABL_SUBMISSION_TO_ASX_CORPORATE_GOVERNANCE_COUNCIL.PDF> accessed 3 August 2018.
[890] 'Women's Role in Cultural Life in Norway' (Norwegian National Commission for UNESCO 1989) 3.
[891] *Id* at 5.

Suffrage dating back to the nineteenth century.[892] While some historians found a set-back to this sub-culture with increase in industrialization, others account for more expanded opportunities instead, in terms of better education and outside-home responsibilities.[893] An analysis of Norway's employment participation reveals both of these views to be correct- following a glorious phase until 1890s, there was a sharp decline in women's workforce, and which continued until 1960s. With slogans "go back to the home" during the times of depression in 1930s, women (especially married ones) were required to forgo their employment favour of men.[894] Having said that, several policies focusing on women's education, rights, dignity and social justice were introduced in the later part of the twentieth century, and which reinstated the egalitarian waves of equality and gender fairness – to which Norwegian culture identifies. Some of these being- women suffrage, ban on sexist or gender discriminatory advertising; enabling single motherhood; decriminalization of abortion and State sponsorship for it; and provision for maternity leave, later followed by mandatory paternity leave (daddy's quota).[895] This explains why Norway is regarded as the best place to be a mother when ranked based on parameters such as maternity welfare and support, childcare provision, and gender equality.[896]

Broadly speaking, with all of the above progressive support mechanisms, and with a labour force participation share of more than 70%,[897] coupled with education levels of 99% female literacy,[898] Norway could offer the talent pool and resources needed for compliance with the quota. If such enabling societal and cultural conditions were absent, the quota could not have been sustained, much lesser complied with. While Norway still has to cope with some of the systemic challenges like gender segregation of roles, part-time workforce, wage gaps, and the persisting dual responsibility ("work-home") conflict ascribed to women, it undoubtedly reveals substantially gender progressive societal and cultural trends, with substantial dependency on affirmative

[892] 'The changing face of motherhood in Western Europe: Norway' (The Social Issues Research Centre 2012).
[893] 'Women's Role in Cultural Life in Norway' (n 890) 8.
[894] *Ibid.*
[895] 'The changing face of motherhood in Western Europe: Norway' (n 892).
[896] *Ibid.*
[897] 'Global Gender Gap Report' (n 134) 262.
[898] *Ibid*

actions in favour of women. All of these, in addition to the Norwegian State control and its significant stake-holding in the corporate sector,[899] offer an apt national context for the stringent 40% quota backed by severe sanctions to operate.

A likewise peripheral glimpse into the UK reveals a very staunch patriarchy coinciding with the capitalist effects of the industrial revolution. As production shifted from homes to factories, and families became the consumption units, women came to occupy domestic and unpaid roles while men earned outside homes. As work and home became separated spaces, the men's horizon expanded and that of women became more curtailed. The impact was more on the middle class women,[900] who were then found to assume part-time religious and charity responsibilities outside homes.[901] Prostitution, education, slavery, economic dependence and participation in any trade unions, rights in relation to ownership and inheritance of property, work hours in factories, choice of abortion, custody of children, suffrage and participation in the electorate, amongst others, were significantly restricted for women to start with. The patriarchal norms were so strong that dissemination of birth control information for family planning was banned strictly under law, and Annie Besant was subject to trial for selling pamphlets having such contents.[902] It was not until 1860s or even later (with the first organized feminist movement at Langham Place) that some considerable social movement in these aspects took momentum.[903]

Having said that, the country has a long-drawn and quite consistent history of progressive social and cultural reforms from as early as the nineteenth century. The first kind of successes were made in the form of repeal of the Contagious Diseases Act (requiring female prostitutes to undergo compulsory medical examination and treatment for ensuring safety to men) in 1886; and attaining female suffrage in 1928. Some of the other significant examples that followed were, custody of infants given to mothers, increased grounds for divorce (in addition to adultery), abolition of marriage bars in employment, allowing birth control medication and abortion, removal of

[899] As discussed in section II.6A(A) above, in this chapter II.
[900] O Banks (n 264) 5.
[901] *Id* at 15.
[902] F Janssen, 'Talking about Birth Control in 1877: Gender, Class, and Ideology in the Knowlton Trial' (2017) 1 Open Cultural Studies 281- 290, 282.
[903] O Banks (n 264) 38-42.

disqualifications from public function based on sex, criminalizing of forced marriage, widows' pensions, equal pay legislation, women made eligible to apply for all roles in the British military forces, and more recently, a ban on advertising depicting gender stereotypes. Paternity leave first introduced in 2003, however, comes with several caveats as regards earning thresholds to be eligible to avail such leave, and its duration normally capped at two weeks. Hence, it is yet not comparable to Norway's liberal daddy's quota.

Nonetheless, the progression as sketched above, along with the female share in labour force participation above 70% and literacy rate of 99%, offer adequate motivation alongside the social and cultural enablers for the country to attain the standards set out by its soft targets. In the 1980s, nearly half (43% in 1984 and 48% in 1987) of UK respondents to an annual national survey supported gender segregation of roles; which has gradually declined to 8% over the past three decades.[904] For UK, it has clearly been a gradual process, rather than one-off or sudden revolutionary reforms.

Lastly, these reforms must also be seen amidst the country's overall long-standing neo-liberal and market supportive philosophy, which relies on formalistic notion of equality and resists too much of State-intervening or absolute affirmative (positive discrimination) measures, as discussed in section II.3B(B) of this chapter. The soft policy approach adopted and the voluntary targets set for female directorships rather fall in line with UK's long-standing ideology of individualism and free market autonomy.

The above indicates how the social and cultural precincts of a country might have a bearing on, and so must be consistent with, the implementation of a policy approach/strategy. Therefore, a choice of optimum policy approach or strategy prior to being implemented must be followed up with an extensive social and cultural assessment verifying its conduciveness specific and unique to each country. Not directly within the scope of this thesis which rather focuses on the corporate governance perspective, such social and cultural reviews can nonetheless be a potential subject for future research.

[904] Phillips, Curtice, Phillips, & Perry, 'British Social Attitudes: 35' (The National Centre for Social Research 2018) 1.

II.8 *Conclusion*

With a concept of boardroom gender diversity standing on the dual case of social justice and business rationales (assumed in chapter I), this chapter explores how countries strategise their regulatory framework in this regard. To understand that, this chapter engages in jurisdictional reviews of Norway, the UK, and the pan-EU level, i.e., first, what are the legal strategies that these countries/territories have adopted, and *second*, how they arrived at such strategies.[905] These jurisdictional reviews reveal that, although choice of rationales may not have much role to play in justifying the case for boardroom gender diversity, it has a significant practical relevance in determining the choice of policy approaches and strategising regulations at the country levels. For instance, Norway's adoption of the hard law approach through a strict mandatory 40% quota backed by severest forms of sanctions could be attributed to the predominance of the social justice rationale of the country, involving strong advocacy for gender equality and representative rights founded on affirmative actions. Likewise, but in contrast to Norway, the voluntary industry-led targets in the UK could be linked to the country's inspirations (emphasising on wider expanse of talent pool and resources, and improved skill-sets, independence and governance) drawn from the business rationale. The EU's "procedural quota" (softer than Norway's binding quota, but more formal than voluntary targets) can thus be explained through its mixed rationale that relies on both, social justice and business.

While undertaking the jurisdictional reviews, the chapter takes note of the range or variance within which such strategies lie, i.e., between the two polarised and extreme policy approaches of hard law and soft law.[906] In this regard, the chapter compares the two to understand the suitability, and pros and cons of each, with instances of international law, financial regulation (more specifically, in the post-crisis period), and corporate governance. The analysis finds that, hard law, which necessitates State intervention and works on deterrence of sanctions, has certain advantages in terms of faster results, precise and detailed obligations, and creating the momentum for compliance. However, owing to its over-emphasis on compliance, it often overlooks

[905] See sections II.2, II.3, and II.4 in this chapter II above.
[906] See section II.6 in this chapter II above.

the absence of systemic changes or behavioural reforms in the substance of the issue (diversity in this case), and thus may lead to institutional complacency. Also, its dependency on the appropriate political and State enforcement set-up, lack of flexibility to adapt to evolving situations, and its inability to access more innate or intrinsic concerns (like executive directorship) make it not the best option for boardroom gender diversity. Turning to soft law, this too has its own plus points and riders. For instance, in view of its flexible nature and easy adaptability, reduced costs of compliance, and ability to influence behavioural or foundational reforms, this is popularly used for international regulation and corporate governance matters. Rather, it appears to be more preferred for board room gender diversity too, given that the latter is still evolving as a business norm, and involves behavioural aspects within the boardroom- most of which is not even visible to the external regulators. Moreover, this approach can be used to access the concerns of executive directorship and tokenism. Having said that, soft laws are difficult to measure and audit, and a sole reliance on it may not stir the momentum in the industry unless backed by a regulatory pressure. The two approaches are also assessed in light of their effects found specifically in Norway and the UK.

Having completed a comparison of the rationales and policy approaches at country levels,[907] this chapter then draws upon these linkages to propound a theory expressing in more general terms as regards the law-making and strategising of regulations for boardroom gender diversity. Illustrated in figure 7, the theory states that where the predominance is of social justice objectives, which are of more compelling nature, the policy approach adopted would be hard law involving mandatory and State-enforced measures like binding quotas. On similar lines, where a country is inspired by the business rationale, State intervention would reduce, and more reliance would be placed on soft law measures, like voluntary targets, disclosures, codes of conduct, memorandum of understandings (MoUs), and other industry led steps.

This chapter further uses this theory above, to establish how an optimum strategy may be formulated in this regard. In doing so, it visits the seminal Hart-Devlin debate, which (although in an unrelated domain of criminal law) offers a valuable discussion

[907] See sections II.5 and II.6 in this chapter II above.

as regards to what extent should people's behaviour and conduct be regulated, and when such regulation must draw a line such that it does not intervene into the private choices, life and liberty of individuals. Hence, seeking a trade-off or balance between the compelling concerns of social justice but without transgressing into the private space of corporations, this chapter finds that an optimum policy approach and strategy for boardroom gender diversity would be one that lies midway between the two- hard law and soft law, or mandatory and voluntary measures, as illustrated in figure 8. This is supported by comparison of the policy approaches, which finds that neither of the two if adopted on a standalone basis can suffice, or achieve the desired results for the dynamic and evolving aspects of boardroom gender diversity. This is also reinforced by the dual case concept (combination of both social justice and business rationales) of such diversity.

Finally, this chapter offers a couple of proposals[908] for what could be such potential optimum strategies. One being, the comply-or-explain mechanism commonly found in corporate governance codes across the globe. The other, and for the first time suggested as one of the original contributions of this thesis, would be a mix of mandatory and voluntary strategies together, distinctly strategized and implemented for the two constituents of a boardroom- non-executive and executive directors. To elaborate, this chapter proposes a mandatory and binding quota for the non-executive constituent, given the nature of such directorships which are more supervisory and representative in nature. In contrast to this, the proposal for executives must leave leeway for flexibility to adapt to strategic needs and business judgment, as such appointments are more individualistic and function-oriented. Hence, voluntary targets or similar soft law measures are recommended.

This chapter however concludes with a final note of caution[909] that all of the above – the general theory for strategising of regulations for boardroom gender diversity, the formulae to derive an optimum strategy, and the proposals for what could be such an optimum strategy, are all advanced at a broad-level. Prior to adopting or implementing these, one must not lose sight of, and must necessarily modify or adapt to, the specific

[908] See section II.7C in this chapter II above.
[909] See section II.8 in this chapter II above.

national contexts and conditions within which they are sought to be enforced. For instance, Norway's binding quota backed with severest sanctions finds support from its national context, i.e., the strong egalitarian social and cultural ethos of the country, State control and intervention as a major stakeholder in the corporate sector, and its historic reliance on affirmative actions in favour of women. Likewise, UK's voluntary targets could be sustained due to the country's conventional neo-liberal ideologies, which have consistently sought to protect business autonomy and freedom with minimal State interventions, the principle-based governance system, and its overall opposition to positive discrimination measures.

Given the findings from this chapter, the thesis next moves to its core, i.e., the national context of India, its legal strategy and the correlation of such strategy with the country's underlying rationale, and its outcomes, in chapter III.

CHAPTER III – UNRAVELLING THE INDIAN STORY

III.1 *Overview of the chapter*

What is deduced and proposed on a broad peripheral level in the previous chapter II, i.e., the correlation between the choice of policy approach and legal strategy adopted by a country with its rationale; the general theory to strategise regulations in this regard; and the way to derive an optimum strategy (with couple of proposals as regards what can be an optimum strategy), would be verified in this chapter and the following chapter IV with respect to the specific needs of the national context in India.

Not too long ago, India had imposed a mandatory quota for female directorship in 2013, with a deadline for compliance by companies in 2015. Notably, within three years, the law has been reformed to substitute what was originally enacted as a "one woman director" quota with a "one independent woman" quota. This chapter examines the legal strategy in detail, followed by an appraisal of the underlying rationale. It is reiterated here (as mentioned in the introduction chapter of this thesis) that, the resources in this regard are limited. There was no elaborate discussion or legislative deliberation on the quota, which could explain the strategy or its rationale in clear unequivocal terms. Moreover, as "diversity" is at its nascence and is still evolving, academic literature on this topic is also quite restricted at present in India.[910] Hence, the thesis had to rely on inferences drawn from indirect sources, including India's experiences of political quotas, to understand whether the introduction of the female directorship requirement was designed to secure gender equality (social justice), or aimed for functional advantages (business rationale).

The chapter examines in detail, *inter alia*, the Companies Act of 2013, read with the Companies (Appointment and Qualification of Directors) Rules 2014, which introduced the "one woman director" quota for certain notified companies (including all publicly listed companies); the brief references found in the pre-legislative deliberations of the standing committees in 2009 and 2011; concept paper on an overall approach to the revamp of company law in 2003; a consultative paper on corporate

[910] S Ghosh (n 204) 110.

governance circulated in 2013; notifications, circulars, guidance notes, and press releases issued by the Securities and Exchange Board of India from time to time; and finally, the substitution of the "one woman director" with "one independent woman director" in the Listing Regulations of 2015 with renewed timelines for compliance, as notified in 2018.

The review of the strategy, in light of all of the above, indicate that, although the "one woman director" quota is a hard law strategy resembling that of Norway, its structure, enforcement and the rationale are substantially different. While limiting the requirement to only "one" woman regardless of the board size, with no clarifications as regards the sanctions that would apply in case of non-compliance, and a mixed rationale founded on both- social justice and business reasons, it seems that India has rather borrowed the strategy from its legacy of political quotas. Quite naturally, as it appears to be ill-founded or misplaced in the corporate context, and more so in relation to its rationale, the outcomes of the quota have not been much encouraging.

The chapter investigates these outcomes through a comprehensive, in-depth and purposive analysis of data pertaining to boards of 100 large and medium (Nifty 50 and Nifty mid-cap 50) companies in India. Not emphasising on only the largest or most top-notch companies as is normally found in few existing reviews, which often tend to offer inflated or deceptive impressions, this chapter instead engages in an extensive review of both, such top and middle segment companies. Moreover, as these companies constitute two standard and frequently used indices for measuring stock performances and market movements, the probability of any biases in the selection of such companies stands further mitigated (if not fully eliminated).

The statistics created by the author, analysis of the data, and deductively reached outcomes, reveal that the quota is far from being reckoned as an optimum strategy for India. Not only the overall industry compliances are low, other aspects of female participation in terms of their presence in executive roles, board committees, and chair positions, are weak too. Moreover, demographic attributes of the existing female directors, their connectivity to other board members, and boiler-plate diversity policies (if at all they exist) of such companies, reinstate that diversity in real sense (not just a

"tick-the-box" compliance) remains far-fetched. Hence, the question arises, *what has gone wrong, and where?*

Thus, this chapter sets the field for or establishes the need to revisit India's strategy five years since its enactment, critically analyse and identify where it falls short of the general theory of strategising or an optimum strategy (as derived in chapter II), and expound a future roadmap specific to the country's needs and context- all of which is addressed in the next and final chapter IV.

III.2 *Strategy*

The Indian corporate law regime underwent a major overhaul in 2013, when a new company legislation, the Companies Act 2013 ("Act of 2013"), replaced the enactment dating back to 1956 which had been subject to alterations as many as 25 times in its lifetime.[911] What triggered such a major revamp of corporate regulation was a need to consolidate the law into a more concise and organised legislation for the sake of brevity and practical usage, enabling the evolving needs of the competitive and dynamic business environment to be addressed.[912] This new Act of 2013, for the first time ever, conceived the idea of boardroom gender diversity in India, five years after Norway had already attained its targeted compliance figure of 40%.

Chapter XI, section 149, of the Companies Act 2013 ("Act of 2013"), while prescribing the necessary requirements as regards board composition, spells out a mandatory quota of "one woman" director for certain categories of companies,[913] later specified in the Companies (Appointment and Qualification of Directors) Rules 2014, notified by the Ministry of Corporate Affairs ("MCA"). These comprise, (a) listed companies, and (b) public companies with paid-up share capital of INR 100 crore (one billion) or more, or turnover of INR 300 crore (three billion) or more.[914]

A timeframe of six months was set to comply with the "one woman director" quota for companies incorporated and registered under the Act of 2013,[915] while providing for

[911] 'Fifty-seventh Report- The Companies Bill 2011' (n 56) 6.
[912] 'Concept paper – Note on the Approach' (n 57).
[913] Section 149(1) Proviso 2 of the Act of 2013.
[914] Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014 (n 54).
[915] *Ibid.*

lengthier timelines for companies existing prior to this. Although six months was initially contemplated for existing companies too – i.e., by 1 October 2014[916] – this was later deferred to almost a year as the SEBI extended the end date for ensuring compliance to 31 March 2015.[917] The quota for "one woman" director thus became applicable as a full-fledged requirement from 1 April 2015.

This was re-instated as one of the listing requirements by India's securities market regulator, the SEBI, in its Listing Obligations and Disclosure Requirements Regulations 2015 ("Listing Regulations").[918] While the regulations did nothing further than mentioning the minimum mandatory quota of "one woman" director, mirroring the Act of 2013, more recently a proviso has been added requiring the top 500 and top 1000 listed entities by market capitalisation to have a minimum of one independent woman director by 1 April 2019, and 1 April 2020 respectively.[919] This is to implement what was suggested by an expert committee set up by the SEBI under the chairmanship of Uday Kotak (executive vice-chairman and managing director, Kotak Mahindra Bank) ("Kotak Committee"), while working upon broad-level corporate governance reforms (including, *inter alia*, board composition, audit, disclosure, transparency, and board evaluation).[920] Accordingly, within less than a year of the Kotak Committee's recommendations, the SEBI announced in its board meeting of 28 March 2018 that regulation 17 of the Listing Regulations ought to be altered to the effect that such woman directors must also be independent.[921] While it is not yet apparent whether, with a timeline of just one/two years, India's leading business houses (which are yet to fully comply with and adjust to the "one woman director" quota) are able to cope with the new requirement of the "one independent woman" quota, the reasons underlying such a speedy regulatory decision need to be understood. Family/personal connections of promoters[922] or owners made the headlines when the deadline for the

[916] 'Corporate Governance in listed entities - Amendments to Clauses 35B and 49 of the Equity Listing Agreement' (n 16).
[917] 'Corporate Governance in listed entities - Amendments to Clause 49 of the Equity Listing Agreement' (CIR/CFD/POLICY CELL/7/2014, SEBI, 15 September 2014).
[918] Regulation 17(1)(a) of the Listing Regulations.
[919] SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations 2018 (n 60).
[920] 'Report of the Kotak Committee on Corporate Governance' (n 59) 14.
[921] 'SEBI Board Meeting' (n 60) 2.
[922] Section 2(69) of the Act of 2013- "promoter" means a person (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or

"one woman director" quota was approaching back in 2015, and even after that.[923] Allegations followed that condemned some of the appointments made by companies from the family connections of promoters, as those being disguised as evasion of the mandatory quota.[924] It is to cure these discrepancies that allegedly infringed upon the spirit of the law that the SEBI decided upon further reform to the quota.

In addition, the Listing Regulations recognise boardroom diversity as an essential governance requirement. Accordingly, they require the nomination committee of a listed company to devise a diversity policy for its board,[925] while working on an overall broad principle of diversity of thoughts, experience, knowledge, perspective and gender as a key responsibility and function of the directors.[926]

In terms of enforcement, the task of monitoring compliance lies with the stock exchange on which companies are listed, which is then required to submit reports to the SEBI narrating compliance status and contraventions, if any.[927] In cases of non-compliance, the stock exchange has the power to impose sanctions[928] in a manner prescribed by the SEBI. Having said this, penalties are not triggered where a vacancy arises for a position of such a woman director, if it is re-instated at the next board meeting or within three months, whichever is later.[929] Considering that no more than 120 days' gap can lie between two board meetings,[930] it can be inferred that the duration of such a vacancy can be stretched up to, but not more than, four months in any event.

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otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

[923] 'SEBI order on women directors: few comply in letter and spirit' (BusinessLine, The Hindu, 3 April 2015) < https://www.thehindubusinessline.com/companies/sebi-order-on-women-directors-few-comply-in-letter-and-spirit/article7065671.ece> accessed 12 May 2016.

[924] N Bhalla, 'Indian firms mock gender diversity as boardroom deadline passes – analysts' (Reuters, 1 April 2015) < https://in reuters.com/article/india-women-directors/indian-firms-mock-gender-diversity-as-boardroom-deadline-passes-analysts-idINKBN0MS4G120150401> accessed 12 May 2016.

[925] Schedule II Part D A(3) of the Listing Regulations.

[926] Regulation 4(2)(f)(ii)(5) of the Listing Regulations.

[927] Regulation 97 of the Listing Regulations.

[928] Regulation 98 of the Listing Regulations.

[929] Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014 (n 910).

[930] Section 173 of the Act of 2013.

There is, however, significant turbulence as regards clarity on the nature of such sanctions. The SEBI has prescribed a definite structure for levy of fines in a circular of 2015.[931] Comprising predominantly monetary penalties, the sanction is intrinsically compounding in nature – i.e., it rises with increases in the duration of non-compliance, as demonstrated here:

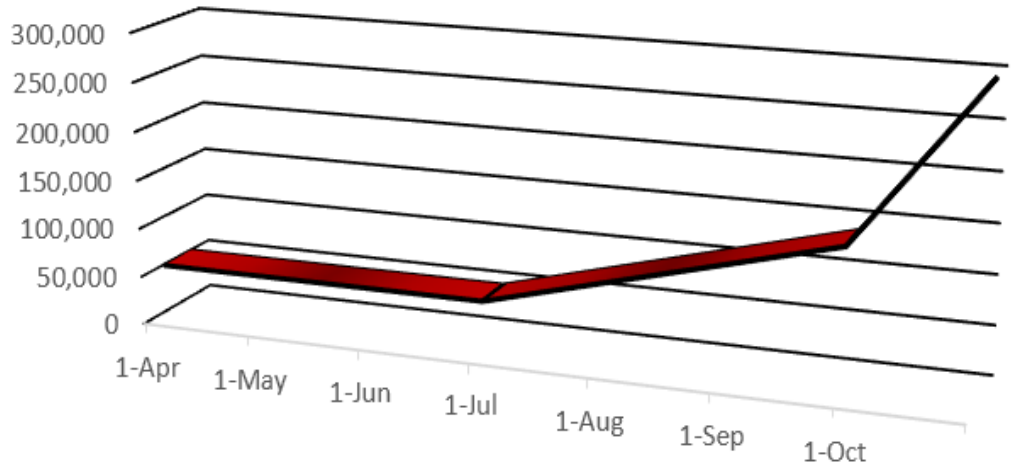

Figure 9: Structure of Fines for Non-compliance – India

To explain, for any contravention between 1 April and 30 June 2015, the fine was fixed at a lump sum amount of INR 50,000 – the minimum threshold. For any non-compliance that occurred after or was not rectified by 30 June, an additional sum of INR1,000 was imposed for each continuing day of contravention until 30 September 2015 (aggregating to INR 142,000 for the entire period), following which the sum of INR 1,000 was replaced with a higher amount of INR 5,000 for each day until compliance took place.[932] As regards the maximum limit, considering that the quota was prescribed by the SEBI as part of its revised clause 49 of the listing agreement, these fines (akin to penalties for any contravention of the listing conditions) could potentially extend up to INR 25 crores (250 million).[933]

[931] 'Fine structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement' (n 58).
[932] *Ibid.*
[933] Section 23(2) of the Securities Contracts (Regulation) Act of 1956.

The structure set out here was the apparent settled position as regards fines/penalties for non-compliance with the quota until September 2015, when the Listing Regulations were notified and came into effect. The Listing Regulations rescinded almost all of the previous SEBI notifications pertaining to listing conditions,[934] including that of 2015 levying the fine structure for not complying with the quota,[935] and now appears to be the main regulation determining fines/penalties linked to all listing and governance contraventions. The variations of such liabilities are open-ended, ranging from imposition of fines, suspension of trading and freezing of securities held to any other action considered by the SEBI as appropriate from time to time.[936] In looking for a harmonised interpretation, it may therefore be said that such fines could escalate up to a peak of INR 25 crores (250 million), stated in section 23(2) of the Securities Contracts (Regulation) Act of 1956, which has not been repealed as yet.

What further adds to these uncertainties is section 172 of the Act of 2013, which establishes a range for such fines between a minimum of INR 50,000 and INR 500,000. While the lower base adheres to the threshold notified (now rescinded) by the SEBI in 2015, the upper limit falls short of the conflicting INR 250 million benchmark. Thus, needless to state, much incongruence exists in relation to enforcement of the "one woman director" quota, particularly in respect of its sanctions, which is rather salient of such state-driven measures premised on a hard law approach.

The journey to the "one woman director" quota in India can be drawn substantially, if not exactly, from the narrative of the Act of 2013. Traces can be found in proposed amendments in 2003 to the then Companies Act of 1956,[937] seeking "such number of women directors, as may be prescribed". Notably, this did not restrict the number to "one". However, this was never enacted, and was not recovered before 2011. Female directorship did not find much emphasis in the interim, as it was not included in initial proposals for new company law, which commenced in 2004 with a concept paper proposed by the MCA.[938] Seeking to re-write the existing provisions of the erstwhile

[934] Regulation 103 of the Listing Regulations.
[935] Schedule X of the Listing Regulations.
[936] Regulation 98 of the Listing Regulations. See also, 'SEBI Board Meeting' (n 60) 6.
[937] Clause 118 of the Companies (Amendment) Bill, 2003' Bill No XXXVIII of 2003.
[938] 'Concept paper – Note on the Approach' (n 57).

Companies Act of 1956 (while enabling more compactness and easy and unambiguous interpretation, and eliminating redundancy), this paper provided a broad overview of what model re-codified company legislation for India would look like. This model law was then subject to expert review by the JJ Irani Committee in 2004, based on the report based on which the Companies Bill 2008 was introduced in October 2008. However, as a result of the dissolution of the 14th Lok Sabha (lower house of the Indian parliament), the bill lapsed, only to be re-introduced the following year without any changes as the Companies Bill 2009. With suggestions for multiple amendments from the Parliamentary Standing Committee on Finance, this bill was later withdrawn and replaced by a fresh proposal encompassing all of the recommendations received during the consultation process – the Companies Bill 2011 ("2011 Bill"). Preceded by an announcement by the then minister for corporate affairs, Murli Deora, on Women's Day 2011, introduction of a quota for one woman director in every company with a board comprising five or more directors[939] in this 2011 Bill represented the first-ever connotation of boardroom gender diversity in the Indian context, but in a slightly modified form of a "one woman director" quota regardless of board size. Despite reservations voiced by the industry,[940] the MCA expressed its concerns otherwise, and the quota was retained in the final legislation enacted – the Act of 2013. On a parallel note, the SEBI has sought to align its regulations for listed companies adhering to the Act of 2013, and, accordingly, notified amendments to clause 49 (dealing with governance) of the listing agreement.[941] Such amendments, *inter alia*, provided for gender diversity as an over-arching principle[942] alongside re-instating the "one woman director" quota[943] to be complied with by 1 October 2014, later deferred until 31 March 2015.[944] These amendments were later subsumed in the Listing Regulations, which rescinded all previous notifications[945] and later added a further qualification of

[939] 'PLANNED PROVISION - Woman Director on Every Board with Five or more Directors' (Mint, 9 March 2011) < http://www.prsindia.org/media/articles-citing-prs/planned-provision-woman-director-on-every-board-with-five-or-more-directors-1567/> accessed 8 August 2016.
[940] 'Fifty-seventh Report- The Companies Bill 2011' (n 56) 89.
[941] 'Corporate Governance in listed entities - Amendments to Clauses 35B and 49 of the Equity Listing Agreement' (n 16).
[942] Sub-clause I-D(2e) of Clause 49.
[943] Sub-clause IIA of Clause 49.
[944] 'Corporate Governance in listed entities - Amendments to Clause 49 of the Equity Listing Agreement' (n 917).
[945] Regulation 103, read with Schedule X of the Listing Regulations.

"independence" to be met by newer timelines in 2019/2020. This, in essence, means that, while all notified companies must have "one woman" director regardless of their independent status at all (including present) times, such directors, or one another director, must be "one independent woman" for the top 500 and top 1000 listed companies from April 2019 or 2020 respectively.

III.3 *Underlying Rationale*

III.3A Social Justice as an idea in Democracy

> *There is no chance for the welfare of the world unless the condition of woman is improved. It is not possible for a bird to fly on only one wing. There is no hope for that family or country where there is no estimation of women, where they live in sadness. For this reason, they have to be raised first.*
>
> – Swamy Vivekanada
>
> *I measure the progress of a community by the degree of progress which women have achieved.*
>
> - Ambedkar
>
> *You can tell the condition of a nation by looking at the status of its women.*
>
> - Nehru

These quotes from the forefathers who steered India's long struggle for independence from foreign rulers and colonisation and shaped India as a nation highlight that gender equality has always remained an issue close to the country's heart.[946] The long duration for which gender has recurred and been sustained as a policy concern for India (since before its birth as a free nation) clearly demands applause, as it could have easily been lost in the face of the rigid but diverse compartmentalisation in Indian society, with historical divisions based on caste, class, region, language and culture. While

[946] S Sen, 'Toward a Feminist Politics? The Indian Women's Movement in Historical Perspective' (Policy Research report on Gender and Development, Working Paper Series No 9, The World Bank, April 2000) 1.

some traces of gender equality movements can be traced to ancient Vedic times,[947] more concrete evidence is found from the times of British rule over India, when the debate on quotas arguably began,[948] since evolving into a fully fledged national instrument.

It all began with the advent of what is popularly termed the "new woman",[949] and the conglomeration of several local and provincial women's organisations under the more formalised institutions of the Women's India Association, the National Council of Women in India and the All India Women's Conference, aiming to initiate the movement for women's right to vote in 1917. This movement, led by Sarojini Naidu, Annie Besant, Saraladevi Chaudhurani and Margaret Cousins, was supported by assertions of rationality, scientific and political soundness and consistency with traditions and human rights.[950] However, when the Montague reforms were published, via the 1919 Government of India Act, women were completely excluded. The Southborough Committee defended this exclusion, stating that the demand for women's franchise in India was elite and limited, confined to a niche group of educated women, not women in general. It further cited the overall secondary status of women in Indian society, overwhelming levels of illiteracy and backward-looking traditions such as the purdah system, justifying their exclusion.[951] Thus, with the issue left as a domestic concern to be handled at provincial level, women in only nine provinces were granted enfranchisement based on their age and ownership of property qualifications.

Subsequently, a Reforms Enquiry (Muddiman) Committee was set up in 1924, which went further to examine women's presence in the legislatures, resulting in women's entry being enabled to the Madras State Provincial legislature in 1927. This was followed by the hearing of a small fraction of women activists before the Simon Commission in 1928 (as the major women organisations had joined the nationalist

[947] TS Sawant, 'Place of the Women in Indian Society: A Brief Review' (2016) 21(9) IOSR Journal of Humanities and Social Science 21-25, 23.
[948] S Parween, 'Gender Quota: Travails of the Women Reservation Bill in India' (2014) 19(3) Journal of Humanities and Social Science 98-103, 98.
[949] ME John, 'Alternate Modernities? Reservations and Women's Movement in 20th century India' (2000) 35(43) Economic and Political Weekly 3822-3829, 3823.
[950] A Roy, *Gendered Citizenship: Historical and Conceptual Explorations* (Orient Blackswan 2005) 131.
[951] *Id* at 133.

boycott of the commission), reiterating the demand for adult franchise, as well as a certain quota of seats for women in the legislatures. The commission, while denying immediate and absolute adult franchise, instead proposed 20% voting rights, and an increased proportion of female voters as part of the electorate – all of which were refused by the women activists to support the nationalist movement over and above their gender commitments. This was particularly so as the women's organisations, not yet politically formalised to voice their demands on a stand-alone basis, were sheltered beneath the conundrums of the Indian National Congress ("INC") – the first organised nationalist movement, formed in 1885 (later transitioning into a major political party of contemporary India). Nonetheless, while the initial phase of the struggle focused on female enfranchisement, the right to vote and political participation, the movement progressed to more advanced motives of representation in political leadership in the later years of the 1920s.

In 1931, founded on a rationale of "equality with no privileges" and demands for "a fair field with no favour", the three women's organisations drafted a memorandum seeking and supporting the universal adult franchise (in line with the INC), but without any demands for preferential treatment for women. Reflecting upon the formal notion of equality, but not compromising on the demand for equal political status for women, Sarojini Naidu stated:

> *We are not weak, timid, meek women… We possess the spirit of creative energy to legislate for the morale of the world... The demand for granting preferential treatment to women is an admission on her part of her inferiority and there has been no need for such a thing in India as the women have always been by the side of men in Council and in the fields of battle. We must have no mutual conflict in our homes or abroad. We must transcend differences. We must rise above nationalism, above religion, above sex.*[952]

These words not only highlight the preliminary conceptions of gender equality and feminist thoughts in India, but also the ideals with which the initial foundation of India's Constitution was negotiated. Having said this, many stumbling blocks were yet

[952] K Sharma, 'Power and Representation: Reservation for Women in India' (2000) 6(1) Asian Journal of Women's Studies 47-87, 57.

to be conquered before enfranchisement of women could see the light of the day. Owing to the complex nuances involved, the Indian Franchise Committee (Lothian Committee) was constituted in 1931,[953] which expanded the boundaries of age and property to broader sections of women so as to include wives and widows of propertied men or men with the right to vote, thereby affirming a case for a substantially increased number of women voters. The committee further suggested a quota of 2–5% for women in the provincial legislatures as a way forward, given the prejudices against women deeply embedded in the social structure of India. Negating such a quota as alleged "communalism against women" and furtherance of the British "divide and rule" strategy, the women's organisations continued with their demands for more Indians on the electoral rolls with minimal disqualifications and differentials premised on gender. The British government on the other hand denounced such demands as cumbersome and complicated. In the Government of India Act of 1935, a quota of 41 seats for women in the provincial legislatures was introduced, much against the wishes of the women activists (who were not in favour of any form of quota or co-option). The eligible age was also reduced to 21 years from 25 years, and the qualification of education was lowered to literacy, while retaining the caveat of ownership of property.[954] Although these provisions increased female visibility in the political arena, the quota was looked down upon with contempt by the women organisations as a divergence from their objective to entitle women to be citizens with equal rights and responsibilities within the new constitutional framework being worked out for India. The protest against quotas not only concerned gender but preferences in any form including against the British Communal Award of 1932 and the Government of India Act of 1935,[955] which familiarised India with the idea of quotas although in a different context of "depressed classes".[956] This was so as not to detract from the nationalist struggle on grounds of religion, caste and gender.

While the formal traits of the pre-independence gender equality movement are fondly remembered for not having succumbed to the anti-nationalist "divide and rule"

[953] A Roy (n 950) 140.
[954] *Id* at 145.
[955] S Parween (n 948) 98.
[956] V Raman, 'The Implementation of Quotas for Women: The Indian Experience' (International Institute for Democracy and Electoral Assistance, 25 September 2002) 2.

strategies of the British government, it is also argued that this movement ignored the hindsight offered by the gender constraints and systemic inequalities so deeply embedded within the social structure of India, which could only re-enforce such marginalisation.[957] This was soon established in the inferior numbers of female voters and their presence in political parties, candidate lists, nominations and representation in legislatures, the legacy of which continued in the first elections in independent India, in which only 43 women contested and 14 were elected to the Lok Sabha – lower house of parliament.[958]

What was so vehemently opposed to preserve nationalist sentiments soon emerged as the most influential (but highly debated) instrument for running the nation after India attained its independence in 1947. Quotas came to occupy the centre stage of India's policy-making,[959] finding strong advocacy in the founding words of Ambedkar – father of the Constitution of India ("COI"):

> *We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political*

[957] K Sharma (n 952) 61.
[958] *Ibid.*
[959] L Thwaites (n 470) 150.

> *democracy which is Assembly has to laboriously built up.*[960]

As a counter to the Supreme Court (apex court of India) striking down a quota for the lower castes in state-run colleges as discriminatory and unconstitutional,[961] the first amendment to the COI was undertaken as early as a year after its coming into effect. Over-ruling the decision, article 31B and the ninth schedule were added to the COI to pave the way for preferential treatment, specifically by way of quotas. Further amendments soon followed to enable special provisions for the advancement of any "backward classes of citizens" under articles 15(4), 16(4) and (4A), 330 and 331 in respect of admission to educational institutions, government/public sector jobs and promotions, and seats in legislatures at both federal and state level, subject to a maximum ceiling of 50%.[962] Although initially considered exceptions to the right to equality,[963] quotas came to be acknowledged as an extension of, and an effective way to attain and implement,[964] the fundamental right to equality, which is otherwise stated in more formalistic tones in articles 14, 15(1) and (2), and 16(1) and (2). Thus, quotas as illustrations of India's adoption and adherence to the substantive conception of equality found firm and unequivocal roots in the founding constitution of the country.

Having said this, the COI only paved the way by enabling quotas, with the decision as regards actual imposition, measure, duration and beneficiaries vested with the government, to be determined from time to time. Thus, a quota, although appearing as a top priority on the national agenda, was not fixed as such within the COI[965] (except in the context of representation in legislatures), which means that the fate of it remains at the mercy of state politics and power play.

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[960] 'Dr. Ambedkar's Last Speech in the Constituent Assembly on Adoption of the Constitution' (25 November 1949), 337 < http://shodhganga.inflibnet.ac.in/bitstream/10603/38799/15/15_appendix.pdf> accessed 10 December 2017.
[961] *State of Madras v Champakam Dorairajan*, AIR 1951 SC 226.
[962] *Balaji v State of Mysore*, AIR 1963 SC 649.
[963] *Ibid*.
[964] *Kerala v NM Thomas*, (1976) 2 SCC 310; and later reaffirmed in *ABSK Sangh v Union of India*, (1981) 1 SCC 246; and in *Indra Sawhney v Union of India*, 1992 Supp (3) SCC 217.
[965] K Sankaran, 'Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution' (2007) 23 South African Journal on Human Rights 277- 290, 281.

The era of the quota, which commenced as such, came to be referred to by a more localised term of "reservation",[966] meaning setting apart certain number of seats for a segment of society on a preferential basis, as against the society in general.[967] Also known as "set asides",[968] it is premised on the rationale of protective or compensatory discrimination, seeking to remedy ill effects of historic favouritism and social fragmentation.[969] While mandatory reservation on lines of caste in educational institutions and jobs, which triggered dramatic protests against the extent of self-immolation by students, found widespread public attention,[970] quotas for women were comparatively regarded as a more passive journey. Although "special provision for women" was enabled in article 15(3) of the COI, the subject almost disappeared from the state agenda until 1974 when the Committee on the Status of Women in India ("CSWI") helped it to re-surface. Constituted to examine the social, economic and political stance of women, the CSWI recommended the creation of women's councils at every village level elected directly by local women to administer women's welfare measures as part of the local governance structure. It further argued against marginalisation of women.[971]

However, while encouraging political parties to increase female candidates, it eventually took a stance against reservation for women in the federal and state legislatures – once again (similar to the pre-independence movement) reiterating that doing so would be a departure from the constitutional principle of equality and threaten national integration, and that women's interests cannot be isolated or distinguished as a separate community. Although the decision was a majority one, a few dissenting views advocating a quota cited difficulties to female entry into male-dominated fields, and the significance of their numerical representation in relation to promoting women's interests, and should not be overlooked.[972]

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[966] JLN Rao, 'Affirmative Action in India: Emerging Contours' (2008) 69(3) The Indian Journal of Political Science 483-492, 483.
[967] BC Rout, 'Divergent Perspectives and Differing Logics: The Case for Affirmative action in India' (2012) 76 The Educational Forum 90-104, 91.
[968] K Sankaran (n 965) 280.
[969] D Sabbagh, 'Identifying the Disadvantaged: The Indian Dilemma' in M Rosenfeld & A Sajó (eds), *Affirmative Action* (Oxford Handbooks Online, May 2012) 1131, 1133.
[970] A Kumar, 'Mandal Memories' (The Hindu, 29 September 2012).
[971] V Raman (n 956) 3.
[972] *Ibid*.

While the CSWI did not succeed in creating much stir in the subsequent regulations and policy-making that followed (except in a few states such as Karnataka, Kerala and Andhra Pradesh, where some reservation for women in village and district councils was undertaken), its recommendations were re-visited after almost a decade in the National Perspective Plan ("NPP") formulated in 1988. Owing to remarks by the New Delhi Document on Women in Development of 1985 – "despite the rapid growth of informal political activity by women, their role in the formal political structure had virtually remained unchanged"[973] – the NPP reviewed gender in India's politics. While initially suggesting reservation at all levels of governance from village to federal, it curtailed its ambitions with time. As part of its final recommendations, the NPP, which suggested 30% reservation for women in local government institutions at rural level (referred to as "panchayats"), went little farther than the CSWI had accomplished. This was followed by a national conference on panchayati raj and women in 1989 initiated by the then prime minister, Rajiv Gandhi, under whose realm women came to be viewed as a significant constituency. Keeping up with his announced commitments to reserve 30% seats in panchayati raj institutions for women, proposals for (64th and 65th Amendment) Bills were initiated in 1989, followed by the (72nd Amendment) Bill of 1991, to that effect. While all of these attempts at constitutional changes fell apart as a result of no majority votes, reservation took its final shape in the (73rd and 74th Amendment) Bills in 1992, with ratification by all states by 1993. This reform, introducing the first-ever formalised quota for women since independence, was hailed as a milestone and a historic achievement in India's polity and its journey to social justice.

Having marked the pathway to how the quota has evolved as an instrument of gender balance within India's social justice trajectory, a review of its current status might help at this stage.

[973] B Mohanty, 'Panchayati Raj, 73rd Constitutional Amendment and Women' (1995) 30(52) Economic and Political Weekly 3346-3350, 3347.

(A) Constitutional Protection

The preamble of the COI declares [974] social justice as one of the basic tenets on which the COI is founded. Accordingly, gender balance in all spheres becomes an indispensable attribute and objective of India's construction, the spirit of which is further advanced in the fundamental rights guaranteed to every person/citizen. More specifically, article 14 enshrines the right to equality, article 15(1) specifically prohibits discrimination based on, *inter alia*, sex, and article 16 enshrines equality of opportunity to all its citizens in relation to employment. Further, the scope of right to life and personal liberty under article 21 has been expansively read by the judiciary to include rights to human dignity, bodily integrity, education, health, environment, equal opportunities of livelihood and access to public resources, and against gender discrimination.[975] Given the sanctity of such fundamental rights, gender equality forms what is considered to be the basic structure – i.e., part of the COI – which cannot be abrogated, destroyed or even amended by the legislature.[976] Having said that, such rights can be exercised and enforced only against the state, and not private parties.

Conversely, duties of citizens list out renunciation of practices derogatory to the dignity of women as a specific obligation.[977] Next, directive principles of state policy,[978] which are fundamental to governance and law-making by the state, require citizens (men and women) to have equal rights to adequate means of livelihood,[979] equal pay for equal work,[980] equal protection against abuse of health and strength of workers,[981] and just and humane work conditions and maternity relief.[982] Although not enforceable in a court of law, such principles earmark directions for India's policy-making.

[974] Preamble to the COI.
[975] *Chairman, Railway Board v Chandrima Das*, AIR 2000 SC 988; and *Bodhisattiva Gautam v Subhra Chakraborty*, (1996) 1 SCC 490.
[976] *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.
[977] Article 51A(e) of the COI.
[978] Part IV of the COI.
[979] Article 39(a) of the COI.
[980] Article 39(d) of the COI.
[981] Article 39(e) of the COI.
[982] Article 42 of the COI.

In addition to these factors, which define the country's broad-level ideology and value system, the quota as a strategy ingeniously finds validation within the COI. In part IX, which establishes the three-tier self-governance institution in rural areas (village, intermediate and district), not less than one-third of the total seats at every level are reserved for women on a rotational basis across constituencies. This was introduced by the (73rd and 74th Amendment) Bills of 1992. Further, article 15(3) enables a quota for women in educational institutions and government jobs, often fixed at 30% by way of horizontal reservation – i.e., a set-aside that cuts across all categories of applicants, general or reserved.[983] In other words, reservation for women works on a cumulative basis, with women candidates across general or other caste categories together constituting the quota.[984] Women are therefore not allowed to apply for general category seats over and above the quota limit, as against vertical reservation, which applies to quotas for castes.[985] As a corollary, any seat so reserved but not fulfilled by women is then offered to general male candidates and is not carried over to subsequent years.

(B) Judiciary at Rescue

While the COI progressively enshrines gender equality, the onus to enforce it lies with the judiciary. For instance, in *Air India v Nergesh Meerza*,[986] the Supreme Court held Air India's rules, which mandated retirement of air hostesses on their first pregnancy, and defined the discretion of the managing director to determine the extension of their services beyond 35 years as arbitrary and violative of the constitutional right to equality under article 14 of the COI. While this ruling appears to be empathetic to women, one must be cognisant of the other facet of the judgment, which ruled in favour of a differential retirement age for air hostesses compared to the higher age for male flight pursers. The court did so on the grounds that such differentiation, not solely based on gender (but on the basis of cadre), did not amount to discrimination. Resonating with the formal approach to equality, this ruling raises concerns over the interpretation of the word "only", which is mentioned while prohibiting discrimination

[983] *Jitendra Kumar Singh v State Of Uttar Pradesh*, 2010 (3) SCC 119.
[984] *Rajesh Kumar Daria v Rajasthan Public Service Commission*, (2007) 8 SCC 785.
[985] *Dharmendra Kumar v Abhishek Kumar*, In re 5158 S/S 2015.
[986] AIR 1981 SC 1829.

based on sex under article 15(1). This is because discrimination, when it entails gender not as a sole basis but along with other conditions, may thus be upheld. Also, often discrimination not ostensibly based on sex may arise from social aspects which in turn result from gender inequality (indirect discrimination). Thus, although the COI (also judicially interpreted) stands on a substantive notion of equality, this ruling represents a a red alert as regards how a judiciary can at times displace the protection constitutionally accorded to women. Likewise, the provisions of the COI have often been cited to mete out disfavour to women, through denial of admission in educational courses,[987] right to work in certain armed forces, prisons,[988]mining, mechanical and night-shift services,[989]and other functions not considered appropriate for women/married women.[990]However, more recently, courts have ruled out many such discriminatory interpretations accorded to article 15(3) on the pretext of protecting women[991] as void and unconstitutional.[992]

This shift of judicial temperament can be inferred from the following two contrasting quotes worded 30 years apart:

> *We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity.*[993]

versus

> *When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st*

[987] *Anjali Roy v State Of West Bengal*, AIR 1952 Cal 822.
[988] *Baghu Ban Saudagar Singh v State of Punjab*, AIR 1972 P & H 117.
[989] K Sankaran (n 965) 283-284.
[990] *Bombay Labour Union v International Franchise*, AIR 1966 SC 942.
[991] *University of Madras v Shanta Bai*, AIR 1954 Mad 67.
[992] Section 66 of the Factories Act of 1948.
[993] *CB Muthamma v Union of India*, (1979) 4 SCC 260, para 7.

> *century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a multinational company. They are now widely accepted both in police as also army services.*[994]

While the first quote is an opinion given in the context of a ruling concerning discrimination between married men and married women in Indian foreign services, the latter quote deals with a prohibition of employment of women in bars or premises where liquor is consumed by the public.

The recent trend of cases thus appears to be more women friendly, as preferential treatment (more specifically, the quota)[995] is no longer looked down upon with contempt,[996] so much so that penal provisions that entitle the release of women on bail, but not men, have been upheld.[997] Special provisions for women, including reservation and those linked to their welfare (such as maternity relief and working conditions), find firm constitutional standing, so long as they are crafted to benefit women as a group.[998] Simultaneously, discriminatory practices ousting women on grounds of gender in conventionally male-dominated domains are increasingly acceding to judicial sanctions.[999]

(C) Legislative and Executive Safeguards

India provides a wide-ranging framework of enactments aiming at protection and welfare of women, many of which date back to times when the country was a British

[994] *Anuj Garg v Hotel Association of India*, (2008) 3 SCC 1, para 26.
[995] *KR Gopinath Nair v Senior Inspector cum Spl Sales Officer of Cooperative Societies*, AIR 1987 Ker 167.
[996] *Government of Andhra Pradesh v PB Vijayakumar*, (1995) 4 SCC 520; *Sagar v State of Andhra Pradesh*, AIR 1968 AP 165; *Dattatreya Moti Ram v State of Bombay*, AIR 1953 Bom 311.
[997] *Choki v State of Rajasthan*, AIR 1957 Raj 10.
[998] K Devi, *Women's Equality in India: A Myth or Reality?* (Discovery Publishing House 2000) 51-52.
[999] *Kush Kalra v Union Of India*, (WP(C)-10498/2015, decided on 5 January 2018).

colony. An illustrative, but not comprehensive, outline of such laws is sketched out below:

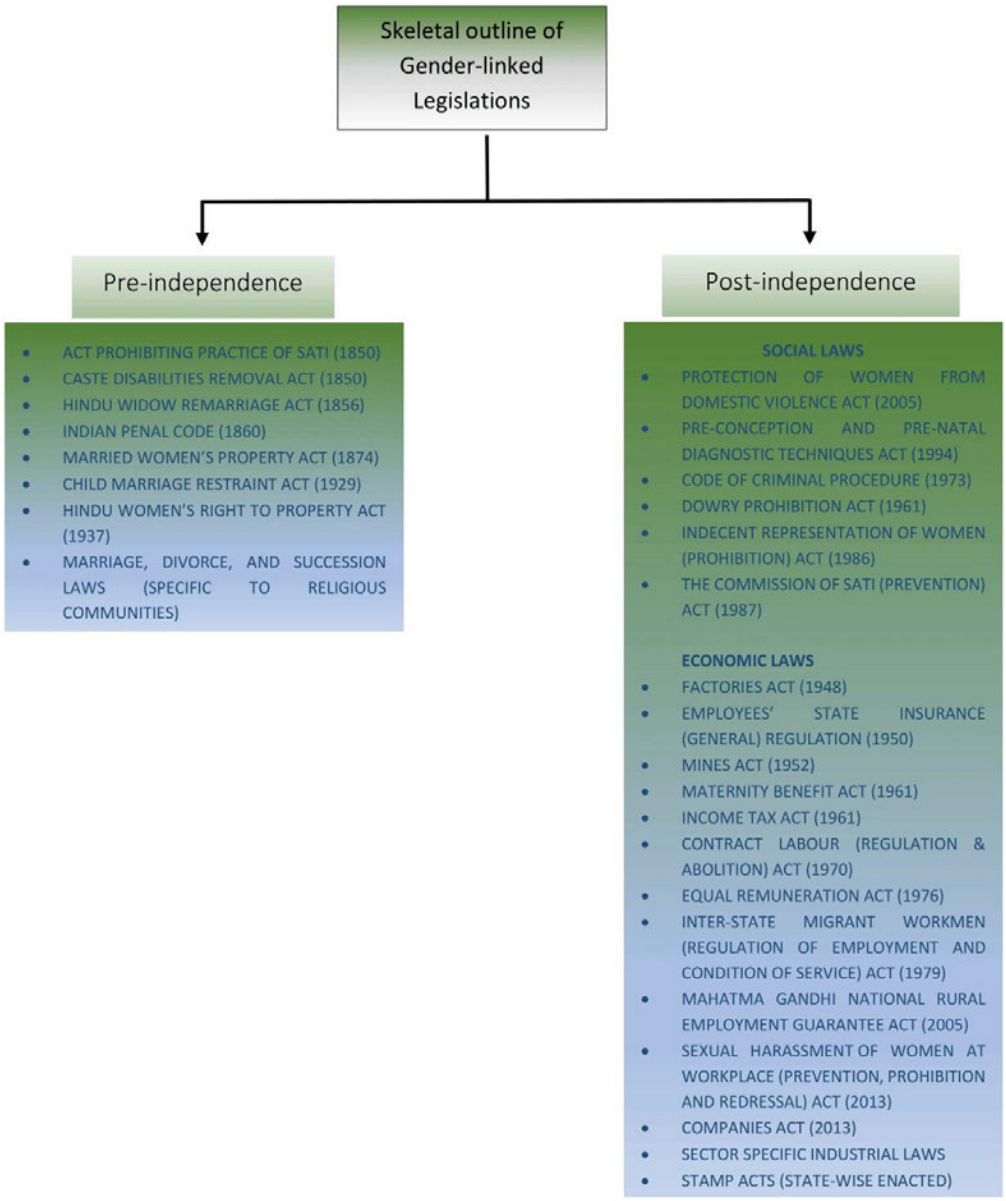

Figure 10: Skeletal Outline of Gender-linked Legislations – India

These laws are further supplemented by multiple executive schemes seeking welfare of women,[1000] such as "swayamsidha" (a flagship programme initiated in 2001 aiming to strengthen self-help groups working for women's upliftment, both social and economic); a "national crèche" (a scheme for children of working mothers);

[1000] 'Women Empowerment Schemes' (Ministry of Women and Child Development, Government of India) < http://www.wcd nic.in/schemes-listing/2405> accessed 10 October 2017.

"empowerment of adolescent girls" (a scheme for upgrading of health and skills of girls between the ages of 11 and 18 years); "support to training and employment programme for women" (to build skills to enable greater levels of employment and entrepreneurship among women); hostel and short-stay homes for women; "janani suraksha yojana" (for safe motherhood); "reproductive and child health programme" (to reduce infant, child and maternal mortality); "priyadarshini" (for improved livelihood opportunities for women and adolescent girls through self-help groups); "pradhan mantri matritva vandana yojana" (a government-run maternity benefit programme providing for cash transfer to pregnant and lactating mothers for their first live birth); "mother and child tracking system" (a database of records of pregnancies and births registered); "kishori shakti yojana" (seeking to attain holistic development of adolescent girls); "swadhar" (for rehabilitation of women in difficult circumstances); "ujjawala" (to prevent trafficking and provide for comprehensive rehabilitation of victims); "ahimsa messenger" (to combat violence); "women's helpline" (to rescue and support women who are victims of violence); "scheme for financial assistance and support services" to victims of rape;[1001] and the "beti bachao beti padhao" campaign, which continues and abides by the legacy (earlier, the "dhanalakshmi" scheme) of progressive attempts to protect and advance girl children, to outline a few.

From a socio-economic standpoint, "rashtriya mahila kosh" (enabling women's access to monetary credit) is perceived as a significant leap forward, followed by the "national mission for empowerment of women", which extends to all social, educational and economic frontiers through the combined efforts of federal and state-level governments. Similarly, others, such as the "mission poorna shakti" and "swayamsiddha phase II", work with a vision for holistic and sustainable advancement. More recently, the "pradhan mantri mudra yojana" was introduced in 2015 with a special focus upon women entrepreneurs. These, alongside newer initiatives such as those linked to digital literacy of women and household infrastructure, contribute to women's advancement.

[1001] *Delhi Domestic Working Women's Forum v Union of India*, (1995) 1 SCC 14, para 15: recognized compensation against financial loss of rape victims.

Of all such programmes that the government has designed and implemented to strengthen the campaign for gender equality, the draft National Policy for Women[1002] is the most recent scheme in the making. Seeking to replace the policy of 2001, this draft envisages mainstreaming and gender sensitisation as means to derive a conducive social, cultural, political, and economic gender-equitable environment. Marking only minor reforms when compared with the objectives listed in its 2001 predecessor, it nonetheless takes cognisance of some critical concerns such as surrogacy, recognising single women as a separate category, and redistribution of gender roles. While it is yet to be formally notified and given effect, much of its success depends, however, upon future inter-ministerial and sectoral collaborations.

Finally, marking an end to the institution of five-year developmental plans outlining the country's fiscal itinerary, the 12th plan (2012–2017)[1003] acknowledged the primacy of women as significant agents of national progress. It emphasised structural transformation not only of programmes directly addressing gender concerns, but also other more general laws that eventually impact women. One of its key highlights is its reinforced emphasis on and institutionalisation of gender budgeting and audit, and inclusion of gender outcomes as part of accountability across all ministries. Translating gender commitments into fiscal planning, it sought to allocate public resources in a gender-responsive manner at all levels. Overall, the plan addressing the historic social, economic and political exclusion of women sought to reinstate entitlement to dignity, self-worth and control over resources to women.[1004] Now that this has expired, it is to be seen how the government resumes and implements this nexus between gender and fiscal planning under the aegis of the current "national institution for transforming India" or "NITI Aayog"'s three-year action plan (2017–2020).[1005]

As regards enforcement of these laws and schemes, the Ministry for Women and Child Development, initially formed as a department of the Ministry of Human Resource Development in 1985 and later established as a stand-alone ministry in 2006, acts as

[1002] 'National Policy for Women 2016' (Ministry of Women and Child Development, Government of India, May 2016).
[1003] 'Twelfth Five Year Plan (2012–2017) Social Sectors' (Planning Commission, Government of India, 2013).
[1004] 'XII Five Year Plan Report of the Working Group on Women's Agency and Empowerment' (Ministry of Women and Child Development, Government of India (2012-2017)) 19.
[1005] 'Three Year Action Agenda' (NITI Aayog - Government of India, 1 August 2017).

the nodal agency vested with all powers and responsibilities of gender enforcement. It is supported by two major autonomous units – the National Commission for Women along with the state-level commissions, and the Central Social Welfare Board – in its efforts to converge, facilitate and co-ordinate all of the women-focused developmental schemes and programmes. On a parallel note, the National Mission Authority, National Mission Directorate and National Resource Centre for Women, along with their state counterparts, were established as points of convergence, co-ordination and mainstreaming across all ministries and departments.[1006] To penetrate further at grassroots panchayat levels, Poorna Shakti Kendras (one-stop centres) have been set up to extend all-encompassing services ranging from literacy, development of skills, health, nutrition, livelihood opportunities and protection from violence and abuse, to information sharing and maintenance of databases on gender-linked matters.

Recently, the anti-discrimination and equality bill of 2016[1007], which, for the first time, introduces the idea of a comprehensive legislation on this issue for India, extending to the private sector too, is yet to see the light of the day. While categorising women as a disadvantaged group, this proposal allows for affirmative measures in favour, and increases the ambit of remedies to include compensation, as well as prosecution. Further, it seeks to establish equality commissions at both centre and state level as enforcing agencies. How these merge within the existing set-up can be answered only once the proposal is finalised, enacted and implemented.

Based on a review of such a broad expanse of what defines India's regulatory commitment to gender equality, it is clear that women's advancement is an unshaken national agenda. Although it did not gain much attention in the immediate years after independence, it soon re-surfaced with vehemence in the later part of the 20th century. Since then, it continues to prevail, notwithstanding the erratic conflict of power and coalition politics over past three decades. Politics has, however, resulted in frequent shuffling and re-shuffling of laws and schemes (with withdrawals, mergers and or new legislation being introduced), despite no significant differences in objectives and

[1006] 'National Resource Centre for Women' (Press Information Bureau, Ministry of Women and Child Development, Government of India, 9 December 2013).
[1007] Bill No 289 of 2016 (introduced on 10 March 2017).

contents. This becomes clearer from the institutional set-up, which involves immense duplication and overlap, and which needs an urgent re-visit.

(D) Exception of Personal (Religion-based) Laws

Despite a strong constitutional basis, and some of the most progressive laws and programmes aiming at upward mobility of women, a major setback emanates from the personal laws which govern the diverse spread of religious communities co-existing in India. Considering that such personal laws enjoy privilege and immunity within India's constitutional paradigm,[1008] discrimination, intrinsically embedded, has escaped the range of sanctions otherwise arising from legal contraventions. Examples are manifold where courts have refrained from adjudging as unconstitutional, and have kept outside the purview of judicial review, religious practices despite these being discriminatory against women.[1009] Such practices include outright inequitable polygamy,[1010] denial of maintenance to wives upon divorce,[1011] and triple talaq (instant verbal divorce), although some state interventions have emerged more recently).[1012]

Such constitutional immunity, which handicaps courts in intervening into personal laws, has created a system of compartmentalised gender rights in India, where one compartment comprises progressive vision and outward-looking ideologies based on human rights, while the other is made up of myopic discriminatory customs based on divine proclamations. As a consequence, the rich mix of provisions that exist in the letter of law seldom translate into or match gender outcomes on a real basis. This is the reason why, despite progressive laws (including ones that criminalise abuse of women), gender symmetry in India is most often distorted.

(E) Act of 2013

As such, the "one woman director" quota does not find much significance or mention in the legislative debate, consultation or background literature that preceded the Act of

[1008] Articles 25, 26 and 29 of the COI.
[1009] *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84; *Krishna Singh v Mathura Ahir*, AIR 1980 SC 707; and *Madhu Kishwar v State of Bihar*, (1996) SCW 2178.
[1010] *Sarla Mudgal v Union of India*, AIR 1995 SC 1531.
[1011] *Mohd Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945.
[1012] *Shayara Bano v Union of India*, Writ Petition (C) No 118 of 2016, Judgment delivered on 22 August 2017.

2013. For instance, the statement of objects and reasons for the Act of 2013, and the notes on clauses of the 2011 Bill, mention no further than providing for the quota, without describing why and how it was devised. To understand how far gender equality was relevant for India in formulating the quota, a "hair splitting" scrutiny of direct and indirect references along with intensive deduction/inferences are therefore needed. Accordingly, the Standing Committee report on the 2011 Bill was referred to, from which it was realised that the quota was proposed "in line with the policy of the government for encouraging more and more women participation in decision making at various levels".[1013] These remarks were found to be compatible with the MCA's objective to make companies "more alive to giving salience to the female gender in the realm of corporate governance" and to "encourage women's participation in decision making at every level in the society".[1014] The social dimension became more explicit in the preliminary talks, as the then minister for corporate affairs, Deora, mentioned it as a step in line with political reservations to give women their rightful place in society.[1015] More recently, a corroboration of the theme of gender equality as an underlying reason for the quota was noted by the Kotak Committee, which announced it as a measure to cure under-representation of women or gender imbalance on the boards.[1016]

Such an intrusion of social objectives into the corporate domain is not new for India, which is one of the foremost countries to legislate on corporate social responsibility as a mandatory obligation.[1017] Companies with a net worth or net profit or turnover above a certain threshold are required to constitute a corporate social responsibility board, devise a policy and spend 2% of their average net profits over the preceding three years in accordance with it. Although not related to gender, this shows that social objectives have transcended into compelling legal obligations for companies in the past. All of these emanate from India's deep-rooted democracy,[1018] which "presupposes a genuine partnership between men and women in the conduct of the affairs of society in which they work in equality and complementarily, drawing mutual enrichment from their

[1013] 'Fifty-seventh Report- The Companies Bill 2011' (n 56) 15.
[1014] *Id* at 15, 89.
[1015] 'Planned Provision - Woman Director on Every Board with Five or More Directors' (n 939).
[1016] 'Report of the Kotak Committee on Corporate Governance' (n 59) 14.
[1017] Section 135 of the Act of 2013.
[1018] K Sharma (n 952) 69.

differences".[1019] Seeking equal access to and a share in social, political and economic participation, power and authority, female directorship is seen as one such extension of necessary and indispensable democratic ideals towards women's emancipation for attaining an inclusive society.[1020]

Having said this, *did social justice operate as an independent and stand-alone rationale? Is it too premature to state that gender balance in the boardroom was an end in itself for which Section 149 was enacted?*

III.3B Business Hand-in-hand

Hints of business-oriented reasons can be traced from the Godrej Committee report, which coincided with the formative years of the Act of 2013. The report strongly described a lack of diversity on the board as not merely a deficit of numbers and "optics":[1021]

> *It looks skewed not to have a diverse board, not just because in the modern world it looks odd, but also because it makes a difference in real economic terms. Diversity is not being sought for diversity's sake, but because diversity on the board contributes to the success of the business… Increased female board participation can, of course, never be an end in itself; tangible benefits must be associated with such increased participation.*[1022]

It went further to elaborate upon the business case:

> *… in order to come to the most robust conclusion about how an organisation should respond to the challenges it faces, there needs to be rigorous consideration of a whole range of stakeholder perspectives, fuelled by as much diversity of thought and experience as possible. If everyone on the board is the same, the discussions could be stagnant, decisions mundane, and the business would not get the full benefit of a rigorous debate. In other words, in order for boards to be effective, and to encourage healthy discussion, debate, and action, there*

[1019] 'Universal Declaration on Democracy- The Principles of Democracy' (Inter Parliamentary Union, 1997).
[1020] 'Three Year Action Agenda' (n 1005) chapter 22, 152-153.
[1021] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (18 September 2012) 5.
[1022] *Id* at 5-6.

> *needs to be independence and diversity in thought and action… The female perspective is neither necessarily better, not more insightful, but different...Ultimately board diversity is about combining alternative and complementary views that in the end lead to better board decision making. In this context, increasing female board participation is but one of several measures, but certainly an important one.*[1023]

Following this, strong advocacy for diversity as a means to sustainable growth was once again sighted in the SEBI's consultative paper reviewing corporate governance undertaken in 2013.[1024] In this, female directorship was linked with widened perspectives in decision-making and greater levels of board effectiveness. Likewise, the concept paper on national corporate governance policy issued by the Institute of Company Secretaries of India, while discussing board diversity more generally in terms of "academic qualifications, technical expertise, relevant industry knowledge, experience, nationality, age and sex", makes a specific mention of gender diversity as an important aspect of it, and describes it as an attribute that "adds value, and adds to the bottom line".[1025] The Kotak Committee then added further justifications reinstating how a diverse composition brings in the right and necessary mix of expertise for quality decision-making and overall corporate performance:[1026]

> *In today's dynamic and complex world, diverse skill-sets of the board of directors have become a necessity. The importance of diversity on a board cannot be overstated. A group of individuals with varied skill-sets and experience is critical for providing comprehensive guidance and direction to a company … while a board of directors may seek external expert advice on various matters, given the collective responsibility and the need for the board to make informed business judgment, a balanced wholesome board with complementary skill-sets amongst the directors is imperative … Recognizing this, board members should collectively have a wide set of skill-sets appropriate for the relevant business.*[1027]

[1023] *Ibid*.
[1024] 'Consultative paper on review of corporate governance norms in India' (n 58) 21.
[1025] 'Concept Paper on National Corporate Governance Policy' (Institute of Company Secretaries of India, 2012) < http://ceget.in/wp-content/uploads/2016/10/National_Corporate_Governance_Policy.pdf > accessed 10 September 2019.
[1026] 'Report of the Kotak Committee on Corporate Governance' (n 59) 7.
[1027] *Id* at 15.

III.3C A Mix of Both- Social Justice and Business Rationales

In view of these assertions, although responsible for India's political, caste-based and other gender-linked quotas, social justice can no longer be held as the only rationale that India was seeking to attain through boardroom gender diversity. Rather, what the country seems to be seeking this time is diversity (over, above and beyond gender balance in boards), substantially motivated by benefits or advantages that female directorship can bring to business.[1028] Thus, although India has shied away from announcing this in clear and unequivocal terms, one can infer that its advocacy for women in corporate leadership relies upon a mix of both rationales. This is affirmed in remarks made by Moily (former corporate affairs minister) condemning mere parity of numbers or "tick-box" compliance as "against the spirit of the company law. The rationale behind the law is to not only bring gender diversity to the boardroom, but the woman director should also be able to offer professional guidance as well".[1029] The intersection of the two rationales upon which India rests finds further strength in the words of a former SEBI chairman: "We are not looking for woman directors, we are looking for directors who also happen to be women, women bring in more focus, more objectivity and their presence on boards makes men perform better."[1030]

Traces of an intersection of the two rationales outlined are, for India, also apparent in the yet-to-be-enacted anti-discrimination and equality bill of 2016,[1031] which recognises duties of diversification, equality and anti-discrimination.[1032] While the emphasis lies on state agencies or public functions, employers with more than 100 employees are required to report their diversity index, the constituents of which are yet

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[1028] 'Opinion: Gender diversity aids corporate governance' (Livemint, 13 October 2019) < https://www.livemint.com/opinion/online-views/opinion-gender-diversity-aids-corporate-governance-11570985393382.html> accessed 10 August 2019.

[1029] J Dubey, 'Companies turn to professionals in search for women directors' (Hindustan Times, 19 September 2016) < https://www hindustantimes.com/business-news/no-more-in-the-family-companies-turn-to-professionals-in-search-for-women-directors/story-SFZgaVcwdpn502NYAfyF2L.html> accessed 15 December 2017.

[1030] 'Women bring in more focus, objectivity & their presence on boards makes men perform better: M Damodaran' (Economic Times, 19 March 2018) < https://economictimes.indiatimes.com/magazines/panache/women-bring-in-more-focus-objectivity-their-presence-on-boards-makes-men-perform-better-m-damodaran/articleshow/63360811.cms> accessed 5 May 2018.

[1031] Bill No 289 of 2016 (n 1007).

[1032] Clause 13 of the anti-discrimination and equality bill of 2016, Bill No 289 of 2016 (n 1007).

to be ascertained.[1033] Although proposed as an outright equality legislation, the bill reflects upon an increased impetus on diversity as a separate duty, over and above anti-discrimination.

With the combination of social justice and business, India differs from Norway and the UK (where female directorship appears to have originated in the predominance of one rationale over, if not independent of, the other). On one hand, emphasis on gender equality can be found as one of the cardinal principles enshrined in the COI, and is well justified amidst the staunch patriarchy that characterizes India's societal and cultural ethos much unique to its national context.[1034] These systemic and deep-seeded challenges, which stand as a root cause for absence of women in fore-running or leadership roles, do not allow India the leverage to rely exclusively upon market-based neo-liberal forces, as in the UK.[1035] This is further substantiated by the country's historically preferred allegiance for mandatory quotas.[1036]Having said that, the strong social motives have not replaced or overpowered the business case, which appears to have played no less significant role in inspiring the urge for more female directorships.[1037] Unlike Norway where gender equality and social justice assumes a predominance,[1038] India's "one-woman" quota seems to have been inspired by a balance of both, social justice and business reasons.

Thus, reflecting upon the twin rationales, India comes close to the real spirit of the dual case, which is inherent within the concept of boardroom gender diversity (as found in chapter I). While this warrants some applause, celebration would be premature, as whether India has been able to carry forward and translate this attainment into optimum policy-making and strategising of regulation is assessed next in chapter IV.

[1033] Clause 15 of the anti-discrimination and equality bill of 2016, Bill No 289 of 2016 (n 1007).
[1034] Explained in section III.3A above. A detailed explanation in this regard, and the effects of such patriarchy on India's literacy rate and female labour force participation rate, are provided in section IV.3 in chapter IV of this thesis.
[1035] Discussed in sections II.3 and II.5 in chapter II of this thesis.
[1036] Please refer to section III.4 below.
[1037] Discussed in section III.3B above.
[1038] Analysed in sections II.2 and II.5 in chapter II of this thesis.

For now, to examine how India arrived at the current strategy of the "one woman director" quota, a review with greater detail, similarly structured but preceding reservation in politics, might help.

III.4 *Indian Experience of Gender-based Quotas in Politics*

Although the "one woman director" quota is the first of its kind intruding into the corporate domain, India is not unfamiliar with the quota as a legal strategy. Rather, the country has a strong tradition of such reservations, initially drawn on lines of caste, and later followed by gender-based ones. The most prominent examples are found in politics – i.e., reservation for women in the three-tier self-governance structure or panchayati raj in rural regions.[1039]

Based on reports of the Balawantrai Mehta Committee in 1957 and the Ashok Mehta Committee in 1977, which paved the way for the (73rd and 74th Amendment) Bills of 1992, the panchayati raj was institutionalised in part IX of the COI. Such a system of decentralised governance, premised on article 40, was not a novel experience for India, as panchayats existed in most of the states even prior to these constitutional amendments.[1040] Moreover, many states such as Karnataka and Maharashtra had also devised quotas for women in the pre-amendment era of panchayats. Nonetheless, the amendments hold significance for institutionalising the governance structure while also granting constitutional status to a gender quota for the first time ever.

The panchayati raj, comprising gram panchayat at village level, panchayat samite at block level and zilla parishad at district level, requires reservation of not less than one-third of seats for women at each level.[1041] This quota includes a head count of women who might enter through the route of reservations along lines of caste. The quota further applies to offices of chairpersons who head the panchayat at each level.[1042]

[1039] Part IX of the COI.
[1040] R Chattopadhyay & E Duflo, 'Women as Policy Makers: Evidence from a Randomized Policy Experiment in India' (2004) 72(5) Econometrica 1409-1443, 1412.
[1041] Article 243D(3) of the COI.
[1042] Article 243D(4) of the COI.

Working on a rotational basis across all constituencies,[1043] proposals to increase the limits to 50% are now doing the rounds.[1044]

A notable trend of similar gender preferences by way of election manifestos and political tactics (including within political parties) was triggered, which finally developed into demands for reservations at federal and state-level legislatures. Initiated as the (81st Amendment) Bill of 1996, seeking one-third reservation for women in Lok Sabha (the lower house of parliament) and state legislative assemblies, the proposal was substantially opposed in parliament.[1045] Re-introduced as the (84th Amendment) Bill of 1998, the scene was no different, as what was ideally a chamber of dignified country foremen witnessed "unprecedented scenes of snatching of papers … and the virtual coming to blows of members".[1046] The bill, followed by its subsequent attempt, the (85th Amendment) Bill of 2000, met with the same fate as that of 1996. Re-enforced by strong gender campaigning by women's organisations such as the Seven Sisters Network and the Joint Action Front for Women (as well as the national commission), the proposal re-appeared in 2003, only to be stalled by more aggressive protests and pitiful scenarios in the history of India's politics.[1047] While it was expected that this dramatised aftermath would have dampened India's movement for reservation for women in politics, the (108th Amendment) Bill of 2008 re-opened the debate. Although the bill stands lapsed to date, it has nonetheless clarified the objectives with which this movement was started and why it has been re-emerging in an uncompromised manner.

III.4A Why was a Quota sought in Politics?

Despite being stonewalled for more than two decades and surrounded by apprehensions of uncertainty, reservation for women in politics did not die out, perhaps

[1043] Third Proviso to Article 243D(4) of the COI.
[1044] S Nair, 'Soon, law for 50% woman quota in local bodies' (Indian Express, 21 May 2016) <http://indianexpress.com/article/india/india-news-india/soon-law-for-50-woman-quota-in-local-bodies-2811593/> accessed 10 March 2018.
[1045] S Parween (n 948) 100.
[1046] V Randall, 'Legislative Gender Quotas and Indian Exceptionalism: The Travails of the Women's Reservation Bill' (2006) 39(1) Comparative Politics 63-82, 63.
[1047] *Ibid*.

because of its deeply entrenched roots within compelling reasons relating to equality and social rights:

> *Political empowerment of women is rightly perceived as a powerful and indispensable tool for eliminating gender inequality and discrimination … there is no adequate representation of women in the social, economic and political life of the country even after more than 60 years of independence … though women have made their presence felt in many male-dominated professions, their representation in the decision-making bodies/processes is far less than that of men ... there has been a historical social exclusion of women from polity due to various social and cultural reasons and patriarchal traditions … meaningful empowerment of women can be achieved only with adequate participation by women in legislative bodies or Parliamentary machinery...*[1048]

Thus, it was from exclusion of women in politics and concern for gender balance that the political quota originated in India. Views on the utility of having women in politics came about as an after-thought only once the panchayat quota was enacted and enforced, when it was found that the entry of women has helped to expand the horizon of subjects for policy-making to more gender-sensitive and women-centric issues,[1049] beyond the conventional caste and communal-based agenda.[1050] Some others argue that women have purified politics and cleaned up corruption.[1051]

III.4B Some Lessons Learnt

Although from a different domain of politics, which appears to be an unclosed chapter for India, this is nonetheless an important example that demonstrates some generalised nuances of the gender-based quota, offering some substantial lessons that are likely to

[1048] 'Thirty Sixth Report on the Constitution (One Hundred and Eighth Amendment) Bill, 2008' (Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, December 2009) 5.
[1049] R Chattopadhyay & E Duflo (n 1040) 1440. Dissenting views were advanced in H Haider, 'What impact do quotas for seats allocated to women in local and national representative government bodies have on social and political processes and outcomes?' (Helpdesk Research Report: Effects of Political Quotas for Women, Governance and Social Development Resource Center, 3 November 2011).
[1050] S Ahlawat, 'Impact of the 73rd Amendment of the Indian Constitution on Women Empowerment: An Analytical Study' (2013) 1(3) International Journal of Enhanced Research in Educational Development 17-20, 17. See also, 'First Step: India Overview' (n 24) 3.
[1051] M Nanivadekar, 'Reservation for Women: Challenge of Tackling Counter-Productive Trends' (1998) 33(28) Economic and Political Weekly 1815-1819, 1815.

hold relevance for any similar endeavours, including the "one woman director" quota for corporate boardrooms.

First, the example affirms and corroborates the link between the rationale of social justice vis-a-vis hard law vis-à-vis the strategy of the mandatory quota, as demonstrated in chapter II. Inspired by purely egalitarian objectives, a quota setting aside seats for women came about as an obvious choice of strategy.[1052] To bring women who are considered as "a traditionally neglected section of society"[1053] to the forefront, "reservation is a sociological concept evolved to bring about social reengineering and that reservation for women is therefore needed to make the democratic process inclusive".[1054] This link is very clear in what was last proposed in the (108th Amendment) Bill of 2008:

> *the rationale behind reservation for women, is to mitigate the deleterious effects of social and economic barriers that have prevented the political empowerment of women … to instil a new harmonious social order promoting genuine fraternity between both the sexes … reservation is certainly needed to enable women to cross the socio-gender hurdles and to give them a level playing ground/equal opportunities as their male counterparts ... reservation of seats for women is a valid and necessary strategy to enhance women's participation in the decision/policy-making process.*[1055]

Considering the rationale and direct relevance of equality, social justice, gender fairness and democracy upon political governance, state intervention by way of a quota came as no surprise.

<u>Lesson I</u>*: Can such a hard law approach and quota as a choice of strategy ipso facto be replicated for representation of women in corporate boardrooms, especially when it works on a mix of both social justice and autonomous business motives, in India?*

Second, reservation for women in politics highlights the significance that the contents/structure of the quota carries.[1056] One of the shortcomings, which is often

[1052] 'Thirty Sixth Report on the Constitution (One Hundred and Eighth Amendment) Bill, 2008' (n 1048) 5.
[1053] *Id* at 21.
[1054] *Ibid*.
[1055] *Id* at 18, 24.
[1056] H Haider (n 1049) 11.

attributed to why a political quota has not been able to yield perfect results, comes from its rotational characteristic – i.e., by the time elected women, mostly first-timers, gain expertise, they are ousted from their seats, which are de-reserved for the next elections.[1057] However, what gives strength to the quota is its constitutional origin, as it was undertaken and/or sought to be undertaken by way of amendments to what is most fundamental and supreme to India's nationalist identity – the COI. Thus, the sanction that applies in cases of contravention is one of the most severe kinds – i.e., nullification of appointments to offices/elections – while rendering them unconstitutional. The volume of the quota – i.e., one-third of seats – is substantial (if not demographically equal), and meets up with what is acknowledged as the necessary limits to counter tokenism/marginalisation (or what is referred to as critical mass).[1058] Finally, it has a time bar of 15 years – a usual and fundamental characteristic of a quota from an affirmative measure standpoint.[1059]

Lesson II: Is the "one woman director" quota (which is not subject to any time bar, and is grappling with uncertainties as regards sanctions) optimally designed and structured?

Third, reservation in politics has undoubtedly raised women's visibility, particularly when measured numerically,[1060] to the extent of also creating some all-women panchayats.[1061] Further, the quota is found to have successfully penetrated down to seek participation of women from a more modest strata of society, which otherwise remains confined to women from elite backgrounds or those with political families or backgrounds.[1062] Also, women who have entered the political echelons offer easy hearings to other women who are then able to voice their concerns more comfortably, something that seems far-fetched in all-male panchayats.[1063] Thus, the political quota

[1057] NG Jayal, 'Engendering local democracy: The impact of quotas for women in India's panchayats' (2006) 13(1) Democratisation 15-35, 19.
[1058] Torchia, Calabro, & Huse, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass' (2011) 102 Journal of Business Ethics 299–317, 312.
[1059] 'General recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures' paragraph 14. See also, T Jones (n 287) 200-201.
[1060] H Haider (n 1049) 4.
[1061] B Mohanty (n 973) 3349.
[1062] H Haider (n 1049) 4.
[1063] *Id* at 5.

has opened doors for many,[1064] as well as paving the way for women in general who traditionally shy away from all-male surroundings.

Having said this, the quota comes with some of the riders noted in relation to hard law in chapter II. For instance, its influence in terms of behavioural reform is limited. This is clear from statistics of gender representation in federal legislature, where women occupy only around 12% of the total seats in each house.[1065] This clearly indicates that the impending proposals for reservation and the panchayat quota have not been able to create any ripple effects. Similar conditions prevail at the level of political parties, with some of the major ones continue to be male dominated. Of 8251 candidates who contested the 2014 national elections, only 668 were female, of which only 62 were elected.[1066] Divided across the parties, the maximum number of female contestants came from the INC (60), followed by the ruling party (the Bharatiya Janata Party), with a little more than half of the INC's numbers (38).[1067] None of this presents a favourable image of its effects in a real sense.

In line with this, and quite expectedly, came incidents of backlash, which proved that reservations were far from what could be propounded as a systemic change. For instance, after being elected as one of the heads of a panchayat in a village of Maharashtra, a woman confronted violent reactions, including physical abuse, from the former head and his allies.[1068] Likewise, another female representative, holding office at the panchayat, had to face allegations against her character and fidelity as a tactic to harm her reputation prior to the elections.[1069] These incidents reflect the regressive attitude of men against, and their difficulty in reconciling themselves with, female entry to a domain that has remained historically under their dominance.

[1064] M Nanivadekar (n 1051) 1816-1817.
[1065] 'Women in Politics: 2017' (Inter-Parliamentary Union and UN Women, 1 January 2015) < https://www.ipu.org/resources/publications/infographics/2017-03/women-in-politics-2017> accessed 1 February 2018.
[1066] 'Highlights' (Election Commission of India, General Elections, 2014 (16th LOK SABHA)) < http://eci nic.in/eci_main/archiveofge2014/2%20-%20HIGHLIGHTS_04122014.pdf> accessed 10 March 2018.
[1067] 'Participation of Women in National Parties' (Election Commission of India, General Elections, 2014 (16th Lok Sabha)) < http://eci.nic.in/eci_main/archiveofge2014/26%20-%20Participation%20of%20Women%20in%20National%20Parties.pdf> accessed 10 March 2018.
[1068] S Ahlawat (n 1050) 18.
[1069] *Ibid*.

Moreover, affirming the argument of institutional complacency,[1070] it is observed that women are perceived as mere fillers of the quorum, with some minimal authority carved out only for those from upper castes or elite backgrounds. Stagnation after reaching the quota is common, as women are seldom allowed to contest general constituencies outside reserved ones. Borrowing the idea of the horizontal quota from the context of education and employment,[1071] reservation of women in politics has taken on a similar meaning. Thus, what is unreserved continues to be *defacto* reserved for men. In effect, women are competing only against women in reserved constituencies, and are rarely given opportunities to contest against men more generally. Thus, from experiences of political reservation, the quota can be said to have ceiling (rather than broadening) effects.[1072]

Lesson III: Can an extension of such ceiling effects to the "one woman director" quota be prevented?

OR

Can the "one woman director" quota, as a stand-alone strategy, increase female participation in a "real and substantive" sense of leadership and decision-making (as against mere numbers or visibility) in boardrooms?

Next, the biggest difficulty of the political quota has been its inability to separate itself from its patriarchal roots. This is particularly the case as women in India do not come from homogeneous backgrounds, and are widely segregated in terms of regional, religious, caste-based, cultural, class-based, educational and linguistic variations.[1073] As a result of these, although seats are physically occupied by women, fathers, husbands, in-laws, brothers and sons continue to be the main participants in actual decision-making.[1074] Popularly termed as proxies,[1075] it is observed that male members of families continue to be the ruling minds for women contestants, many of whom are

[1070] 'Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination' (n 300) 2176.
[1071] *Jitendra Kumar Singh v State of Uttar Pradesh*, 2010 (3) SCC 119.
[1072] M Nanivadekar (n 1051) 1816.
[1073] A de Jonge, *The Glass Ceiling in Chinese and Indian Boardrooms* (Elsevier Asian Studies Series 2015) 67.
[1074] S Ahlawat (n 1050) 17.
[1075] M Nanivadekar (n 1051), 1815.

forced into politics against their own wishes.[1076] It is therefore not astonishing that most such women who enter politics and contest reserved constituencies are married.[1077] Such experiences once again reiterate the importance of enabling precincts or simultaneous socio-economic advancement of women, which is essential to complement and provide the correct milieu within which the quota can function[1078] (as also discussed in relation to hard law in chapter II). If otherwise, the quota can be rendered only a game of numbers with no functional outcome, while the real power and authority is retained by men puppeteering women. This is arguably the only somewhat justifiable argument for continuing, if at all, with the announced "one independent woman" quota, as against why it may not be required in the same way for male directors from the same family.

Lesson IV: Is the "one woman director" quota backed by adequate socio-economic measures to facilitate mobility of women up the corporate ladder and up to board level?

To sum up, experiences from the political quota that have been and/or are being implemented demonstrate that, while reservation has been a good stepping stone, the prospects for women's participation outside such reservations are not very good. While this could be sustained in an exclusive state domain,[1079] its veracity in the private or business sector needs further probing (in section III.5). Nonetheless, although emerging from differing (but not completely disjointed) rationales, and operating in two separate domains (politics versus business), it appears that the "one woman director" quota is derived in continuation of India's strong legacy of political reservations. Lessons learnt from the political quota, with bearings upon the "one woman director" quota (as enumerated above), must not therefore escape attention or be omitted (or rather they should be actively factored in) when strategising the regulatory roadmap for India in chapter IV.

[1076] 'Legislative Brief- The Constitution (One Hundred and Eighth Amendment) Bill, 2008' (PRS India, 23 September 2008).
[1077] B Mohanty (n 973) 3348.
[1078] SP Bhat, 'Gender Quotas and Panchayat Raj Institutions in India: A Reflection' (XXIII IPSA World Congress of Political Science 2014) 16.
[1079] R Chattopadhyay & E Duflo (n 1040) 1437. See also, Domingo, Holmes, O'Neil, Jones, Bird, Larson, Presler-Marshall, & Valters, 'Women's voice and leadership in decision-making' (Overseas Development Institute, April 2015) 60.

III.5 *Outcome of the "One Woman Director" Quota*

Five years since the "one woman director" quota was first legislated, and three years since the deadline for compliance passed, it is time to assess how the quota as a choice of strategy has fared insofar as female directorship in the Indian context is concerned.

Given the large gamut of listed and unlisted public companies to which the quota applies for which data is not organised or readily available, it becomes important to define the scope of this kind of review with caution, and in a manner that involves in-depth and purposeful assessment, re-while not being scattered across an impracticable range that distracts from the objective of the study. Accordingly, for the purposes of this thesis, review is confined to listed companies, as they, in view of the magnitude of their impact on public monies and the industry/market at large, are the first to enter the regulatory radar when it comes to corporate governance reforms, whether in India or worldwide.[1080]

Ambiguity in the selection of the range does not end here, as Indian companies are listed across multiple stock exchanges at national and state level (totalling more than 20 in number).[1081] The review is therefore further narrowed down to one such exchange – the National Stock Exchange of India Limited ("NSE"). As the largest in India in terms of total and average daily turnover for equity shares every year, and fourth largest worldwide in terms of equity trading volume,[1082] the NSE is an ideal choice for the intended review. Of around 2,000 companies listed, the boardrooms of 100 companies (representing both the blue chip and mid-cap segments) are extracted. The range of the study, which covers the Nifty 50[1083] (the top 50 companies in terms of market capitalisation and stock liquidity) and the Nifty mid-cap 50 companies (the top 50 companies in the mid-cap segment comprising companies on the growth

[1080] 'OECD Corporate Governance Factbook 2017' (OECD 2017) 22-23.
[1081] Many of these exchanges operate on a passive mode, while many have been asked to exit by the SEBI, vide orders in 2013, 2014 and 2015 – 'Details of Stock Exchanges' < https://www.sebi.gov.in/stock-exchanges.html> accessed 1 March 2018.
[1082] 'About NSE' < https://www.nseindia.com/global/content/about_us/about_us htm> accessed 1 March 2018.
[1083] Nifty 50 is a free float market capitalisation weighted index- NSE's benchmark for the equity market, comprising of 50 most actively traded companies of India. It represents about 62.9% of the free float market capitalization on the NSE, as of 31 March 2017.

line),[1084] helps in revealing a holistic view of how the "one woman director" quota has fared in large- and medium-range companies.

Figure 11: Nifty 50 and Nifty mid-cap 50[1085] (of top 150 companies on NSE)

Together, the Nifty 50 and Nifty mid-cap 50 capture a diverse cross-section of a total of 100 large- and medium-sized companies (in terms of market capitalisation) in India.[1086] This diverges from the commonly adopted focus on the largest or most top-notch companies. Usually the fore-runners, an overt emphasis on such companies might yield results that are myopic, short-sighted and deceptive, as the whole industry would not react so progressively or maturely. This study is therefore the most recent and a one-of-a-kind attempt made towards an in-depth analysis, both statistical and purposive, of gender diversity in the boardrooms of two distinguished cross-sections of companies listed on the NSE. The results reflect upon and offer a meaningful insight into not only the numeric but some of the most pertinent qualitative implications of the "one woman director" quota. This quality assessment, in addition to statistics or numbers, is most relevant to crafting the regulatory roadmap for India in chapter IV.

[1084] Nifty midcap 50 index represents about 5.8% of the free float market capitalization of the stocks listed on the NSE, as of 31 March 2017.

[1085] Constructed from information at NSE website < https://www nseindia.com/products/content/equities/indices/broad_indices.htm> accessed 1 March 2018.

[1086] All of the data relating to Nifty 50 and Nifty midcap 50 companies in this thesis, are dated as on 31 March of 2013, 2014, 2015, 2016 and 2017, and 3 February of 2018.

III.5A Percentage of Women to Total Directorships

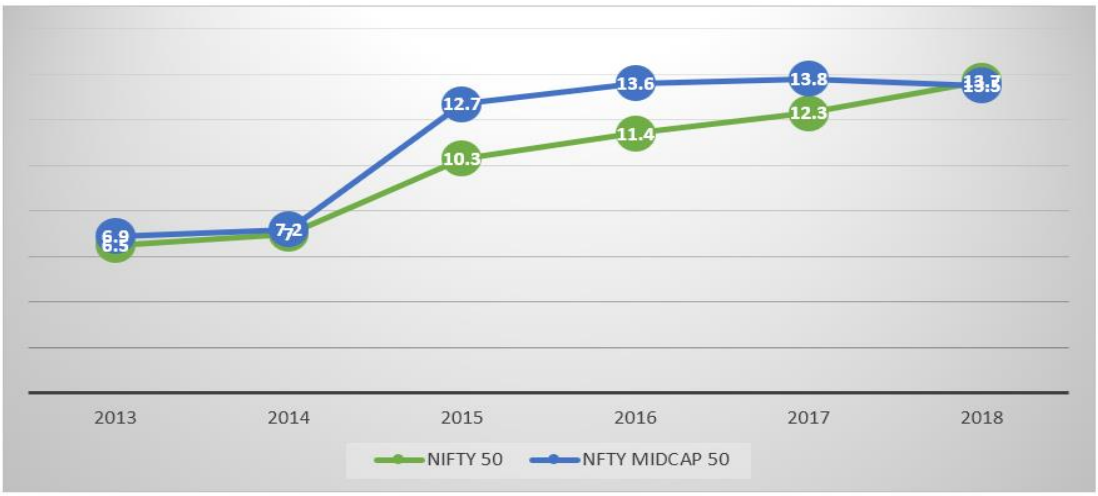

Figure 12: Percentage of Female Directorships (2013–2018) – India[1087]

The above chart reflects upon very weak position, with women occupying less than 14% of the total director positions across both Nifty 50 and Nifty mid-cap 50 companies in 2018 (with the "one woman director" quota in fully fledged operation for around three years). A sharp rise from around 7% was witnessed in both categories at the time of the quota deadline in 2015,[1088] which explains why the average tenure for women directors is less than that of men.[1089] Following the deadline, the rise has been rather snail-paced, with the Nifty mid-cap 50 faring slightly better than the top 50 companies until 2017. Progress in the last year has, however, been negative for the Nifty mid-cap 50, with a decline of about 2.17%, so as to come down to levels nearing the Nifty 50 (which has slowly but consistently risen to 13.7%). This essentially and undisputedly denotes that, regardless of the "one woman director" quota, boardrooms of both top and medium-growth companies in India continue to be largely male dominated, with more than 85% of director positions still occupied by men.

[1087] Constructed based on data sourced from Prime Database, which is a subscription-based paid information service that manages data on companies listed on NSE, in association with the stock exchange. Started in 1989, it has developed into what is now the most referred centre for company and securities market linked information in India. Prime Database is the flagship product of the group operated by Praxis Consulting & Information Services Private Ltd.
[1088] RK Agrawal, 'A Study on Appointment of Women Directors by Companies in Mumbai' (2015) 2(10) International Journal of Ethics in Engineering & Management Education 1-5, 4.
[1089] 'Corporate India: women on Boards' (Prime Database Group, May 2017) 9.

While this provides a numerical broad view as regards how the quota has impacted female presence in boardrooms, the quality of such progress can be mapped out only through a more in-depth scrutiny of such appointments – whether by way of an addition to the existing board, or through replacement of male directors where the board size remains constant. Only the latter can be acclaimed for having influenced any behavioural change, as against mere compliance with the letter of the law.

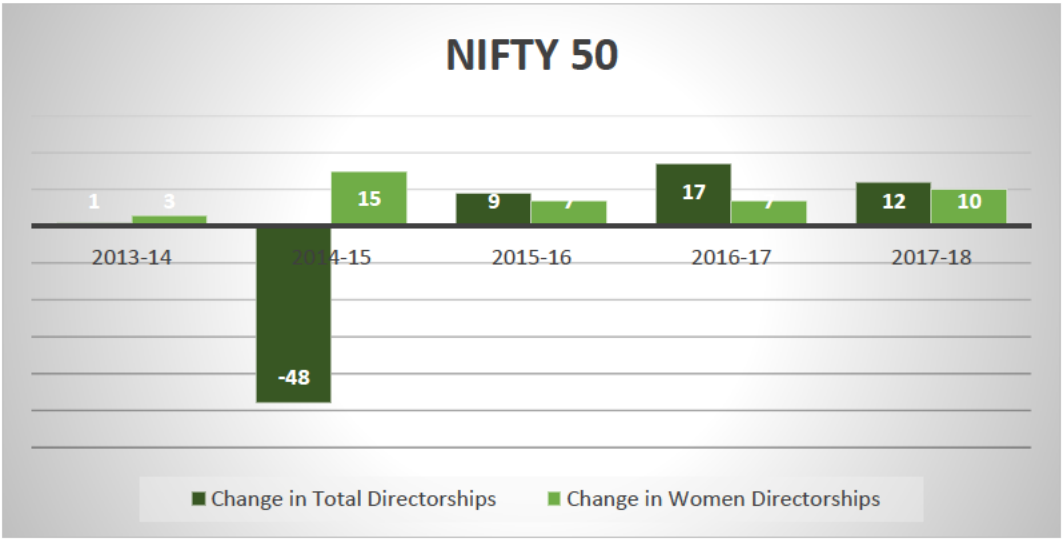

Figure 13: Change in Total Directorships vis-à-vis Change in Female Directorships (Nifty 50)[1090]

While in the 2015–2018 period, the rise in female directorships runs alongside a parallel rise in overall directorship positions, positive change is shown in the rise in female appointments, unmatched by a decline in director positions over the period from 31 March 2014 to 31 March 2015, when corporates in India were gearing up to the compliance deadline. It can thus be inferred that the initial female appointments to comply with the quota were not just numeric additions for the Nifty 50, as otherwise they would have coincided with a similar rise (as against actual decline) in total directorships.

Having said this, do similar results follow for the Nifty mid-cap 50?

The answer is yes, as the traits observed in figure 13 find similar replication – i.e., the rise in female appointments from 2014 to 2015 (the compliance deadline period)

[1090] Constructed based on data sourced from Prime Database.

witnessed an unparalleled decline in overall board positions, indicating towards positive replacements in the boards of Nifty mid-cap 50 companies (as illustrated below).

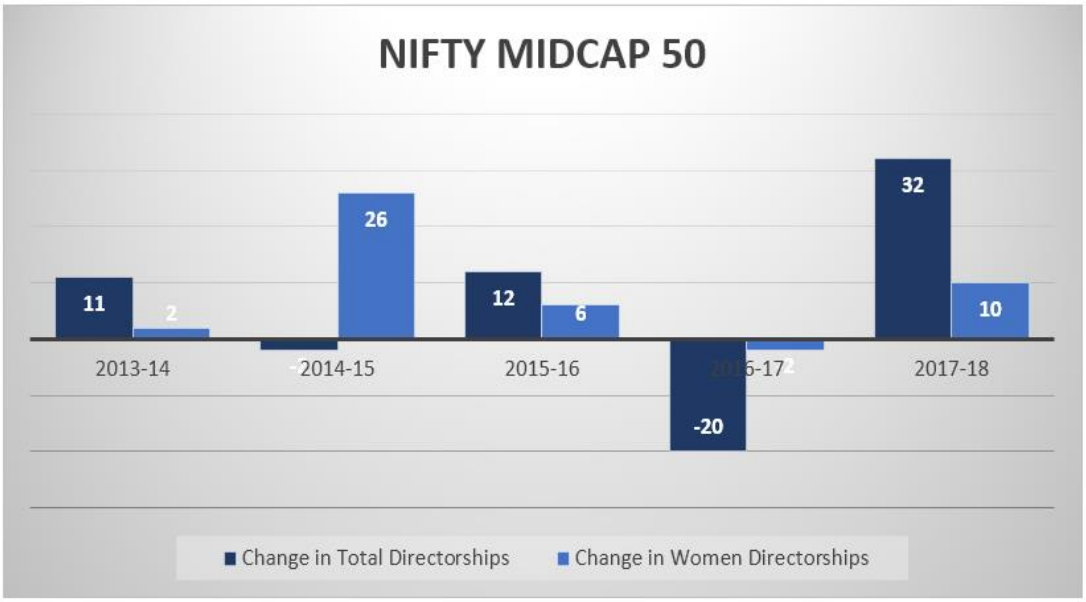

Figure 14: Change in Total Directorships vis-à-vis Change in Female Directorships (Nifty mid-cap 50)[1091]

Having said this, the subsequent years narrate a different story, when the changes in board positions and female directorships almost coincide to denote a not so favourable trend following quota compliance. While it is possible that the board sizes may have expanded for reasons other than to accommodate more female appointees (at individual company level), the aggregated scenario for both Nifty 50 and Nifty mid-cap 50 companies suggests otherwise.

[1091] Constructed based on data sourced from Prime Database.

III.5B Any Defaulters?

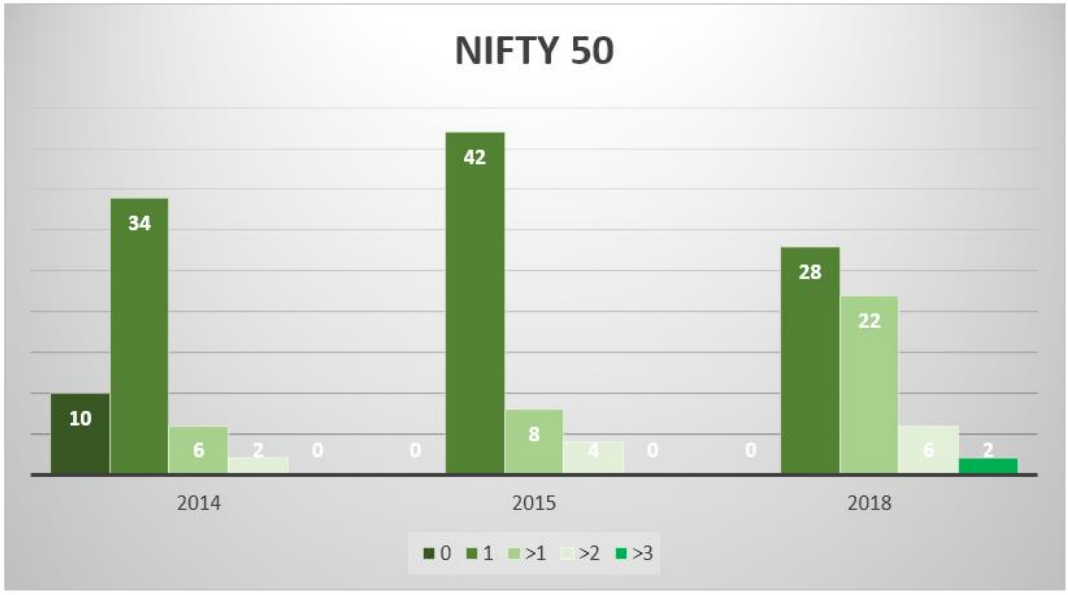

Figure 15: Companies with 0, 1, >1, >2, and >3 Female Directors (Nifty 50)

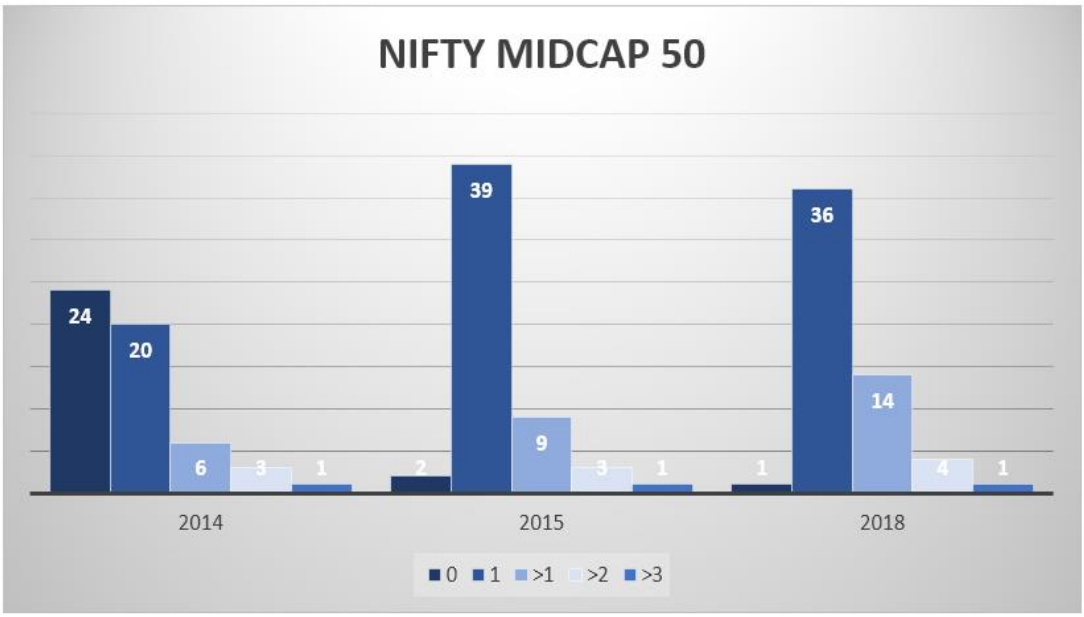

Figure 16: Companies with 0, 1, >1, >2, and >3 Female Directors (Nifty mid-cap 50)[1092]

As of 2018, while there are no all-male boards in Nifty 50 companies, there is a single exception among the Nifty mid-cap 50 companies. Tracing back to the deadline of 31

[1092] Constructed based on data sourced from Prime Database.

March 2015, all the Nifty 50 and Nifty mid-cap 50 (barring two) companies were compliant with the "one woman director" quota. While this gives an outright reason to celebrate the quota, such rejoicing is hasty, as the MCA reported 191 (comprising 42 active companies) non-compliant companies out of all NSE-listed companies on 10 May 2016 – one year after the deadline had passed.[1093] This was nonetheless a noticeable improvement from 550 non-compliant companies, reported in 2014 (after the quota was announced, but prior to the deadline), and 147 on 1 April 2015 (a day after the deadline passed).[1094] Ironically, the bulk of these non-compliant companies were composed of public sector enterprises, possibly because of appointments hindered/delayed for bureaucratic reasons.[1095]

Further, one must review the charts in greater detail so as not to miss out on the down sides of the quota, which emerge loud and clear. Any spill-over effects beyond the mandatory requirement of "one woman director" are visibly exceptions, rather than general practice, as can be inferred from the above charts. Companies with more than one female director are few, and the numbers drop further when trying to identify boards with more than two or three female directors. This hints at what is argued to be an undesired implication of the quota strategy – institutional complacency. In other words, companies appear to be reluctant to take any further initiatives, over and above what the mandatory quota imposes, towards boardroom gender diversity. Thus, it is apprehended that the "one woman" boardroom quota is likely to follow the preceding example of political quotas, where female entry nearly stalled upon reaching the quota limit, exhibiting the ceiling repercussions of the quota.

III.5C "Golden Skirt" Myth

In line with what is alleged globally to be a challenge to boardroom gender diversity, Indian companies have also raised concerns citing the "golden skirt" as an impediment

[1093] 'Compliance of SEBI Directive on Women Director' (Unstarred Question no 1783, Answered on Tuesday, 10 May 2016, MCA).
[1094] 'Gender Diversity in Boardrooms' (n 63) 35. See also, 'Women on Boards- Refresher report 2016' (Biz Divas 2016) 3.
[1095] 'Corporate India: women on Boards' (n 1089) 9.

to female board appointments.[1096] It is therefore vital to check the veracity of such allegations in the Indian context.

First, when the number of women individuals occupying one or more directorships is compared to the total pool of director individuals (without making any gender comparisons), the outcome seems to hint that the "golden skirt" is real for India:

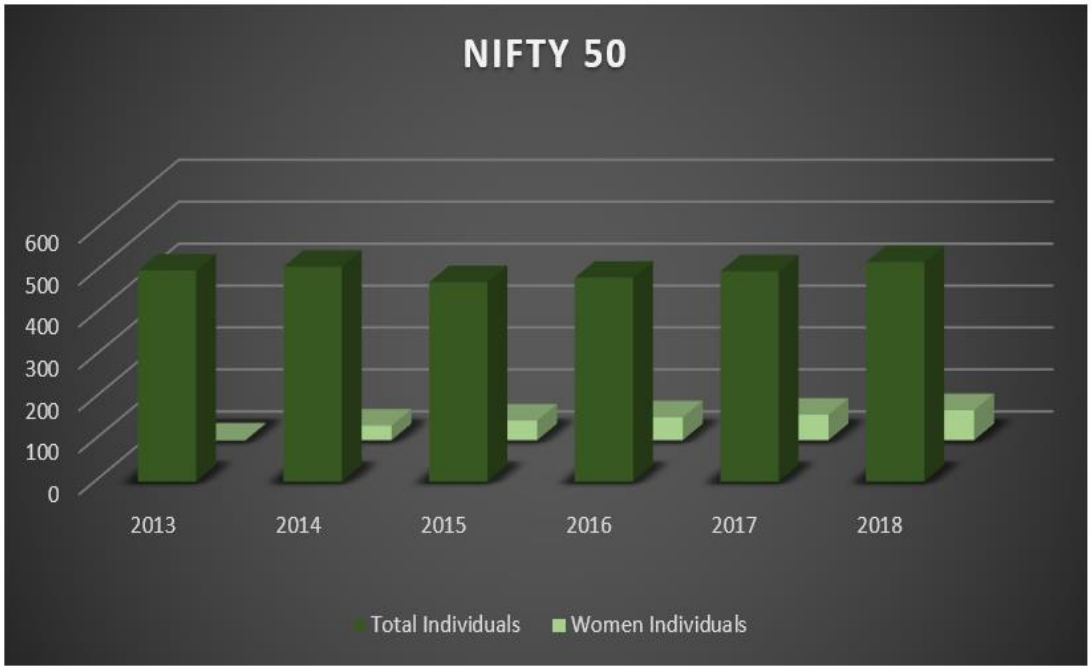

Figure 17: Comparison of Women Individuals to Total Individuals (Nifty 50)[1097]

[1096] J Jose, 'Women leaders mean more profits' (Business Line, 10 February 2016) < https://www.thehindubusinessline.com/opinion/women-leaders-mean-more-profits/article8219453.ece> accessed 5 December 2017. See also, 'Fifty-seventh Report- The Companies Bill 2011' (n 56) 89.

[1097] Constructed based on data sourced from Prime Database.

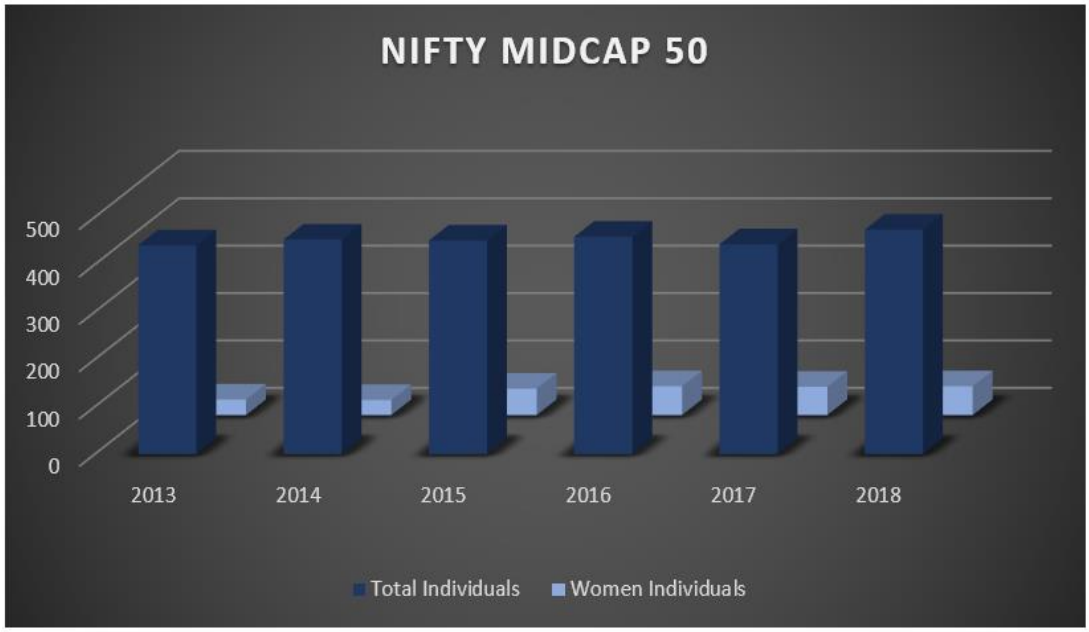

Figure 18: Comparison of Women Individuals to Total Individuals (Nifty mid-cap 50)[1098]

Both figure 17 and figure 18 illustrate that women constitute only around 13% of the total pool of individuals occupying directorships in these 100 companies, which is as much of a concern as the percentage of female directorships to total directorships (figure 12). The composition of women for directorships and director individuals hovers as low as less than 14%, which is indeed depressing. *With so few individuals, is the "golden skirt" a real challenge for India?*

Although the outlined statistics suggest this, apprehensions relating to the "golden skirt" are not real for India. The number of female individuals as a percentage of the total pool essentially follows from the restricted number of female directorships, where the former cannot possibly out-number the latter. As regards the phenomenon of the "golden skirt", it has emerged only recently with the entry of women into corporate boardrooms, which has otherwise been historically male dominated, only replacing what could be analogically termed (but never alleged to be) the "golden trouser".[1099] The gender bias that underlies the very connotation of the "golden skirt" (as also asserted in chapter II) is once again proven through India's example:

[1098] Constructed based on data sourced from Prime Database.
[1099] M Huse (n 398) chapter 1, 17. See also, Noland, Moran, & Kotschwar (n 182) 8.

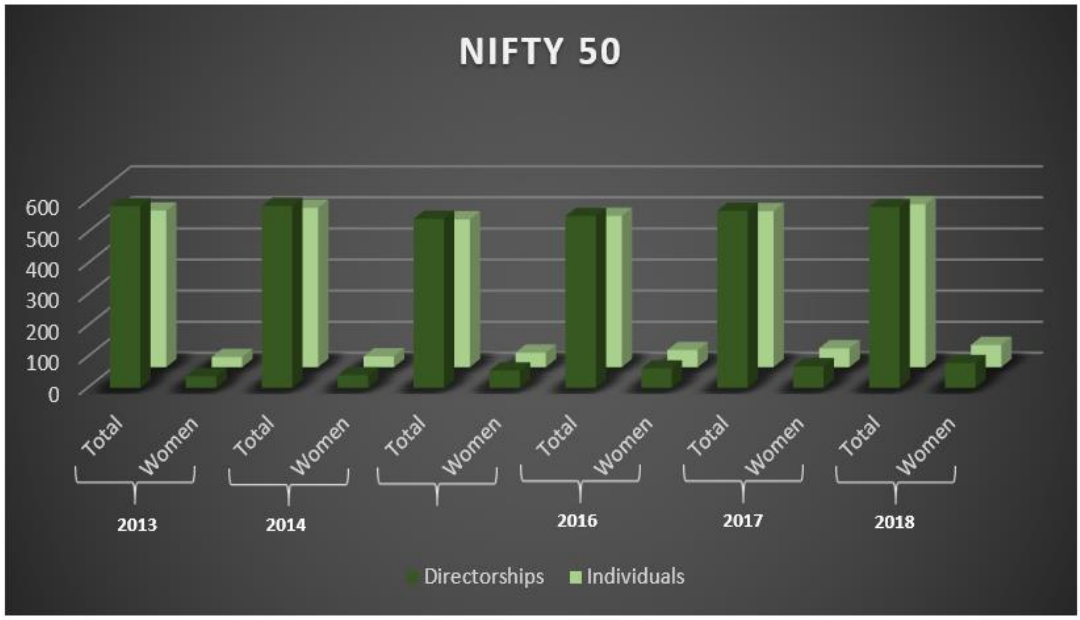

Figure 19: Directorships versus Individuals (Total vis-à-vis Women) (Nifty 50)[1100]

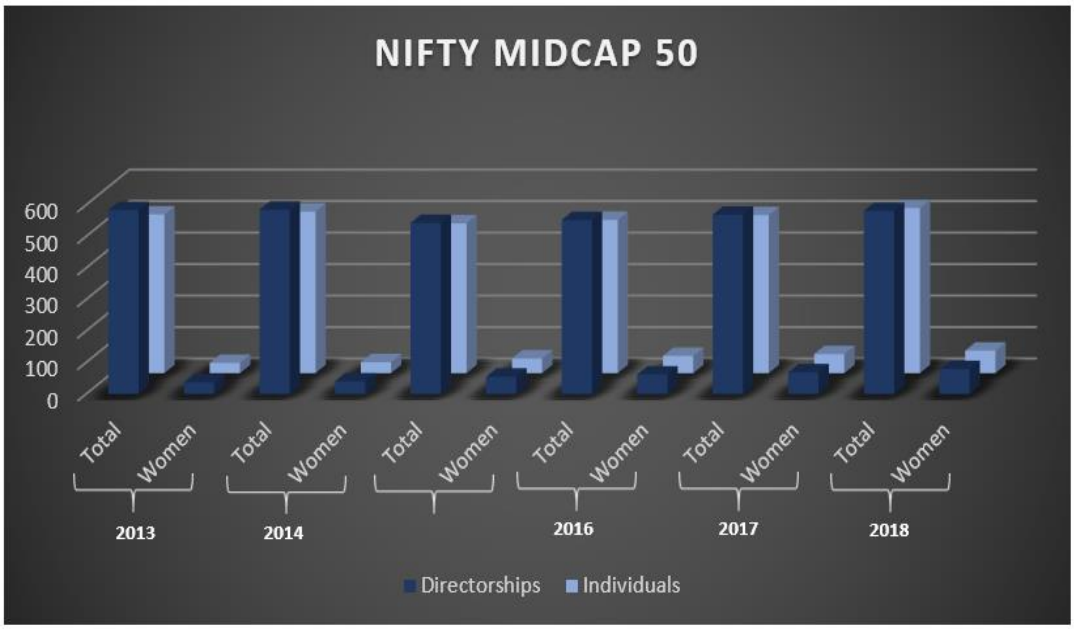

Figure 20: Directorships versus Individuals (Total vis-à-vis Women) (Nifty mid-cap 50)[1101]

[1100] Constructed based on data sourced from Prime Database.
[1101] Constructed based on data sourced from Prime Database.

From these comparisons drawn between total directorships versus total individuals vis-à-vis women directorships versus women individuals for both Nifty 50 and Nifty mid-cap 50 companies, it becomes clear that the deficits are nearly identical. In other words, as of 2018, women individuals stood at 90% or more of their directorships, similar to overall individuals. This pattern of similarity, with the individual to directorships overall percentages vis-à-vis those for women nearing one another, remains uninterrupted when traced back to 2013. Both of these comparisons suggest that female directors are under no additional pressure of holding multiple positions exceeding that of male directors in these 100 companies. The often-cited "golden skirt" (an intrinsically gender-biased phenomenon) is therefore unsurprisingly a fiction, rumour or myth even in the Indian context.

III.5D Sectoral Segregation

A sector-wise analysis of the Nifty 50 and Nifty mid-cap 50 companies (together) may provide some helpful inputs as regards how some of the most prominent sectors have reacted to the "one woman director" quota:

Figure 21: Sector-wise Divide of Women Directorships (Aggregate of Nifty 50 and Nifty mid-cap 50)[1102]

As is clearly visible in this pie chart, there are no significant variances in female directorships across the sectors in which Nifty 50 and Nifty mid-cap 50 companies are located.[1103] Barring the diamond-cutting and jewellery sectors, which have no female directorship, all of the other sectors have at least one woman director in order to comply with the quota. Only in very few sectors, such as hospitals/diagnostics and tea/coffee, is female directorship (at or more than 30% of total directorships)

[1102] Constructed based on data sourced from Prime Database. One must be cautious when drawing inferences from the above, that the sectors listed are only the ones which Nifty 50 and Nifty Midcap 50 companies belong to. Thus, sectors with companies having female directorship but not ranked in top 150, are not included here. Moreover, the constitution of these indices may change depending upon any changes in the market capitalization of companies, such that a company might be added or omitted from the index with time. Thus, a company with higher female directorship, if excluded from the index, will bring down the sectoral average (although the actual/overall sector position may not deescalate).
[1103] See also, 'Corporate India: women on Boards' (n 1089) 8.

outperforming the quota. Further, female executive directorship is concentrated mainly in the financial and pharmaceutical sectors. At the other extreme, sectors such as oil exploration, metals, castings, breweries/distilleries, real estate, roads/highways, textiles and trading, continue to dawdle as low as less than 10%. Most of the remaining sectors have directorships ranging between 10% and 20% occupied by women directors. Thus, based on a review of a few selected sectors to which Nifty 50 and Nifty mid-cap 50 companies belong, one finds a uniform behavioural pattern (without any significant variances), where companies across sectors have acted upon (and mostly to the extent of) the quota.

In terms of change since 2014, it is observed that, while most of the sectors have witnessed a rise in female directorships owing to the commencement of the quota, the change is substantial in sectors such as cement, mining, paints, chemicals, tyres and tubes, lubricants/oils, tobacco, pharmaceuticals, information technology (software) and trading, with an increase of around/over 8%. Having said this, one must not be lured by every instance of such percentage increases, as many of these may results from falls in total directorship positions as against a rise in female directorships (resulting in higher percentages), witnessed in the gas/fuel, media and telecom sectors. There have, however, been no negative percentage changes in any of the sectors, although diamond cutting and jewellery retains an all-male board.

III.5E Effects beyond "One Woman"

The quota is widely condemned for results that are limited to numbers, where its effects rarely spill over to systemic or behavioural reforms.[1104] This holds good even in the Indian context, insofar as the example of the political quota asserts. It can thus be hypothesised that the "one woman director" quota would also be plagued with such shortcomings, to which the quota as a strategy has conventionally been linked. *Or does it diverge to narrate a different story?*

[1104] M Schulz-Strelow (n 625) chapter 25, 182. See also, D Higgs (n 173) 11-12.

(A) Executive Directorship

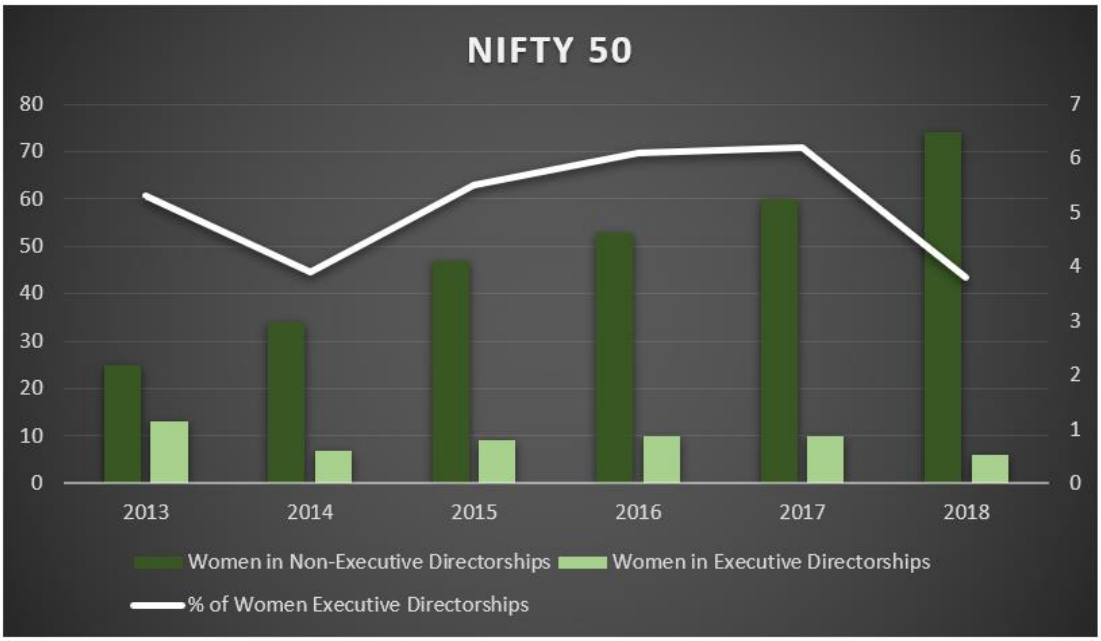

Figure 22: Executive versus Non-executive Women Directorships (Nifty 50)[1105]

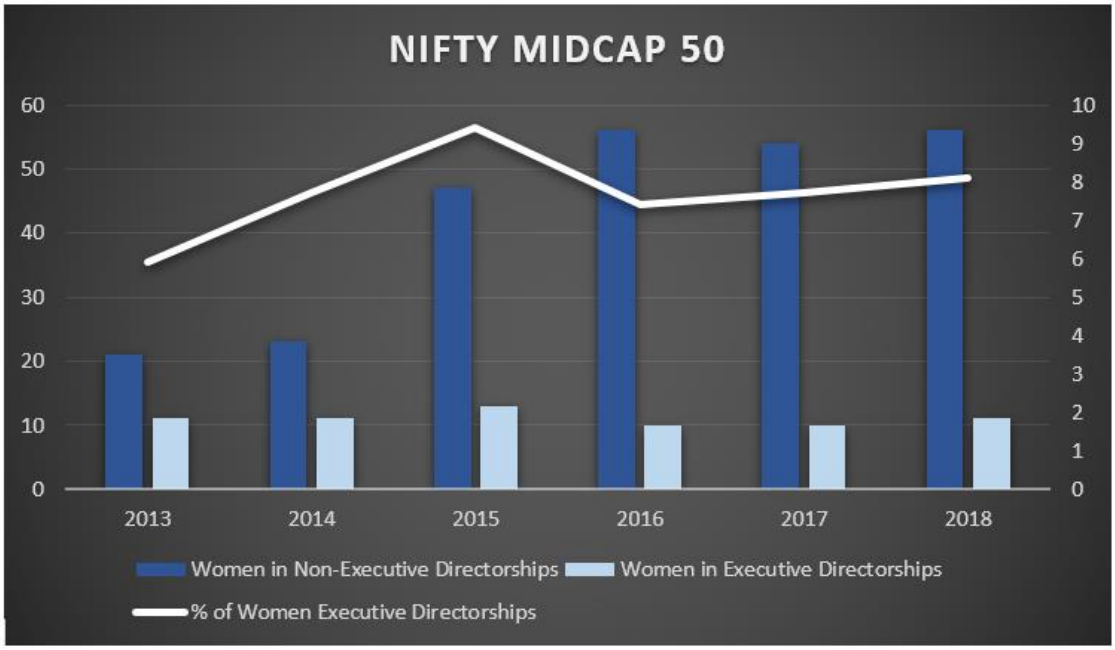

Figure 23: Executive versus Non-executive Women Directorships (Nifty mid-cap 50)[1106]

[1105] Constructed based on data sourced from Prime Database.
[1106] Constructed based on data sourced from Prime Database.

A rise in women entering executive directorship roles is clearly visible in 2015 for both categories of companies, following which, while Nifty 50 consistently rose until a sudden decline in 2018, Nifty mid-cap 50 had an immediate drop in 2016. Since then, it has sluggishly risen. As of 2018, women hold six of 157, and 11 of 136 executive directorship positions in Nifty 50 and Nifty mid-cap 50 companies respectively. All in all, in both Nifty 50 and Nifty mid-cap 50 companies, the status of women in executive directorships is deplorable, with the latter faring marginally better than the former. The entry of women into non-executive roles is therefore clearly linked to the rise of female directorship in these 100 companies.

(B) Board Committees

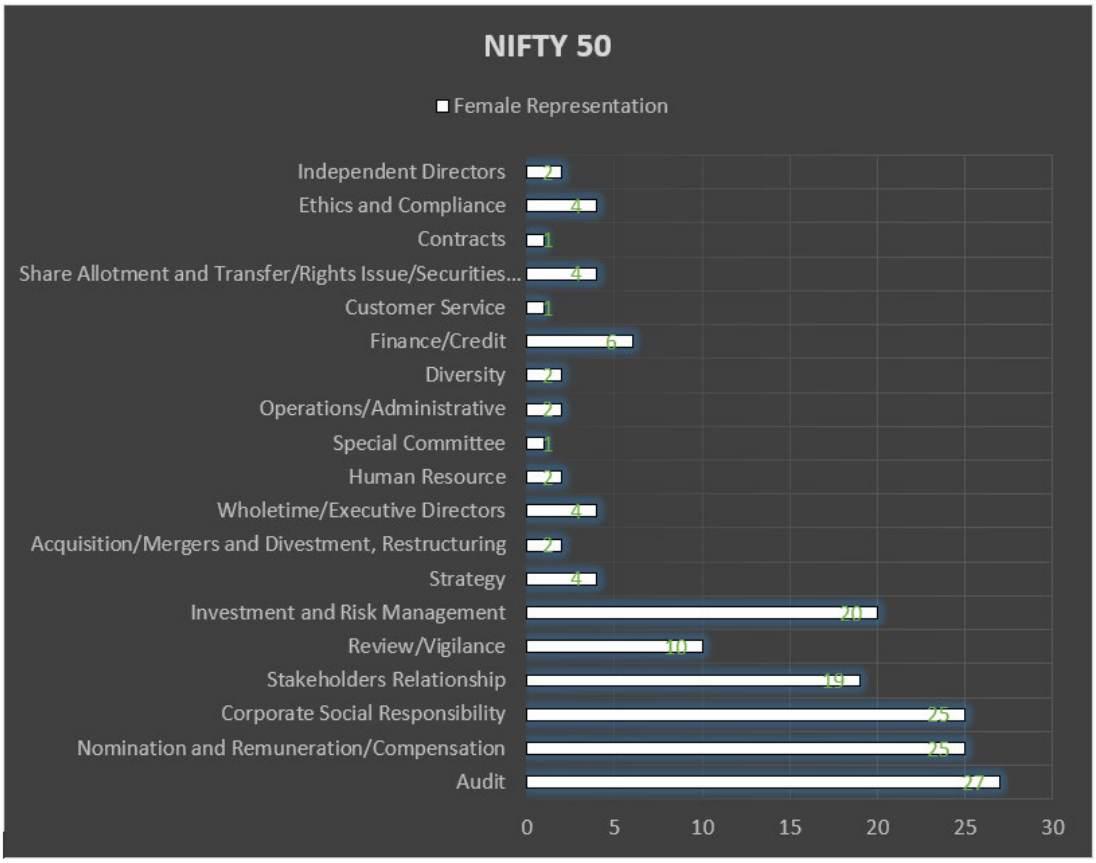

Figure 24: Committee Representation of Women Directors (Nifty 50)[1107]

[1107] Constructed based on data sourced from Prime Database. The nomenclatures used by companies for the board committees are non-standardized. As the actual committee names used vary from company to company, the researcher has classified the information based on substance/function of the committees. Accordingly, in few cases, one representation might be repeated in more than one function, as the company has established a single committee for two or more functions.

While it is encouraging to observe that women directors are visible in the board committees (as illustrated above), the quality of such presence needs to be tested. Women were found in around 156 of 1,418 committee positions in Nifty 50 companies in 2018.[1108] This not so impressive finding is reasserted by the nature of committee functions in which women appear to have gained prevalence. As illustrated in figure 24, committees to which women have been able to gain access are those linked to monitoring (audit, review/vigilance, ethics and compliance), risk profiling and finance (investment and risk management, finance/credit), person-related aspects (nomination and remuneration/compensation, human resources), and outward-facing roles (corporate social responsibility, stakeholder relationships). Committees concerning core business or productivity functions such as strategy, acquisitions/mergers, divestments and restructuring, capital raising and issue of securities, award of contracts, projects, operations, research and development, and executive or whole-time directors, continue to be made up predominantly, if not exclusively, by men.[1109] Further, women led only 24 of all Nifty 50 board committees in 2018.[1110] In other words, as women occupy only 24 of more than 300 chair positions, the majority of their presence in board committees is simply by way of membership.[1111] This asserts that female presence/participation in actual steer heads and leadership functions is far from what can be considered to be real. This all indicates that women have a long way to go before India's corporate leadership can be rightly acclaimed for being gender diverse (beyond the number game of the quota).

III.5F How "Diverse" is the Diversity of the "One Woman Director" Quota?

To ascertain if the quota-compliant boards exhibit the intended diversity, it is worthwhile to examine the background and attributes of female directors who personify the quota, particularly of those serving in top-notch boardrooms of Nifty 50 companies. A comprehensive review in 2018 of the profiles of 72 women directors

[1108] Based on a review of board committees of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.
[1109] Based on a review of board committees of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.
[1110] Based on a review of board committees of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.
[1111] Based on a review of board committees of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.

occupying 80 directorship positions across Nifty 50 boards (and who mainly re-appear in Nifty mid-cap boards) led to some interesting revelations:

(A) Age

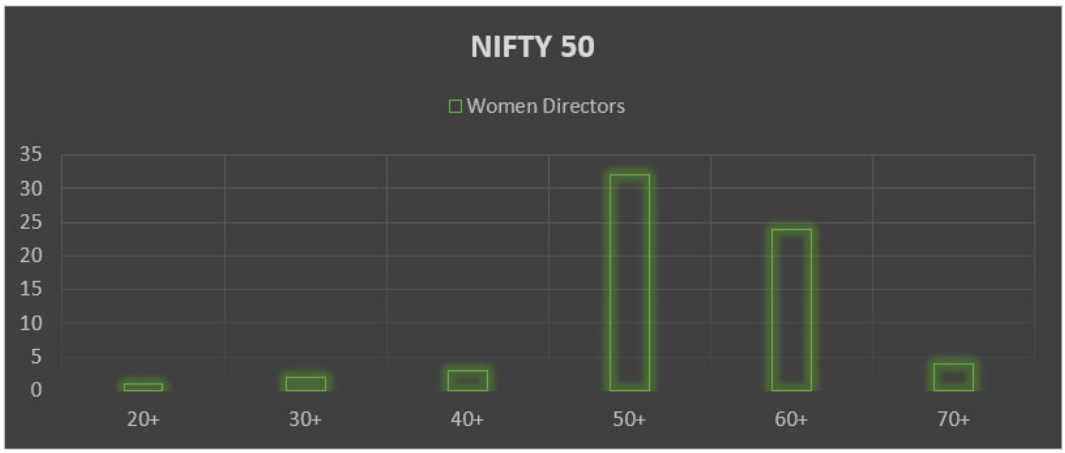

Figure 25: Age Classification of Women Directors (Nifty 50)[1112]

From the available data, it emerges that a clear majority of female directors belong to the 50-70 year age group, followed by four directors above 70 years, and five directors in the 30–50 year age group. With only one director below 30 years of age, severe levels of homogeneity mark the age composition of female directors in the top 50 companies in India.

It is also interesting to note that the three directors in the 20–40 year age group are promoter directors – i.e., directors from promoter/owner families, who joined directorship positions which were almost pre-destined for them. Thus, it is not incorrect to infer that outside recruits from the pool of young or first-time candidates are not so ordinarily put in place, as companies prefer to reach out to middle- or older aged recruits, justifying this in their demand for substantial years of experience.

[1112] Constructed based on data sourced from Prime Database.

(B) Competencies and Qualifications

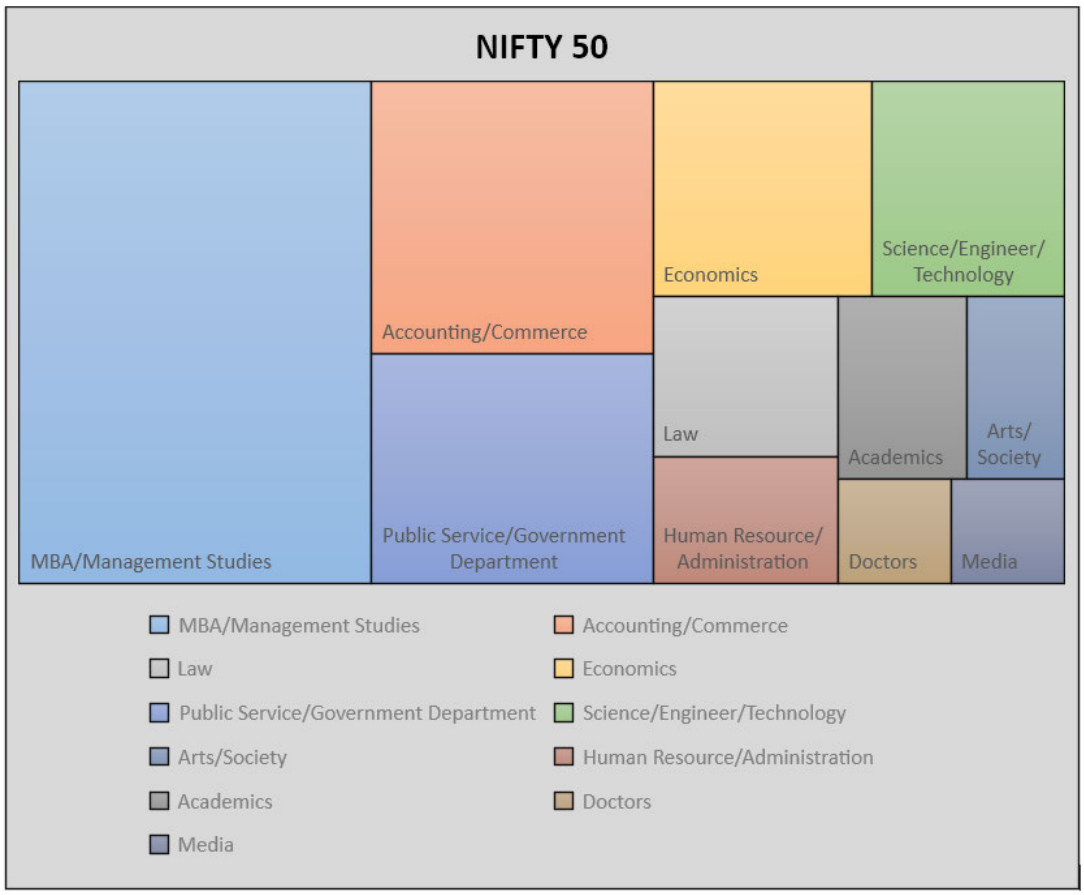

Figure 26: Qualifications/Experience of Women Directors (Nifty 50)[1113]

As is evident in figure 26, significant numbers of female directors come from a background of management studies, within which there exists a further confined predominance of the alumni of the IIMs – a leading management institution in the country. Those emanating from accounting/commerce backgrounds, many of whom are professionally qualified chartered accountants, are the second most common. Next, comes the category of directors in public services (administrative, revenue, economics, finance and foreign divisions) and/or holding government positions in ministries (mines, power, petroleum and natural gas). This category is found to be substantial, owing to some of the major state-owned companies listed within the Nifty 50 index, which have nominees from related ministries on their boards. Some of the other

[1113] Constructed based on data sourced from Prime Database. Some of the directors may have qualifications/experience in more than one disciplines, due to which the number within each discipline may outnumber the actual individuals.

disciplines from which female directors in the top 50 companies emanate are economics, science/technology/engineering, law, administrative/human resources and academia – each of which have minority numbers.

From this information, one can detect a noticeable extent of homogeneity insofar as discipline-wise qualifications/experience are concerned, within the range of Nifty 50 female leaders. It is also possible to infer that recruitment emphasises broad-level managerial skills, and less sector-specific knowledge or expertise – something that probably coincides with the predominant non-executive (as against mainstream executive) roles, in which female directors are found. Overall, it appears that women with niche backgrounds from some elite institutions, divisions and departments in the country and worldwide have been able to access the upper echelons of these companies.

(C) Connections in Disguise

As most accusations against family connections, sparking the recent Kotak Committee recommendations, followed by the SEBI announcement to replace the "one woman director" with "one independent woman director" quota, date back to the times when Indian companies were scurrying to comply with the quota in order to avoid sanctions, it is time that this alleged discrepancy is re-visited to understand if these still hold good, or whether any reversals have been made in the three years since then.

To start with, it would be helpful to examine the percentage of the women directorships which are independent in nature, essentially meaning that such directors do not have, *inter alia*, any personal relations with the company or its promoters/management/directors.[1114]

[1114] Section 149(6) of the Act of 2013.

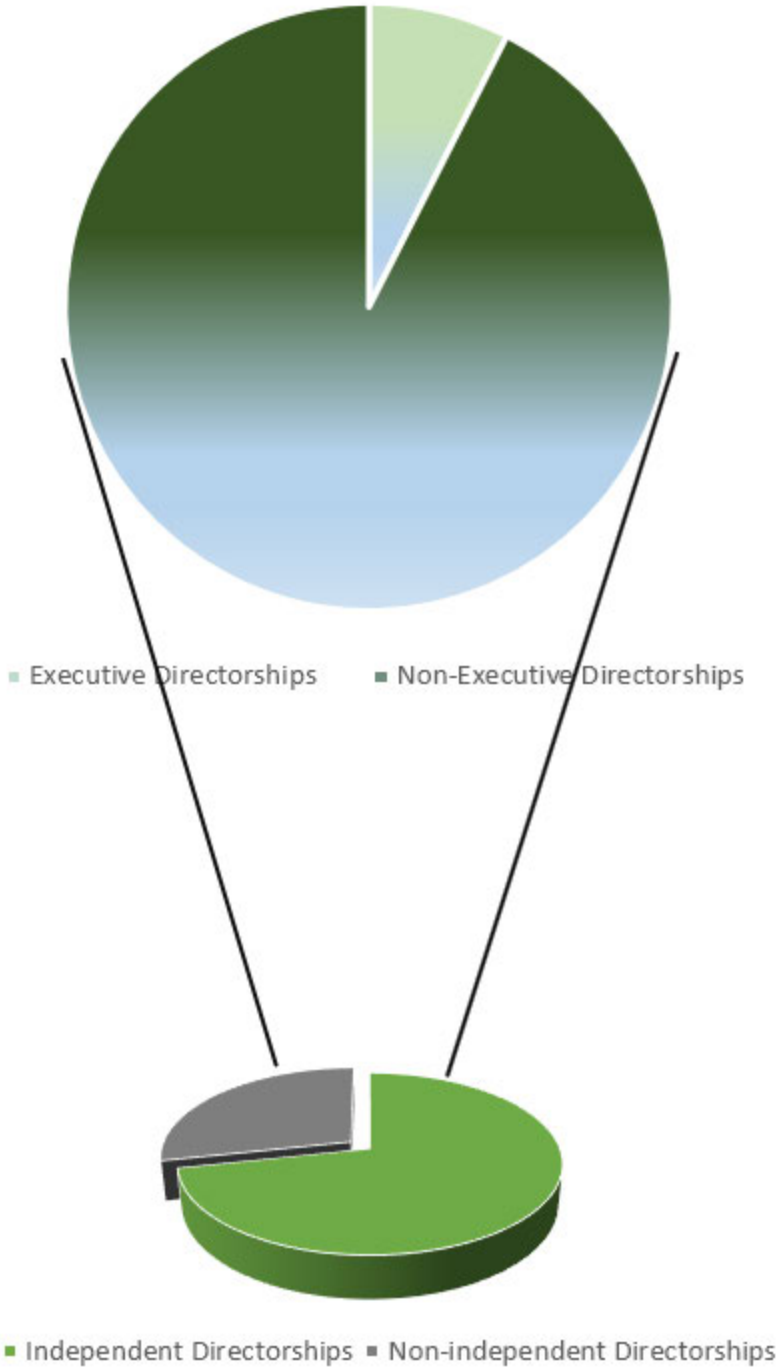

Figure 27: Independent Women Directors (Nifty 50)[1115]

[1115] Constructed based on data sourced from Prime Database.

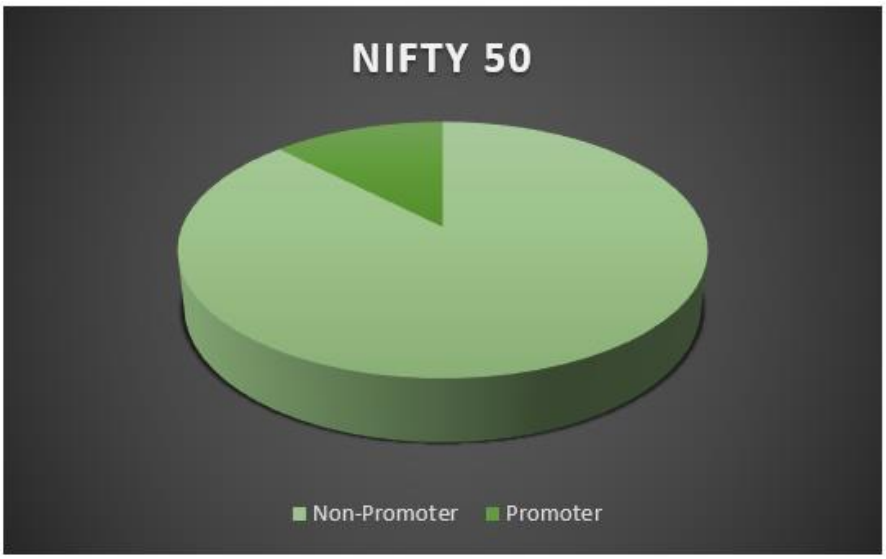

Figure 28: Promoter versus Non-promoter Women Directorships (Nifty 50)[1116]

Upon a review of the percentages of independent directorships in (a) non-executive directorships, and (b) total women directorships (which stand at 71.6% and 66.3% respectively), and promoter directorships in Nifty 50 companies, it appears that the apprehensions of disguised connections and law evasion are not as highly critical as those in the media had alleged. Given that the legal requirement for independent directors is fixed at one-third (where the chairman is non-executive) and half (where the chairman is executive) of the board,[1117] the above percentages exceeding either of these limits depict not so precarious conditions. Moreover, as most (barring one out of ten) of the promoter directorships (usually those suspected as the means to defy law) are engaged in executive roles, chair positions and/or board committees (which the quota does not mandate, and thus are voluntary company-level initiatives),[1118] they cannot be suspected outright of being mere quota fillers.

Having said this, one cannot overlook (which mostly escapes the regulatory/media radar) connections that are personally motivated, although they do not come within the formal connotation of personal relations/relatives. Examples are directors who are also partners in law firms or audit firms, which have advisory or consultancy relations with companies. There are visibly four (if not more) such instances within the female

[1116] Constructed based on data sourced from Prime Database.
[1117] Regulation 17(1)(b) of the Listing Regulations.
[1118] Based on a review of the boards and female directors' profiles of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.

directorships in Nifty 50 companies.[1119] While it is possible that the appointments of such professionals (who have the acumen and knowledge of company business) are not skewed at the outset, they cannot be excluded from the danger being compliant to only the letter (and not the spirit) of the "one woman director" quota.

To protect against the alleged menace of disguised connections, while the announced "one independent woman" quota might be helpful (as one of the eligibility criteria for "independent director" eliminates connections to promoters, and audit, accounting, legal and consulting firms),[1120] it is arguably not an optimum remedy. This is because confining women to such positions eventually results in the increase of their dependence upon management for seeking information and participation, which essentially means reverting back to "old boys".[1121] Further, a condition of this nature completely debars women professionals or those linked to promoters from holding such directorship, all of which appointments may not be manipulative. Considering that these women professionals might otherwise have credible backgrounds and understanding of the relevant industry/company, their appointments are not outright wrong. The same argument holds good for family connections too.

In such events, is such an absolute elimination at all necessary?

No reason justifies why women directors cannot have family/professional connections, if male directors can.[1122] No explanations can be adduced as regards how a board with a female executive director but with no female independent director is in any way inferior to a board with no female executive but one female independent director. No rationale explains the nexus why a woman director (if the only woman on board) has to be an independent one, if otherwise her credentials justify her appointment. Having family members or professional links on boards tends to become a crisis when such appointments cannot be justified with business intellect. Thus, what creates a nuisance is not the family or professional connections *per se*, rather the objective with which

[1119] Based on a review of the boards and female directors' profiles of Nifty 50 companies, as of 3 February 2018- data sourced from Prime Database.
[1120] Section 149(6)(e)(ii) of the Act of 2013.
[1121] CB Carter & JW Lorsch (n 868) 43, 101.
[1122] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (Stakeholders Empowerment Services and the National Stock Exchange, 31 March 2017) 5-7 < https://www.sesgovernance.com/pdf/1520575238_NSE-BOARD-COMPOSITION-&-REMUNERATION-OF-DIRECTORS.pdf> accessed 7 May 2018.

such appointments are made, and manipulations which are pervasive across most, if not all, board appointments that happen within closed circuits. This might prevail even where one is appointed as independent, where otherwise such a person is influenced by or affiliated with the management.[1123] Hence, what is needed is a means to check such connections and conflict, which stand on corrupt motives. Instead, what the SEBI seeks to do can be compared to an analogous situation where one cuts a tree so as to prevent trespass by feeding animals. *Could there be no alternative intermediate means to check only manipulative appointments instead?*

Moreover, one must be aware of the implications that would necessarily follow from this move. Given that the added requirement of "independence" has been formally legislated by the SEBI, all of the additional compliances that are applicable to independent directors, in terms of their eligibility,[1124] restrictions on levels of their involvement, participation, ownership of shares/stock options and remuneration, as well as more stringent evaluation, codes of conduct and related obligations, would extend to woman directors too.[1125] For instance, to qualify as an independent director in a listed company, such women must not (as well as having pre-existing restrictions on her personal and pecuniary relations with companies or their promoters) sit as non-independent directors on the board of any other company on which another independent director conversely holds a non-independent directorship in the listed one.[1126] To explain, A (to qualify as an independent woman director in company I) cannot hold a non-independent directorship in company II, in which B is an independent director, if B also holds a non-independent directorship in company I. Also derived from the Kotak Committee, this will eliminate a large section of women directors from holding the quota position, unless they sacrifice their existing directorships, even if within the legally permissible limits of eight[1127] directorships across listed companies (further reduced to seven in cases where all such directorships are of an independent nature, or further to three where a woman holds an executive

[1123] 'Submission on the Review of the 4th Edition of the Corporate Governance Principles and Recommendations' (n 889).
[1124] Section 149(6) of the Act of 2013; and Regulation 16 of the Listing Regulations.
[1125] Sections 149(6)-(13) and 150 of the Act of 2013; Schedule IV of the Act of 2013; and Regulations 17 and 25 of the Listing Regulations.
[1126] 'Report of the Kotak Committee on Corporate Governance' (n 59) chapter II, 25-26.
[1127] *Id* at chapter I, 22.

directorship elsewhere).[1128] Moreover, all of these requirements mean that a more expansive pool of female candidates is needed to fulfil what the quota necessitates. This is particularly the case as female directors, even when in mainstream business as executive directors, will not be counted within such quota compliance. Given that most companies in India are family- or promoter-run (meaning those who are in direct or indirect control over the company, whether as a shareholder, director or otherwise, or on whose advice, directions or instructions directors act)[1129], this can serve as a major handicap for female appointments, while no such condition applies to similar male appointments. This further curtails the choices within the available candidature. Needless to state, this also comes with added risks of strengthening stereotyping and segregation of roles. As independent directors are reckoned to be passive, secondary and "outsider" to the company, a similar image will be equated with female directors, who, as women, are stereotyped as such anyway. Thus, upon entering boardrooms through the "one independent woman" quota, they continue to remain in or carry forward the status of outsider. In other words, such a quota is more likely to institutionalise gender stereotypes and segregation, running against diversity or rather which diversity seeks to displace. As an announcement that is untimely and too premature, the "one independent woman" quota quintessentially makes the pathway for gender diversity, still at its nascent stage in India, more complex and difficult to attain, while also confining the scope of participation and decision-making by woman directors so appointed.

Owing to the broadly fair revelations from a review of the directors' profiles in Nifty 50 companies (discussed earlier in this section), and announcements by the MCA (in denial about any proposals to oust such family/professional connections) made not more than a year before the Kotak Committee,[1130] one is tempted to ask, *was this amendment adequately brainstormed (in light of the industry facts) at regulatory level, or did it result from sheer pressure from critics/the media?*

[1128] SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations 2018 (n 60).
[1129] Section 2(69) of the Act of 2013.
[1130] 'Appointment of Women Directors' (Release ID: 148845, Press Information Bureau, MCA, 12 August 2016).

III.5G Policy on Diversity

As such, although India has made it mandatory for companies, particularly nomination committees, to devise a policy on diversity of boards of directors,[1131] there is no compulsion as regards any disclosure of such policy. Yet, a review of the annual reports (2017–18) of the ten largest companies based on market capitalisation of Nifty 50 companies was undertaken to understand if companies have voluntarily taken this initiative, and disclosed or demonstrated what constitutes their approach towards such diversity.

In only three out of ten companies is a policy with a title containing the word "diversity" published, whether as an exhibit/annexure to the annual report or referred through a website link. Two out of these three policies are devised as a consolidation of policies on appointment, remuneration and diversity. Given the legal requirement to devise *and* disclose a remuneration policy,[1132] it appears that these two companies, while complying with that, have inserted diversity as a sub-issue within the same policy, instead of working upon a separate and dedicated policy for it. Only one company has therefore published a distinct policy earmarked for diversity.

Further scrutinising the contents of these three policies, it is found that the first two contain diversity only as a sub-section, while the main policy details remuneration aspects. Outlined in brief provisions, all three of the policies discuss diversity in terms of the following:

optimum balance of executive, non-executive and independent directors
mix of skills, expertise, experience, age, gender, background, education and sector knowledge
primacy of merit in all appointments
no tolerance for discrimination

Thus, almost reiterating what the law/regulations specify, the policies do not go much beyond that. This involves throwing out some broad-level ideas and none of the real concerns or challenges, such as how diversity will be attained, administered, practised,

[1131] Schedule II Part D A(3) of the Listing Regulations.
[1132] Section 149 (3) and (4) of the Act of 2013.

measured and monitored or how its consequences, reliance on external agents or search firms, internal procedures and control, milestones or officers responsible, are dealt with. Rather, by including reference to merit, experience and background, the preponderance of subjectivity only increases. In other words, these policies appear to be no more than boiler-plates, which reveal no real or measurable objectives.

Even worse, the other seven companies, which have not published any diversity policies in their annual reports, either contain no mention of it, or confirm it as one of the responsibilities or terms of their nomination committees mirroring verbatim what the Listing Regulations provide for.

It is worthwhile to note here that, while their diversity policies remain under cover, these companies have published their policies on remuneration, corporate social responsibility and dividends, all of which are mandatorily required by law to be disclosed in annual reports. It can thus be inferred that the absence of such legal compulsion is the reason why companies have refrained from publishing their diversity reports, even if they might have devised one otherwise. Given that the contents, even where published, are no more than standard templates, what remains not revealed can hardly be expected to be any better. This becomes more worrisome as these relate to the top companies or perceived governance champions of India, and the rest are expected to follow their examples. It is obvious from the material outlined that companies, which reiterate exactly what the law states, and do no more where the law is silent, are only seeking and aiming for the letter, and not the spirit, of the law.

III.6 *Has the "One Woman Director" Quota Worked?*

Based on the extensive review presented here of India's top and medium-growth companies, the "one woman director" quota can be said to have mixed implications. While levels of compliance, coupled with how companies have added women directors without expanding their board sizes (rather displaced with time), suggest that the mandatory quota triggered a good start, the overall outcome is far from appealing.

Boards continue to be male dominated with women directors constituting less than 14% of total directorships. As this percentage is derived from a group of companies of which a major chunk are top ones, usually the governance fore-runners, this is even

less, at around 11%, for all companies when figures are taken together at aggregate country level.[1133] With the new April 2019 deadline (requiring top 500 companies to have at least one independent woman director) having passed, and 10% of such companies failing compliance by then, the outcomes continue to be challenging.[1134]

Moreover, what seems to have been achieved by the quota is mostly one that is only apparent. A qualitative assessment of the numbers and an in-depth scrutiny of the directors' profiles further disparage the overall status. With poor representation of women in executive directorships, board committees, chair positions and mainstream business, the "one woman director" quota has clearly not been able to trigger any significant momentum for behavioural or systemic reforms. This is once again proven by the niche group of candidates able to access peak positions, their not-so-diverse attributes in terms of age and background, and the close confines of candidature. Coming from the same generation and from similar courses and qualifications, alumni/institutions and disciplines, their experience and orientation tend to be alike, and no different from their male colleagues. Likewise, as against the outrage that was witnessed in reaction to a few family appointments, what remains unnoticed are appointments made from close professional/service firms, which also mimic and are no less influenced by management. In such conditions, how far they will really act diverse behind the closed doors of the boardroom can never be probed.

Further, while sector-specific segregation is not visible outright, with most of the companies barely managing to comply with the quota, the reality is not so symmetrical. Rather, the segregation can be clearly inferred from women's presence (or absence) in executive directorship and management roles to which the quota does not apply distinctly, where such women are mostly found within the finance sector.[1135] This is also evident from the nature of memberships of female directors, which are mostly in monitoring as against core business committees of the board. Such functional

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[1133] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (McKinsey & Company, May 2018) 42.

[1134] 'Gender diversity: Top NSE-listed companies in violation of SEBI's directive' (Forbes India, 9 April 2019) <http://www.forbesindia.com/news/business/gender-diversity-top-nse-listed-companies-in-violation-of-sebis-directive-3788671 html> accessed 15 August 2019.

[1135] SD Basu, 'Why banking mints the most women CEOs in India' (Economic Times, 4 October 2013) < https://economictimes.indiatimes.com/jobs/why-banking-mints-the-most-women-ceos-in-india/articleshow/23479513.cms> accessed 18 May 2017.

segregation can only be expected to intensify with the announced "one independent woman" quota, which, by its nomenclature itself, increases the risk of stereotyping women to what are described as part-time "outsider" roles, as against "whole-time"[1136] executive directorships. Thus, instead of diversifying, the quota appears more likely to further compartmentalise gender and roles traditionally associated with it.

All of these findings assert that, although numerically compliant, boards are not yet so diverse in terms of their composition, functions and outlook. Rare instances of companies appointing more than one female director – i.e., in excess of what the quota stipulates, affirm that reforms have only been triggered by the compulsion of law and the fear of sanctions. This is further proven from diversity policies, which, although not mandatorily required by law to be disclosed, nonetheless must be devised by companies. The contents of such policies, where rarely published within annual reports, reiterate only what the regulation states. Coded in brief, cryptic and subjective ideas, they appear to be no more than inconsequential boiler-plates. Such diversity, which has not as yet been internalised through self-reflection by companies in their value systems or as a business norm, remains superficial and symbolic. This reflects upon the inability of the quota to steer the true spirit of diversity. Having said this, some of the apprehensions in terms of family connections bypassing the law (which might have been true at the inception of the quota), as well as the "golden skirt", are now proven to be misconceived.

III.7 *Conclusion*

This chapter turns the focus on India, and for the first time offers a scrutiny of India's "one woman director" quota in the most extensive and critical way. It includes a comprehensive review of the strategy along with all relevant laws and regulations; explores the rationale underlying the strategy with a detailed scrutiny of both, the social justice and business reasons specific to India (as revealed from some of the direct sources and inferred from many indirect ones); draws an analogy with the country's legacy of political quotas, which explains the rationale further; and finally, investigates the outcomes of the quota through an in-depth and independently

[1136] Section 197 of the Act of 2013.

undertaken analysis of boards of 50 large companies and 50 mid-size companies of India. The chapter thus offers several originally created graphs and statistics based on an analysis of the data procured, and which in turn help the thesis to independently arrive at interpretations/results specific to the Indian context.

The chapter starts with examining the strategy of "one woman director" quota introduced,[1137] amidst more elaborate reforms as part of the complete overhaul of India's company law statute, in 2013. While section 149 of the Companies Act of 2013 imposing the quota does not say much, other than requiring for at least one female director on boards of certain notified companies, subsequent rules list out the categories of companies to which the quota applies, and which includes all publicly listed companies (the thesis is concerned with only this category of companies). This chapter then tracks the evolution of this quota, i.e., the timelines for compliances extended until 2015; a structure of fines issued (but later revoked); recommendations of the Kotak Committee to substitute the "one woman director" quota with "one independent woman director" quota in 2017; regulatory amendments to require companies to formulate diversity policies; and finally, the reformed quota notified and brought into effect in 2018 with extended timelines of 2019/2020.

After tracing the trajectory of the quota, the chapter then makes an attempt to understand the rationale underlying the strategy.[1138] In doing so, it confronts a big challenge in terms of procuring the relevant materials or sources of information, as none of the existing literature (including the scantily available legislative debates or records) explicitly mentions whether the introduction of the female directorship requirement was designed to secure gender equality or was put in place for business reasons. Hence, inferences were drawn from brief accounts in indirect sources and other suggestive materials like draft bills, pre-legislative standing committee reports, regulatory notifications/circulars and concept papers (most often concerning with diversity only as an ancillary issue or a passing reference), expert committee views

[1137] In section III.2 in this chapter III above.
[1138] Analysed in section III.3 in this chapter III above.

and other associated deliberations.[1139] India's experiences from its legacy of political quotas were also examined in this regard.[1140]

All of the above reveal that India is seemingly inspired by a mix of both, the social justice and business rationales.[1141] For instance, on one hand, the Godrej Committee of 2012, the SEBI's consultative paper on corporate governance reforms, the Kotak Committee, and even few occasional public speeches made by the former SEBI chairperson and ministers, emphasise upon diverse skill-sets, board effectiveness and contributions to the business. On the other hand, the Standing Committee reports prior to legislating the Companies Act of 2013, describe this quota to be in line with the government's policy towards representative equality and gender balance in decision making. Therefore, the rationale resonated by India appears to be a mixed rationale, i.e., based on social-cum-business reasons or objectives.

With a fair understanding of the strategy and its underlying rationale, the chapter finally appraises the performance of the quota in the industry.[1142] To do so, the chapter undertakes a comprehensive, in-depth and purposive analysis of the boards of 100 large and medium (Nifty 50 and Nifty mid-cap 50) companies in India. Once again, the data was not available in public domain, and had to be specifically sourced for the purposes of this thesis for a hefty fee, from Prime database, which is a subscription-based paid information service that manages data on companies listed, in association with the National Stock Exchange. The analysis goes beyond the aggregate compliance figures to comprehensively assess the individual profiles of female directors in these companies (including, *inter alia*, their age, attributes and competencies; the nature of their directorships – executive, non-executive or independent; their connectivity to other board members or promoter owners; sectoral presence; and functional segregations across board committees). Further, the most recent (2017–2018) annual reports of the top ten Nifty 50 companies were reviewed to examine their diversity policies, if and where they were published.

[1139] Mentioned in the introduction chapter of this thesis.
[1140] Discussed in section III.4 in this chapter III above.
[1141] A Kamalnath & A Masselot, 'Corporate board gender diversity in the shadow of the controlling shareholder—an Indian perspective' (2019) 19(2) Oxford University Commonwealth Law Journal 179-203, 193.
[1142] Illustrated and detailed analysis in section III.5 in this chapter III above.

The thesis has analysed the company-wise data of all 100 companies to create meaningful graphs and statistics, which help in deductively interpreting the outcomes of the quota. Some of these being, no more than 14% of total directorships (which reduces further to 11% if measured at aggregate industry level) are held by women; female representation in executive director positions is even poorer (six out of 157 and 11 out of 136 in Nifty 50 and Nifty mid-cap 50 companies, out of which many belong to promoter families);[1143] segregation of female directors to board committees linked to monitoring rather than core business or productivity;[1144] only 24 of more than 300 chair positions are occupied by female directors; niche and not-so-diverse attributes in terms of age, background, qualifications and competencies among the existing female directors; and close connectivity with existing directors reflecting the close confines to which board searches remain restricted.[1145] While the reformed "one independent woman director" quota sought to address the concerns of proxy directorships (where mothers and daughters of promoters were sitting as trophy directors, while the actual control and authority lay with the male members), the outcomes from the analysis reveal that this reform has only little implications of practical relevance. With very few companies having more than one female director over and above what the quota requires,[1146] and weak or boiler-plate contents of diversity policies,[1147] the impact of the quota appears superficial with no systemic or foundational effects as such. While it has been a good starting point as such (considering that India is first among its developing peers to initiate efforts on boardroom gender diversity), the momentum is still missing.

Hence, with the "one woman director" quota revealing a not-so-positive story five years since its enactment,[1148] one must ask – *what went wrong from a regulatory standpoint?* The next chapter would accordingly revisit India's "one woman director"

[1143] Illustrated in figures 22 and 23, respectively, of this thesis.
[1144] Illustrated in figure 24 of this thesis.
[1145] Revealed in chapter III (section III.5F) of this thesis. See also, R Bhattacharya, 'Gender diversity on boards improves, but more ground needs to be covered: Experts' (Economic Times, 19 February 2018) < https://economictimes.indiatimes.com/news/company/corporate-trends/gender-diversity-on-boards-improves-but-more-ground-needs-to-be-covered-experts/articleshow/62988324.cms?from=mdr> accessed 8 August 2019.
[1146] Illustrated in figures 15 and 16 of this thesis.
[1147] Elaborated in chapter III (section III.5G) of this thesis.
[1148] Summarised in section III.6 in this chapter III above.

quota, critically assess the strategy, and understand where it falls short of the general theory of strategising or an optimum strategy (as derived in chapter II). This will in turn enable rectification of the gaps or missing links, and help expounding a future roadmap specific to the needs and context of India,[1149] in the following final chapter IV.

[1149] NK Sanan, 'Board Gender Diversity, Financial and Social Performance of Indian Firms' (2016) 20(4) SAGE Publications 361- 367, 366.

CHAPTER IV – ROADMAP FOR INDIA

IV.1 *Overview of the chapter*

At the outset, India's "one woman director" strategy has been a good starting point, especially considering that it initiated a movement for the first time among the developing nations, and could also arouse industry interest as regards boardroom gender diversity within the country. One cannot also ignore the rise in female directorships, which has almost doubled, in Indian companies over the past five years.[1150] Having said that, the results are not up to the expected levels, as (a) female directorship is still hovering at less than 14% for 100 of India's large and mid-sized companies (and even less at 11% in aggregate); (b) large number of defaulting companies (and which is likely to increase with the reformed "one independent woman" quota); (c) extremely poor representation in executive roles; (d) passive participation in board committees; (e) few chair positions occupied by women; (f) homogeneous traits and trends, and close connectivity within boardrooms even where companies comply with quotas; and (g) not-so-mature internal diversity policies and procedures.[1151]

The above outcomes reveal that, although the quota might have brought the issue of female directorship to the forefront and made companies aware of its indispensability (at least from a legal standpoint), something has gone significantly wrong with what and how India has imposed. When concerns were raised in respect of the shortcomings of the quota as originally enacted, the regulator (instead of investigating for the missing links) impulsively reacted to media allegations,[1152] and reformed it by substituting "one woman director" with "one independent woman". Needless to state, this change has only added to the complexities of an already complex regulation. Ideally, that was the opportune chance for the regulator to re-visit the quota, map it against the objectives or the rationale for which it was imposed, identify the gaps, and then re-strategise an optimum regulatory framework. Considering that this was not done then,

[1150] Illustrated in figure 12 of this thesis.
[1151] Detailed analysis can be found in section III.5 in chapter III of this thesis.
[1152] N Bhalla (n 924).

and that many companies have in the meanwhile missed the 2019 deadline for the reformed quota too,[1153] this chapter makes an earnest attempt in this regard.

To start with, the chapter re-visits the quota to understand if it was strategized the right way at the outset. Accordingly, the rationale underlying why India seeks to attain boardroom gender diversity, and for which the quota was purportedly imposed, is verified in relation to its choice of policy approach. This mapping reveals that, while the rationale is a mix of both – social justice and business reasons, the policy approach adopted is one of strict hard law, i.e., binding and mandatory quota with sanctions. To recall from chapter II, the general theory and the formulae to an optimum strategy require that, where the predominance is of the social justice rationale, the policy approach is hard law; and likewise, where the rationale is motivated by business reasons, the approach would be soft law. As a corollary, the strategy in case of former would be mandatory, binding quotas backed by sanctions, as against industry led voluntary measures for the latter. In case where neither of the two override the other, and the rationale is a combination or mix of both, the optimum approach would be one that lies mid-way between the hard law and soft law (or a mix of strategies, both mandatory and voluntary in nature). Hence, when assessed against this general theory of strategising, and the formulae for an optimum strategy, an outright mismatch between the quota (which is a purely hard law approach and strategy) and the rationale (which is a mix of both, social justice and business) emerges, referred as a "regulatory mismatch" in this thesis.[1154] To rectify this incongruence, this chapter recommends a mix of strategies in a way that would cumulate up to a mid-way policy approach between hard law and soft, as is ideal for India's rationale.

To explain the recommended strategies, the chapter once again recalls the broad-level proposals (for what can be an optimum strategy for boardroom gender diversity) made in chapter II.[1155] The proposal for mix of strategies- distinct for the non-executive (i.e., mandatory quota) and executive (i.e., voluntary measures) constituents of the board, is reiterated here, but with modifications and adaptations to suit the Indian context.

[1153] 'Gender diversity: Top NSE-listed companies in violation of SEBI's directive' (n 1134).
[1154] Explained in section IV.2 of this chapter.
[1155] See section II.7C(B) in chapter II of this thesis.

Hence, this chapter turns next to gather what may be these India-specific nuances or needs, necessitating any such modification of the broad strategies proposed for the two constituents.

In doing so, the chapter reveals the challenge of candidature and pipeline, i.e., a severe shortfall of potential female candidates for both the constituents. This may be explained through India's strikingly low female labour force participation, low female literacy rates, and a vicious cycle (of gender segregation, stereotyping, mid-level filtration, severe leakage in the pipeline, and a "double" glass ceiling) with deep and staunch patriarchal roots.[1156] Hence, the strategies (proposed broadly as mandatory quota for non-executive directors and voluntary measures for the executive directors) must be so crafted that, aside to rectifying the regulatory mismatch, they also factor the candidature crisis, and aid in building it up further.

Finally, with the two-fold objectives (i.e., (a) to rectify the regulatory mismatch, and (b) doing that in a way that factors the candidature crisis), the chapter proposes a roadmap specific and focused on the Indian context. *Firstly*, it proposes for a modified quota with phased implementation and timelines for the non-executive directors. In doing so, the chapter acknowledges that, as these directors have supervisory and representative roles, the talent pool from which these directors may be sourced is larger than that of executive directors. Hence, a mandatory quota, if strategised in phases with carefully drawn sanctions is likely to work for this constituent. With a hard law approach as this, the necessary regulatory message emphasising the importance and indispensability of such gender diversity can also be conveyed across to the industry. Further, to build a more enhanced future candidature, the chapter makes several recommendations towards greater involvement of search firms and nomination committees (instead of acting as "rubber-stamps" to board nominations), creation of databases, and institutionalising professional directorships.[1157]

In contrast to the above, voluntary targets on a conform-or-explain basis (once again, in a phased manner) are proposed for the executive constituent.[1158] Considering the

[1156] Explained in section IV.3 in this chapter IV.
[1157] Detailed explanation in section IV.4A in this chapter IV.
[1158] Detailed explanation in section IV.4B in this chapter IV.

functional and strategic characteristics of their roles, and the need for flexibility to adapt to changing needs of the business, this strategy would work on business judgment. To avoid its transformation into a hard law compliance by practice (which is not intended), the targets have been proposed on a "conform-or-explain", and not "comply-or-explain basis. Having said that, the disclosures in case of non-conformity and the expected "naming and shaming" repercussions of the industry (as is typical of soft law) would ensure that the motivation is not lost. Also, not overlooking that much of this strategy would require industry activism, the roadmap provides for greater obligations on the industry participants (including, the institutional investors) too.[1159]

As regards its candidature (which is primarily sourced from within the lower levels in the hierarchy of the same or other companies, preferably in the same sector- referred as the "pipeline"), the scope is further curtailed. This is because, executive directors, who are the real day-to-day decision-makers of the business, have a bigger onus to bring in expertise and knowledge, along with previous experience of job/sector. To address this, a model diversity policy (referred here, as the "ready reckoner") is formulated. Providing for diversity mainstreaming at all levels, and across recruitments/progression, work profiles and fixing of liabilities/accountability, work-life conditions, board evaluation, this can offer a direction as regards how to devise a diversity policy, as is a mandatory obligation for listed companies. This can also offer some help to the regulator (SEBI) in promulgating some regulatory guidance in this regard for the industry. Notably, with both, a top-down and bottom-up approach, coupled with disclosure/transparency obligations endorsed in the ready reckoner, it is expected that the concerns of gender segregation, stereotyping, pay-gaps, mid-level filtration, severe leakage in the pipeline, "double" glass ceiling- all of which are off-shoots of the staunch patriarchy that characterises Indian context, and which contribute to the candidature crisis (in this case, the more severe pipeline crisis), may be systemically addressed. This may also help in evolving gender diversity as a business and institutional norm, and an inevitable way of life.

The roadmap also emphasises upon proper and regular diversity audit and disclosure mechanisms, which is an area of great folly in India. The quota has not been followed

[1159] Detailed explanation in section IV.4C in this chapter IV.

up in India with any subsequent reviews or audits by the regulator, due to which there is no centralised organisation of data in this regard available in public domain, or otherwise. Without these audits, the quota has come about as a one-time tick-the-box compliance, with no further progression. To address this lacuna, the roadmap provides for a diversity audit mechanism (not only in the introductory phases, but as a systemic requirement).

With all of the above, the two-fold objective (i.e., the rectification of regulatory mismatch, and doing so in consideration of the candidature crisis specific to the Indian context) of the roadmap is likely to be attained. The mix of strategies (distinct for the non-executive and executive constituents) sums up to a policy approach that lies mid-way between hard law and soft law, and thus, re-adjusts the equation (which was broken by the strict hard law quota) with India's mixed rationale, to conform to the general theory and formulae for optimum strategy (as laid down in chapter II).[1160] This also takes care of the candidature shortage, as the strategies are devised in a phased manner. Moreover, the roadmap acknowledging that no "one-size-fits-all" approach can work for boardrooms, and much less for its two constituents, refrains from imposing an overarching quota (as is currently the case). Accordingly, for the executive faction where the crisis (with a grossly leaking pipeline) is more severe, the strategy has been kept at discretionary measures, as against mandatory and binding obligations for non-executive directorships which require a more generalized skill-set and thus has a comparatively larger resource pool.

Thus, with an all-inclusive multi-party approach, all of these recommendations, a few as obligatory mandates and the remainder as guidance, are interwoven to offer a preferred way forward, or roadmap, for India. It is worthy to note here before proceeding to the detailed chapter that, the roadmap and the strategies formulated have been ingeniously developed for the Indian context, and not borrowed or transplanted from any other country or existing frameworks in other jurisdictions.

[1160] Illustrated in figure 29 of this thesis.

IV.2 *Regulatory Mismatch*

Following on from chapter III, although India has been adventurous compared to its other developing peers in its drive for boardroom gender diversity, its strategising of the "one woman director" quota has not met with the expected outcomes. Rather, the policy adopted and the strategy enacted have resulted in significant doubts and confusion relating to what India actually sought to achieve through it. Did India seek gender balance (i.e., equal demographic representation or parity in numbers) *per se*, or did it aim beyond that for a functionally diverse boardroom? If India strives for the former, is a "one woman" director sufficient to attain such equilibrium, especially when board sizes can go up to 15 directors or more?[1161] The answer is an obvious "no", as a single woman amidst 14 (if not more) male directors can by no means strike that balance, whether expressed in terms of demographics or numbers, or even meaningful participation. Does India then seek values that gender can contribute to boardrooms? It is not too difficult to elucidate that a quota cannot replace function-oriented decisions of business, which can never be fitted within "one size" for all. Likewise, it cannot be expected to trigger sudden realisations of functional advantages or utility of gender when such needs differ from one company to another. Unable to attain either gender equality or diversity, India's "one woman director" quota seems to be a rather less thought of and disoriented formulation of policy and strategy, even less when compared with the mixed (society-cum-business) rationale that the country otherwise seems to aim for.

IV.2A Why ≠ How

While India responds to *why* through a mixed case constructed upon both a social justice and business rationale,[1162] the answer to *how* – i.e., the choice of policy and strategy – seems rather misplaced.

With a rationale that coincides with the optimum concept of boardroom gender diversity, India deserves some applause for having realised the true spirit of such diversity. However, despite making such a good start, the country eventually lost its

[1161] Section 149(1) of the Act of 2013.
[1162] Analysed in section III.3 in chapter III of this thesis.

direction while this was being crystallised into regulation. Ideally, such a mixed rationale, where neither social justice nor business motives significantly over-power each other, should have culminated in a strategy that balances hard law and soft law policies, in line with the formula for the "optimum", as recommended in chapter II (figure 8). Accordingly, what could reasonably be expected from the regulator was enactment of a single strategy with such hybrid characteristics, or a combination of more than one strategy that could sum up and attain such balance collectively. In other words, in view of the compelling gender balance concern on one hand and business autonomy on the other, a regulatory stance involving both mandatory laws and voluntary provisions that could help avoid any overwhelming bureaucratic burden on business judgment[1163] would be more fathomable. India has instead taken a contrary stand that is purely founded on hard law.

Given that the aim was not just about bringing in more women, but rather about getting the right mix of functional attributes into the boardroom through directors who happen to be women,[1164] how far, if at all, a quota can do this is doubted. Even if argued from a social justice standpoint alone, the tenability of this is rather weak. However, India's legislation on the "one woman director" quota appears to be nothing more than an easy escape or avoidance of brainstorming, which was much needed to address complexities innate to boardroom gender diversity, particularly within the Indian context. Instead of adopting an approach of integration or regulatory innovation, India chose a mandatory quota – an instrument with which the country is traditionally well acquainted. The regulator, however, failed to take cognisance of the lessons it should have learnt from its experience of political quotas. First, previous impositions of quotas were made in exclusively political and social domains where the underlying objective was unifocal (concerning essentially gender balance and equality in representation), against the bifocal rationale for boardroom gender diversity. Second, past experiences with quotas have not been devoid of controversies, to the extent that many such quotas remain inconsequential or unlegislated even after decades of governmental tussle. Third, the structure of the quota in itself is erroneous and deficient, as "one woman

[1163] A Kun (n 762) 66-67.
[1164] 'Women bring in more focus, objectivity & their presence on boards makes men perform better: M Damodaran' (n 1030).

director" cannot reasonably be expected to bring about even gender balance or equality in representation, setting aside any distinctive value additions to the boardroom. Finally, support of adequate socio-economic measures to facilitate the mobility of women up the corporate ladder must exist alongside what is needed for either a hard law or soft law approach to succeed (discussed in chapter II).

Another point relating to mismatches or rather "not-so-perfect" matches is observed in the context of governance frameworks. A strict hard-bound quota may not perfectly fit within India's corporate governance, lying between a rule-based and principle-based regime.[1165] Having come a long way since the post-independence restrictive socialist ideals where trade and commerce was state-controlled, India now relies upon both market forces and mandatory "bright-line rules".[1166] Testing on the two variants of corporate governance frameworks enunciated by the OECD,[1167] India stands mid-way,[1168] as it exhibits re-hashed codes of corporate governance from time to time, while also prescribing binding obligations emerging from the authority of statutes and regulations.[1169] To explain, the overall outlook has been to encourage "voluntary adoption" of "guiding principles" to transform the regulatory tenets from a "tick-box" to systemic change – all of which cannot be explicitly legislated.[1170]

A classic example of this comes from the Listing Regulations, which, although incorporating statutory rigidity in the listing rules (by escalating what was part of listing agreements with stock exchanges into more formalised regulations enacted by the SEBI), works upon over-arching governing principles that prevail over rules in case of any inconsistencies.[1171] These further enumerate several requirements that companies may comply with only at their discretion.[1172] This approach was also evident while articulating the overhaul of the 1956 company law, where the intention was to devise a framework of self-regulation with over-sight, such that state intrusion,

[1165] 'Consultative paper on review of corporate governance norms in India' (n 58) 9.
[1166] U Varottil, 'Evolution and Effectiveness of Independent Directors in Indian Corporate Governance' (2010) 6(2) Hastings Business Law Journal 281- 371, 288.
[1167] 'OECD Corporate Governance Factbook 2017' (n 1080) 15.
[1168] 'Consultative paper on review of corporate governance norms in India' (n 58) 9.
[1169] 'OECD Corporate Governance Factbook 2017' (n 1080) 22.
[1170] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 1.
[1171] Chapter 2 of the Listing Regulations.
[1172] Regulation 27 read with Part E of Schedule II of the Listing Regulations.

preferably only in times of mis-governance, remains minimal.[1173] The shift away from strict rules and the mandate of hard law can also be deduced in several of India's corporate governance reviews, with the first of its kind undertaken by the Confederation of Indian Industries ("CII"),[1174] which was followed by others from time to time crafted by expert committees and often led by industry stalwarts, and/or framed in consultation with industry and professional bodies.[1175] Standing between the two extreme pillars of principles (forming the foundation and spirit) vis-à-vis obligatory rules (deviation from which triggers sanctions), India's corporate governance has been advancing to an inward-looking or self-reflecting approach that goes beyond (but not essentially substituting) the mechanism of regulatory compliance. For India, "real issues that determine the quality of corporate governance are issues of principle" where "only a law or rule may not be an effective measure".[1176] Extending a similar analogy to the "one woman director" quota, it can be said in unequivocal terms that such a law or rule by itself is not an effective or optimum measure, which would be better represented by a mix of hard law and soft law policies, or principles and rules.

For a more thorough understanding of the regulatory mismatch, such points of error or incongruence where the "one woman director" quota falters are shown here:

[1173] 'Twenty-first Report- The Companies Bill 2009' (n 55) points 5 and 14. See also, 'Legislative Brief- The Companies Bill, 2009' (n 55).
[1174] 'Desirable Corporate Governance: A Code' (CII 1998).
[1175] 'Twenty-first Report- The Companies Bill 2009' (n 55) Introduction; and 'Consultative paper on review of corporate governance norms in India' (n 58) 8. See also, Reports of Kumar Mangalam Birla Committee (2000); Reserve Bank of India Advisory Group on Corporate Governance (2001); Naresh Chandra Committee (2002); Narayana Murthy Committee (2003); JJ Irani Committee (2005); Godrej Committee (2012); and Kotak Committee (2017).
[1176] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 15.

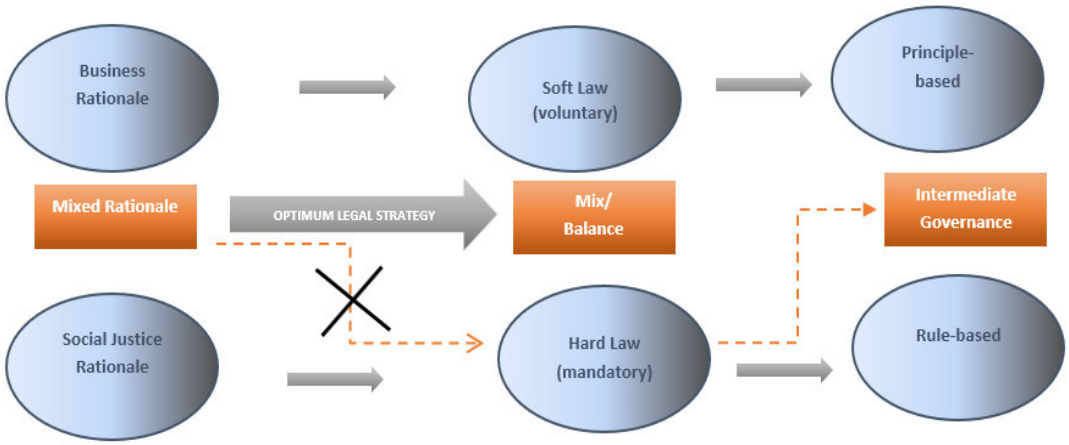

Figure 29: Regulatory Mismatch – India

The illustration here seeks to map out where India has deviated from what could otherwise have led the country to an optimum regulatory paradigm, both conceptually and contextually. The blue/grey boxes and arrows replicate the formula from chapter II (figure 8) and the orange boxes/arrows denote where India stands or ought to have stood. The mixed case for why India wants such diversity (or India's rationale, which coincides with the dual case of boardroom gender diversity, as noted in chapter I) is soon followed by divergences (traced through dashed arrows) from the optimal linear path that an ideal strategy would otherwise follow. Instead of running mid-way through the two poles between mandatory hard law and voluntary soft law, India takes a turn downwards to conform with what corresponds to an exclusive or predominant social justice rationale. This quintessentially leads to the second divergence, which for the quota would perhaps have worked best if it could be strictly rule based, as against India's intermediate governance framework. Conversely, for such an intermediate framework, a similar intermediate or mid-way strategy derived from a balance of hard law and soft law policies would have been ideal, or preferred. India should have rather made use of its increasing reliance on principles, which can be particularly helpful in relation to issues on which the regulator lacks foresight, as it appears to be for India insofar as the back-and-forth on diversity regulation is concerned. Its intermediate governance framework could have served best for regulatory innovation, which is

much needed to identify a "new governance"[1177] strategy – something that the dual concept of boardroom gender diversity, specifically India, require.

While the rationale and the governance framework offered what could be the ideal base for a balance of policy/strategy optimum for boardroom gender diversity, it was just one instance of an error of judgment that displaced the symmetry and ignited a chain of consequent irregularities. Thus, a single miscalculation of regulatory choice interrupted what could be a perfect equation.

IV.2B Strategy by Impulse

Given that its rationale does not equate to its adopted policy or strategised law, is the "one woman director" quota a strategy that grew out of regulatory impulse, not knowing where it is heading to?

From the divergence noted above in figure 29, the back-and-forth that India has gone through within five years of its enactment, and the not so considerable outcome from and beyond the quota (as revealed in chapter III), it is no longer premature to conclude that the strategy has not gone well, and has perhaps gone wrong, for India. At the stage of the complete overhaul of company law (vide replacement of the 1956 enactment by the Act of 2013), lawmakers, having noted the global stimulus as regards gender diversity in corporate leadership, arguably included it as only one of the many more critical reforms that the package of new law brought in. Although relying upon a mixed rationale, they, however, did little to construct or draw connections with what could be an appropriate legal strategy. Instead, an approach that, amidst long and drawn-out debates, has historically been entrenched in the nation's political and social context, was transplanted to an unfamiliar precinct of business and commerce. Such a strategy, without a clear or forceful articulation of objectives or critically vetted alternatives, is quite expectedly distinct from what was actually sought.

This thesis therefore asserts that the "one woman director" quota is a reckless move by India's lawmakers, which can be clearly inferred from the absence of any substantial jurisdictional references, literature reviews, critical assessments or

[1177] J Black (n 817) 431. See also, B Smith, 'It's about Time – for a new regulatory approach to Equality' (2008) 36 Federal Law Review 117-144, 142.

elaborations on the underlying objectives or reasons in any of the formal preparatory materials preceding the quota. Aside from the nominal background with which the quota was introduced (so much so that the underlying rationale had to be inferred from indirect, fragmented and piecemeal resources), the statute and/or its preliminary texts had no description as regards how the quota was constructed, its time span, what it aims to achieve in the short or long term, why it was applied to only select companies, alternate policy approaches or strategies and how the mandatory quota fares above other options, so as to be adopted in law. Although recurring but fragmented reviews and publications have been undertaken by the industry from time to time, how far these were consulted, referenced or critically assessed by the regulator when fixing the quota or its structure remains invisible. In addition, the main architects or "minds and brains" behind the quota, which has been a "faceless" formulation so far, are not known. Unlike Norway and the UK, which have one or more names (such as Haugland, Gabrielsen and Lord Davies) who personify their respective campaigns for gender diversity in boardrooms, there is no such figure for India.

Such a dearth of regulatory impetus re-emerged when the SEBI, while responding to a query under the Right to Information Act of 2005 regarding clarifications on "one woman" directors and ramifications in terms of actions taken against non-compliant companies, fumbled with answers that were cryptic and fell short of a response to the query raised.[1178] When the request for information relating to "Query 6. As per the provisions of the Companies Act, 2013, it is mandatory for a company with annual turnover of more than Rs. 300 Crore to have at least one woman director on its Board of Directors. What action has been taken by the SEBI against the Companies who have not complied with the said provisions?"[1179] was repeatedly raised, the appellate authority found the SEBI's response to be "generic" and "not [able to] adequately address the request for information made".[1180]Accordingly, the appellate authority directed the SEBI to reconsider its response with reference to the request for specific information sought. As neither the appellate authority had explicitly quoted the exact response of the SEBI, nor is it publicly available, the contents of the response could

[1178] *Chandrakant Dheeraj v SEBI*, Appeal no 2828 of 2017 (29 November 2017) 2.
[1179] *Id* at 1.
[1180] *Id* at 2.

not be further critically examined, except what one can decipher from the appellate order.

Moreover, the parliamentary debates, which have been aggressive and vehement in the context of political quotas for legislative bodies such that the proposal has not progressed any further for over two decades, find no deliberations, or indeed any protests or criticisms, against the "one woman director" quota. Enacted without any notable objections, the smooth passage of the "one woman director" quota and the announcement of its quick substitution by a "one independent woman" quota, also without sufficient explanations/facts/data to corroborate it, reveals that boardroom gender diversity has always remained an issue subservient on the regulatory agenda. Only in an effort to sync with global trends, but not supported by adequate brainstorming, necessary to place a partially social dimension into a purely corporate set-up, the result has been a misplaced strategy – one that has been in operation, unmindful of the peculiar needs of the crisis that it seeks to redress.

On a parallel note, one cannot be oblivious to how politics has played its part. With the advent of coalition politics since the latter half of 1980s,[1181] the passage or relapse of regulatory proposals can be reasoned less on intellectual or logical substance and more on how political parties and their ideologies have allied or disjointed on matters to be regulated.[1182] Thus, while gender quotas in panchayats (enacted as a populist electoral tactic to encash the rural vote bank) could see the light of day, similar proposals at federal and state levels floundered amidst arguments of caste and discrimination, to eventually result in violent protests and parliamentary sabotage.[1183] This was more so because the former did not infringe upon the direct stake of the lawmakers themselves (as was the case in the latter).[1184] When confronted with the impending question of gender reservation within their own composition, lawmakers sitting in the federal and state legislatures, possibly worried by apprehensions about

[1181] M Kishwar, 'Women and Politics: Beyond Quotas' (1996) 31(43) Economic and Political Weekly 2867-2874, 2870.
[1182] SM Rai, 'Democratic Institutions, Political Representation and Women's Empowerment: The Quota Debate in India' (1999) 6(3) Democratization 84-99, 92.
[1183] V Randall (n 1046) 69.
[1184] M Nanivadekar (n 1051) 1815.

diluted power and control in the hands of men, stepped back, notwithstanding that they enacted similar laws for the panchayat and even in the private domain of companies.

Similar sentiments are echoed in relation to the "one woman director" quota, which appears to have been enacted under an oblivious political temperament, and is thus devoid of the warranted levels of regulatory activism. From a review of the not-so-impressive results five years after the Act of 2013 (detailed in chapter III), it appears that stagnation (if not negative repercussions), which far outweighs the positive effects, is likely to cause stress on corporate resources or costs, without yielding any significant or material outcome. Thus, if companies (and not politicians) were to strategise, the quota as it is currently structured would perhaps have never been enacted, not at least in such an under-rated manner that was devoid of critical appraisals of the policy approach so adopted. The passive construction of the "one woman director" quota on similar lines to the gender quota in panchayats or rural governance, neither of which could gather even half of the levels of anxiety or attention witnessed in relation to reservations in federal/state legislatures, can thus be described as a political (rather than a legal or regulatory) strategy.

What was a correct purpose but appears to have lost its path mid-way, requires the regulator to once again start from scratch, but this time with greater innovation, novelty and sensitivity to the issue at hand. As companies scurry to meet the newly imposed 2019 deadlines, it is time regulators/lawmakers think beyond conventional and predicted means to create (and not just replicate) what the Indian industry really needs.

In doing so, the regulator must realise that it is not enough to have a board that appears to be diverse. A diverse-looking board may not automatically act diversely, unless it finds itself amidst such precincts that nurture and cultivate diversity in substance. If otherwise – i.e., where success is about cloning the leader – acting in a diverse way may be suicidal. Similar needs also arise from the requisites of hard law and soft law, both of which necessitate the pre-existence of certain enabling conditions for each to survive and function. Reiterating from chapter II, while soft law requires, *inter alia*, industry- or market-driven incentives, measurable parameters for evaluation and an environment of mutual trust, transparency and co-ordination between the regulator and regulated entities, hard law or quotas also need support in terms of infrastructure and

resources outside boardrooms and/or the regulator. This can be stated more assertively from the examples of Norway and the UK, both of which, notwithstanding that they symbolise two distinct rationales and policy approaches, stand strong in terms of their social, economic, political and cultural precincts, specifically the necessary resources or female share in education and labour participation/employment. Whether similar enablers exist for India therefore needs some probing as part of the strategising process.

IV.3 *Is India ready for a Quota in Boardrooms?*

IV.3A Available Female Resources or Candidature

When responding to a quota, the foremost concern is the availability of potential candidates who can immediately step into directorship roles. *Does the candidature existing in India match up to what the quota demands?*

Measured on the twin parameters of education and labour participation, India does not reveal a very promising gender harmony. From the global gender gap report of 2017,[1185] India is shown to rank in overall 108th position with further inferior rankings in educational attainment (at 112) and economic participation (at 139). The position is significantly below not only the world average, but also the average within Asia.[1186] What is more worrisome is its relegation from the 2016 rankings, at 87th position, divided between education at 113 and economic participation at 136, respectively,[1187] and which has only downgraded over the preceding years, as shown below.

[1185] 'Global Gender Gap Report' (n 134) 176.
[1186] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 3.
[1187] 'Global Gender Gap Report' (n 252) 196.

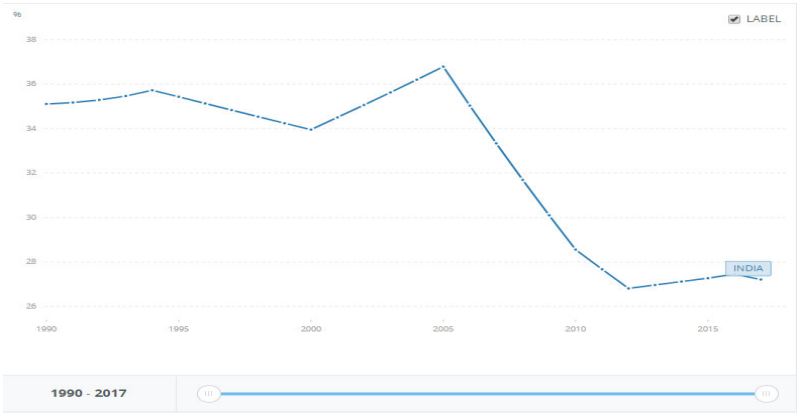

Figure 30: Female Labour Force Participation 1990–2017 – India[1188]

With labour force participation at 28.5% versus 82% for males,[1189] and the female literacy rate at 59.3%,[1190] the gender constituent of India's human resources seems highly asymmetric. The gender gap in the NEET (not in education, employment or training) rate, which is one of the largest in India,[1191] along with disparities in high-skilled categories of the labour force, further reaffirms this.[1192] The situation appears worse when the share of women actually employed at only 24% (in the 15–49 age group) is compared to the corresponding male share, which exceeds 75%.[1193] Furthermore, the labour force, when explained by gender and education, yields results that are significantly polarised – i.e., females are significantly outnumbered by males at all three (basic, intermediate and advanced) levels of education.[1194] This is because, while 27.6% of women (as against 12% of men) in the 15–49 age group have never been to school,[1195] the female share amongst those who were enrolled but eventually

[1188] 'Labor force participation rate, female (% of female population ages 15+) India' - International Labour Organization, ILO STAT database. Early release of the 2017 ILO Labour Force Estimates and Projections, retrieved in November 2017 (2018) < https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?end=2017&locations=IN&start=1990> accessed 10 April 2018.
[1189] 'Global Gender Gap Report' (n 134) 176.
[1190] *Ibid*.
[1191] 'Report on the Implementation of the OECD Gender Recommendations - Some Progress on Gender Equality but Much Left to Do' (Meeting of the OECD Council at Ministerial Level, June 2017) 22, 28.
[1192] 'Global Gender Gap Report' (n 134) 177. See also, 'Progress of the World's Women: Transforming Economies, Realizing Rights' (UN Women 2015) Annex 1, 254.
[1193] 'National Family Health Survey (NFHS-4)' (International Institute for Population Sciences, Ministry of Health and Family Welfare 2015-16) 74- Table 3.7.
[1194] 'Labour force participation rate by sex, age and education (%)' (International Labour Organization, 1996-2018) <https://tinyurl.com/ya76tbmc> accessed 1 April 2018.
[1195] 'National Family Health Survey (NFHS-4)' (n 1193) 67- Table 3.4.1.

dropped out is also significant.[1196] The gender parity index for enrolments in schools, when compared to that in higher education, stands at an average of 92.5 females as against 85 females for every 100 males enrolled.[1197] This is despite a higher ratio of female students passing (as against those sitting exams) secondary and senior secondary levels in schools, and often out-performing boys.[1198] The focus of education for females is therefore confined to elementary levels and differs from that of male students, who are more inspired to undertake higher degrees of longer duration.[1199]

Such a gender gap, which commences from educational attainment, keeps accumulating to create wider crevasses in the labour force and actual employment, and transcends further up the corporate hierarchies to board level.[1200] Much of this can also be attributed to the subjects/disciplines pursued at school level, as a result of which females have less access to tertiary/technical/vocational developments. This is eventually reflected in workforce outcomes.[1201] For instance, gender profiling of IIMs that foster the talent pool for corporate boardrooms (including for female directors, as found in chapter III) reveals an imbalance with only about 30% of female students. It is, however, worth noting that such proportions have been attained through conscious effort, and otherwise would have been languishing at much inferior levels prior to the introduction of gender diversity as one of the criteria for shortlists in these institutions.[1202] The imbalance came about as an automatic consequence of degree holders from engineering colleges, which in turn were male bastions, feeding into the

[1196] 'Educational Statistics at a Glance' (Ministry of Human Resource Development 2016) 8- Gender Parity Index 2014-15. The position is expected to improve, as the gross enrolment ratio for females at 24.5% (although lower) is not significantly overridden by that of males at 26%- 'All India Survey on Higher Education 2016-17 ((Ministry of Human Resource Development 2017) iv, 24.
[1197] *Id* at 32- Number of Female per hundred Male Enrolled by Stages of Education.
[1198] *Id* at 9- Examination Results.
[1199] L Wirth, *Breaking through the Glass Ceiling- Women in Management* (ILO 2001) 61.
[1200] Banerji, Mahtani, Sealy, & Vinnicombe, 'Standard Chartered Bank: Women on Corporate Boards in India 2010' (Community Business Limited & Cranfield School of Management 2010) 30. See also, E Roberts (n 77) 300.
[1201] 'What are the gender differences and the labour market outcomes across the different fields of study?' (OECD 2017) <https://www.oecd-ilibrary.org/docserver/7913d157-en.pdf?expires=1526558710&id=id&accname=guest&checksum=3BC75DD2489628AE9CFE24C18F519BBB> accessed 10 March 2018.
[1202] V Umarji, 'Top 3 IIMs see rise in gender parity' (Business Standard, 24 June 2017) < http://www.business-standard.com/article/management/top-3-iims-see-rise-in-gender-parity-117062200563_1.html> accessed 24 April 2018.

majority of such institutions.[1203] The causal chain can be completed by a long stereotypical trend that ascribes gender tags to subjects/disciplines right from school level – where STEM (science, technology, engineering, maths), business administration, law and defence are all perceived as boys' fields,[1204] as against arts/social science, nursing, home science, fine arts and fashion, where female enrolments are concentrated.[1205]

These stereotypes further justify why the gender ratio within the faculty of such top-notch management institutions remains skewed, with only about a 10% figure for female teachers, who are mostly confined to "soft areas" of human resource management, organisational behaviour, communication and marketing, as against production and operations, strategy, quantitative methods and finance, which traditionally belong to male professors.[1206] The position is no different in science, research and technology institutes where women account for 8% to a maximum of 30%.[1207]

Thus, what starts from the elementary stages of education continues up to tertiary levels, and then to workplaces, where a combination of all the bottlenecks – gender segregation, pay gaps, staunch patriarchal values and mid-career filtration – together culminate in a shortfall of candidature.[1208] These also explain why there are so few female directors or why women only rarely reach up to board level.[1209]

[1203] P Verma, 'More non-engineers making it to IIMs' (Economic Times, 13 September 2017) < https://economictimes.indiatimes.com/industry/services/education/more-non-engineers-making-it-to-iims/articleshow/60487045.cms> accessed 10 April 2018. See also, B Sanga, 'More Than Half of Engineering Degrees at MIT Went to Women, But IITs' Share is Pathetic 8%' (Outlook, 14 February 2017) < https://www.outlookindia.com/website/story/more-than-half-of-engineering-degrees-at-mit-went-to-women-but-iits-share-is-pat/297956> accessed 10 April 2018.

[1204] RB Adams & T Kirchmaier, 'Women in Finance' (Finance Working Paper N° 479/2016, ECGI, September 2016) 25.

[1205] 'All India Survey on Higher Education 2016-17' (n 1196) Tables 12, 13, 35 and 36. See also, 'Educational Statistics at a Glance' (n 1196) 6- Percentage Enrolment in various Programmes in Higher Education 2014-15; and 'Global Gender Gap Report' (n 134) 177.

[1206] S Basu (n 250) 22.

[1207] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 50.

[1208] R Seth, 'Are Regulations Mandating Board Diversity Helpful?' (Business World, 3 December 2018) <http://www.businessworld.in/article/Are-Regulations-Mandating-Board-Diversity-Helpful-/03-12-2018-164814/> accessed 15 August 2019.

[1209] S Rajesh & K Ekambaram, 'The Career Trajectories of Indian Women Professionals in the IT Industry: An Empirical Study' (2013) 2(6) International Journal of Social Science & Interdisciplinary Research 84-95, 86.

RELATIONSHIP BETWEEN BOYS AND GIRLS

> *This is a co-educational school where due respect is given to both boys and girls. They participate in all activities as equals and enjoy a healthy relationship which is one of the most precious memories that our Alumni cherish.*
>
> *We have to take steps to see that a healthy relationship does not deteriorate into one that is unacceptable. What is acceptable?* ***As long as children don't move into corners and lonely areas, or show open signs of affection, interaction between boys and girls is acceptable***. ***Since unanimity on this matter is not likely in a traditional society like ours*** *THE PRESENT OFFICIAL LINE WHICH THE SCHOOL SHALL TAKE CONTINUES TO BE:-*
>
> > *Boys and Girls will behave on the campus with utmost respect to one another. Towards this end, the* ***distance of about one meter shall be maintained at all times between a boy and a girl***. ***Boys and girls in senior classes are requested to avoid inappropriate friendships with those in lower classes.*** *Complaints by parents, teachers or students about the misbehavior of any student will be investigated immediately and action will be taken based on discussions and recommendations of the Committee.*[1210]

No, not something that is worth raising eyebrows about when it comes to India – this excerpt, which comes from one of the premier schools,[1211] depicts the usual and expected decorum, discouraging interactions between male and female students.[1212] With similar rules separating schools, classrooms, laboratories, staircases, canteens, dress codes[1213] and behavioural conduct,[1214] and strong gender tags linked to

[1210] 'Pallikoodam' < http://www.pallikoodam.org/general-notes/> accessed 5 March 2018.
[1211] M Balachandran, 'An elite Indian school has an absurd rule—boys and girls must be separated by a meter' (Quartz India, 23 September 2015) < https://qz.com/506869/%E2%80%8Ban-elite-indian-school-has-an-absurd-rule-boys-and-girls-must-be-separated-by-a-meter/> accessed 10 April 2018.
[1212] S Basu (n 250) 166.
[1213] *Id* at 12.
[1214] D Sarkar, 'Separate staircases for girls, partitioned classrooms: gender segregation is not new on Indian campuses' (scroll.in, 14 November 2014) < https://scroll.in/bulletins/129/spirit-infused-cooking-for-spirited-occasions> accessed 10 April 2018.

educational attainment and choice of disciplines, including at university level, it is not surprising that gender segregation in the industry fails to ring any alarm bells – instead, divergence from it does. Gender fosters a non-malleable divide in the formative years, which spills over to career paths as something that is indispensable and reflexive. Culminating in what can be described as "glass walls",[1215] these divisions are found both outside organisations at sectoral level, and also intra-organisation at functional level.

In sectors, the absence of noticeable variance in female directorship in Nifty 50 and Nifty mid-cap 50 companies (from chapter 3 (figure 21)), which is mainly a result of all such companies barely managing to reach the "one woman director" quota, should not be mistaken to conclude that gender segregation is redundant. Rather, with preconceptions as regards professional characteristics on one hand and gender capabilities on the other,[1216] glass walls are rampant across sectors. That there are more women in executive roles in the finance sector when compared to manufacturing proves this.[1217] Other examples include the plethora of legislation with historically ingrained occupational restrictions applicable to women in terms of, *inter alia*, handling machinery, manufacturing processes, lifting of weight, hours of work and permissibility to work at night.[1218] Most of these caveats apply under the guise of safety measures to protect women from strenuous or dangerous work conditions[1219] without any clear reasoning or objective criteria (apart from gender) spelt out upon which such classification may be reasonably based, finding further validation from judicial pronouncements.[1220] Therefore, and quite naturally, traditionally earmarked "soft" careers in nursing, care and services – mainly retail, education, domestic work, hairdressing, laundry, handicrafts and other domestic-facing industries – are where

[1215] 'Women in Business and Management: Gaining momentum in Latin America and the Caribbean' (International Labour Office, May 2017) 26.
[1216] 'More women in senior positions: Key to economic stability and growth' (n 549) 35.
[1217] SD Basu, 'Why banking mints the most women CEOs in India' (n 1135).
[1218] The Factories Act of 1948; Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act of 1996; Mines Act of 1952; The Beedi and Cigar Workers (Conditions of Employment) Act of 1966; The Plantation Labour Act of 1951; Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act of 1979; and state-level Shops and Establishment Act.
[1219] 'Report of the Committee on the Status of Women in India- Towards Equality' (Ministry of Education and Social Welfare, December 1974) 190.
[1220] *CB Muthamma v Union of India*, 1979 4 SCC 260.

Indian women are mainly concentrated.[1221] This is in contrast to their sparse presence in mechanics, surgery,[1222] technology, energy, infrastructure and construction, manufacturing (mostly of food, tobacco, spinning and textiles, apparel and basic chemicals),[1223] and high-skilled[1224] or technical fields.[1225] The above trend is also affirmed by the sector classification of female entrepreneurship.[1226] With female predominance in agriculture and services (at 48.3% and 11.2%, compared to 32% and 8.6% for males respectively), which withers away when it comes to sales and production (4.8% and 20.7%, as against 11.7% and 32.3% for males respectively), the most recent government-run national family health survey ("NFHS-4") clearly asserts that gender segregation still looms large across Indian sectors.[1227]

Within organisations, glass walls also mark out horizontal gender-linked divisions between departments and functions, such that women are under-represented in line positions that provide the feeding ground for potential promotions/appointments to management and boards.[1228] Such disparities are often the outcome of pre-conceived assumptions about the inability of women to commit to business-facing responsibilities,[1229] as women continue to be assigned to positions that are managed by (and do not involve managing) men.[1230] The roots of such assumptions lie in culturally drawn gender roles, which confine women to household and care duties, restricting their physical movements and public interaction, while men are the fore-

[1221] S Mehrotra & S Sinha, 'Explaining Falling Female Employment during a High Growth Period' (2017) LII(39) Economic & Political Weekly 54-62, 56.
[1222] R Khadilkar, *Oh! To Be A Lady Surgeon* (Ocean Books 2011).
[1223] Chattopadhyay, Chakraborty, & Anker, 'Sex segregation in India's formal manufacturing sector' (2013) 152(1) International Labour Review 43- 58, 56. See also, 'XII Five Year Plan Report of the Working Group on Women's Agency and Empowerment' (n 1004) 10; and 'Report on Enablers for Women Empowerment at Workplace in India' (Deloitte 2017) 40.
[1224] I Hirway, 'Has India learned any lessons from the global crisis? The case of a less well-known but most globalized industry from a gender perspective' in R Antonopoulos (ed), *Gender Perspectives and Gender Impacts of the Global Economic Crisis* (Routledge 2014) chapter 7, 157-182, 163.
[1225] T Agrawal, 'Occupational Segregation in the Indian Labour Market' (2016) 28 European Journal of Development Research 330–351, 342.
[1226] Ghani, Kerr, & O'Connell, 'Political Reservations and Women's Entrepreneurship in India' (The World Bank, Poverty Reduction and Economic Management Network, Economic Policy and Debt Unit, January 2013) Table 1d.
[1227] 'National Family Health Survey (NFHS-4)' (n 1193) 76- Table 3.8.
[1228] 'The Gender Balance in Business Leadership' (n 81) 6. See also, L Wirth (n 1199) 106.
[1229] S Datta & UA Agarwal, 'Factors effecting career advancement of Indian women managers' (2017) 6(3) South Asian Journal of Business Studies 314-336, 323, 325.
[1230] M Thornton & J Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 Osgoode Hall Law Journal 773- 811, 775.

runners or breadwinners. Over time, this has created stereotypical assumptions as regards what men and women can best do and are fitted for, resulting in gendered task allocation – creating a vicious cycle.[1231]

Put simply, gender segregation is an outcome of pre-conceived gender characteristics, aspirations, preferences and capabilities. It is assumed that women do not work as breadwinners unless compelled to do so for economic reasons, do not work for self-actualisation, are less motivated for success and power, are not willing to re-locate or travel, are more driven by communal aspects than financial results and thus cannot be trusted with strategic matters.[1232] Accordingly, men and women continue to be employed in sectors and roles that are considered masculine and feminine respectively, in exclusion of other roles for which they are considered inappropriate. This explains why women are more likely to be offered inter-personal, supportive or secretarial roles, akin to what they handle within the home, involving repetitive or monotonous tasks with little or no scope for career advancement (infamously referred to as pink-collar jobs).[1233] Men, on the contrary, are entitled to strategic, on-site, developmental, procurement-linked, operational management (or "profit and loss")[1234] tasks. Thus, what starts with perceived gender differences culminates in gender segregation, tending to later split into different career pathways, re-instating the gender stereotypes with which the whole process started.

Moreover, such functional segregation within organisations entails less access to training and development opportunities that are offered to mainstream roles, which further limits the scope of female progression. Notably, horizontal segregation has indirect consequences on the ability of women to surmount vertical hierarchies and climb up the corporate ladder, including up to board level. This perhaps explains why the chances of women reaching senior positions or directorships are further diminished in sectors/functions where men outnumber women by greater margins – i.e., with higher horizontal segregations.[1235] The converse also applies, all of which stands

[1231] R Anker (n 235) 39.
[1232] L Wirth (n 1199) 103.
[1233] A Lawton (n 296) 611. See also, 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223) 33.
[1234] 'Women in Business and Management: Gaining momentum in Latin America and the Caribbean' (n 1215) 27, 53.
[1235] 'Women at work' (n 238) 52.

proven by the example of India's finance sector, where a higher sectoral participation has translated to more women in senior or leadership positions.[1236]

For even those few women who reach the boardroom, companies tend to look for stereotypical skill-sets revolving around human resources, public relations, communications, finance, compliance and administration,[1237] re-enforcing the gender codes to which workplaces have traditionally confined themselves.[1238] Such stereotyped perceptions of "think manager–think male"[1239] is why Indian women have not been able to evade being labelled as "aggressive" if assertive, and "laid back" if communal.[1240] This places them at a vulnerable juncture, where they must prove that they can succeed, but at the same time not deviate from stereotypical perceptions traditionally linked with gender. Consequently, they are crowded into a narrow range of board functions that involve mitigated responsibilities, less critical, or with only indirect effects on business outcomes.

Interestingly, an instance that also marks the irony of how such gender sorting, normally condemned for restricting women to back offices, has come to their rescue in a recent corporate scam, nonetheless goes on to establish that women directors are no more than "secondary" leaders. They are just "women", while the nomenclature of "director" has no relevance, implications or ramifications for them. As India's apex court pronounced in its verdict exonerating a female director while detaining others, "we order detention of all the contemnors, except Mrs Vandana Bhargava (the fourth respondent) and send them to judicial custody at Delhi, till the next date of hearing. This concession is being extended towards the fourth respondent because she is a woman Director …".[1241] The ruling (although it worked favourably for the woman in

[1236] A de Jonge (n 1073) 94-95.
[1237] J Dubey (n 1029).
[1238] 'Challenges and strategies for retention of women talent in India' (Biz Divas 2015) 20. See also, 'Women in Business and Management: Gaining momentum in Latin America and the Caribbean' (n 1215) 27, 80.
[1239] S Basu (n 250) 70.
[1240] 'Challenges and strategies for retention of women talent in India' (n 1238) 20. See also, Acharya, Sharma, & Nair, 'Assertiveness in Indian Context: Perspectives of Women in Coastal Karnataka' (2016) 15(2) Online Journal of Health and Allied Sciences <https://www.ojhas.org/issue58/2016-2-7.html> accessed 18 September 2017.
[1241] *SEBI v Sahara India Real Estate Corp Ltd*, (2014) 8 SCC 751, para 5.

question personally) re-instates the notion that directorship roles and related duties/liabilities are yet to recover from gender shackles in the Indian context.

It is not therefore possible to dispute the influence of glass walls, which go on to determine how masculine or feminine a sector or job profile appears (although in a more subtle and sub-conscious manner, amidst strong gender equality campaigns of contemporary times). This comes across clearly in intermittent news reports of women entering defence,[1242] aviation services[1243] and sports (biking, wrestling, surfing and weight-lifting, amongst others), as well as steer heading ministries,[1244] public services[1245] and strategic goals,[1246] areas long demarcated for men.[1247] The appearance of these events as "news" demonstrates that piercing glass walls is more of an exception, and not what is considered usual and routine.

To re-emphasise this, although turning malleable with time,[1248] gender segregation remains firmly entrenched within Indian industry, and as long as this continues to be so, diversity remains impending. It is obvious that segregation and diversity cannot co-exist.[1249] Only when cross-gender intrusions (which offer only occasional reasons to celebrate) no longer merit appearances in news headlines, will there truly be an occasion to rejoice for the country.

[1242] *Kush Kalra v Union of India*, (WP(C)No 10498/2015 and CM No 44852/2016, decided on 5 January 2018). See also, 'Women in combat mode' (The Tribune, 10 January 2018) < http://www.tribuneindia.com/news/jobs-careers/pathfinder/women-in-combat-mode/526120.html> accessed 10 April 2018; and 'Indian Army to induct women in combat roles; here's all you need to know' (Financial Express, 5 June 2017) < https://www.financialexpress.com/india-news/indian-army-to-induct-women-in-combat-roles-heres-all-you-need-to-know/701591/> accessed 10 April 2018.

[1243] 'Indian Women Flying High as Country now has Maximum Women Pilots in the World' (Indiatimes, 30 January 2018) < https://www.indiatimes.com/news/india/indian-women-flying-high-as-country-now-has-maximum-women-pILO ts-in-the-world-338687 html> accessed 15 April 2018; 'India's delivery girls on the road to break gender stereotypes' (Al Arabiya English, 11 March 2018) < http://english.alarabiya.net/en/life-style/healthy-living/2018/03/11/India-s-delivery-girls-on-the-road-to-break-gender-stereotypes.html> accessed 15 April 2018.

[1244] 'India new defence minister hails progress for women' (BBC, 4 September 2017) < http://www.bbc.co.uk/news/world-asia-india-41144546> accessed 15 April 2018.

[1245] S Basu (n 250) 19.

[1246] 'The Most Powerful Women in Business' (Business Today 2016) <https://www.businesstoday.in/powerful-businesswomen/2016/> accessed 10 April 2018.

[1247] SM Koshi, 'This Indian Woman Bodybuilder with a Hijab is Breaking Stereotypes' (NDTV, 10 March 2018).

[1248] MA O'Connor, 'Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power' (2006) 65 Maryland Law Review 465- 503, 478.

[1249] 'Women in Financial Services' (n 259) 11.

IV.3C Lingering Pay-gap

If asked whether female workers draw remuneration that is differential or less than what is conferred on male workers, one would receive exclamatory responses and some astonishment expressing how gender biased the question is, or that their organisation runs on gender equality and egalitarian policies. Some would even state this to be illegal. What is, however, overlooked amidst such claims of gender righteousness, is the statistical proof that places India, with a score of 0.67,[1250] among the last few countries globally on the scale of gender pay parity. Even against comparatives within Asia, a red alert for excessively high inequality in the perceived wage gap for similar work is marked out for India.[1251]

Despite India providing for "equal pay for equal work" as a constitution laid principle, which is further safeguarded through the enactment of the Equal Remuneration Act of 1976 ("ERA"), why does the gap persist?

Starting with what is codified, the COI and ERA pronounce protection of remuneration not less favourable where work done is of the "same" or "similar" nature.[1252] This means that equal pay must follow where the work done is "in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions".[1253] Accordingly, outright discrimination in pay scales has been struck down as unconstitutional in several judicial rulings.[1254] What, however, remains unaddressed is work that does not fall squarely within the ambit of "same work or work of similar nature" because of variances (not necessarily greater or lesser) in qualifications, merit, experience, nature of effort or attached responsibility attached, as well as working conditions, when otherwise work accrues equal value or worth to the business.

The courts appear to have taken the view that the question of a pay gap arises only where employees are equal in every way – i.e., in terms of qualifications, merit,

[1250] 'Global Gender Gap Report' (n 134) 177.
[1251] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 10.
[1252] Article 39(d) of the COI; read with Section 4 of the ERA.
[1253] Section 2(h) of the ERA.
[1254] *Randhir Singh v Union of India*, (1982) 1 SCC 618; and *People's Union for Democratic Rights v Union of India*, AIR 1982 SC 1473.

experience, duties and responsibilities, and yet are denied equality in pay.[1255] Not surprisingly, therefore, different pay scales on the basis of qualifications,[1256] skill-sets,[1257] merit, experience,[1258] nature of work,[1259] and even historical trends in pay scales,[1260] have found judicial validation,[1261] regardless of whether the work was of the same or similar nature.[1262] Whether or not such differences in qualifications, merit or experience and allotment of work started with stereotypical bias that ascribes women to less valued tasks has no relevance.

Asserting inability to translate pay parity into a mathematical formula,[1263] the closest that courts have come to interpreting something akin to work of equal value was to suggest proper job evaluations.[1264] This cannot suffice or help when such evaluations once again commence with preconceptions of inferior or superior work, such that women are reckoned to start with what is an inferior or under-valued task. At this stage, one can argue that, as the statute extends protection to cases where differences,[1265] although existing, have no practical relevance, concern for equal value is taken care of. This is, however, far from what has actually been implemented. In most cases, differences that are cited to justify pay gaps, which are seldom objectively assessed, and which in turn culminate in perceived (if not real) differences of practical importance, stay out of the regulatory radar.

Under the guise of such legal lacunae, attempts are also made to justify unequal pay for women, who companies are hesitant to place in mainstream business-facing roles. For example, differences in skills, efforts, responsibilities and working conditions ascribed to a male on-site production manager vis-à-vis a female back-office manager (when such designations are more often the outcome of gender segregation), take

[1255] *Markendeya v State of Andhra Pradesh*, AIR 1989 SC 1308.
[1256] *Markendeya v State of Andhra Pradesh*, AIR 1989 SC 1308.
[1257] *Federation of AI Custom and Central Excise Stenographers v Union of India*, AIR 1988 SC 1291.
[1258] *State of Haryana and others v Charanjit Singh*, AIR 2006 SC 161.
[1259] *Federation of AI Custom and Central Excise Stenographers v Union of India*, AIR 1988 SC 1291.
[1260] *Markendeya v State of Andhra Pradesh*, AIR 1989 SC 1308.
[1261] *Air India v Nargesh Mirza*, 1981 AIR 1829.
[1262] *State of Uttar Pradesh v JP Chaurasia*, [1989] 1 SCC 121.
[1263] *Federation of AI Custom and Central Excise Stenographers (Recog) v Union of India*, AIR 1988 SC 1291.
[1264] *M/s Mackinnon Mackenzie & Co Ltd v Audrey D'Costa*, (1987) 2 SCC 469.
[1265] Section 2(h) of the ERA.

discriminating payments outside the regulatory radar.[1266] Considering that sectors or functions which comprise of women perceived as demonstrating lesser skills, they are routinely under-valued,[1267] resulting in reduced payments.[1268] Moreover, while men, placed on an escalating career track, are likely to progress to higher pay scales, the probability of the same for women is blurred – which further increases the existing gap.[1269] This is corroborated by increasing gaps in rising wages, education, age and hierarchical levels.[1270]

Further, given that (a) the ERA defines remuneration to include cash or kind,[1271] and (b) women as against men are paid more in kind,[1272] it ought not be overlooked that any amenities in terms of health or safety measures or allowances of flexible work if extended to female workers are likely to be discounted when fixing the cash component of wages.[1273] This might be a reason why the pay disparity intensifies based on marital status – i.e., it is higher for married women than for single women,[1274] as the former are in greater need of ancillary or support facilities. The converse, however, does not apply – i.e., men tend to be paid higher with families and fatherhood.[1275] Finally, lower pensions and contributory social protection schemes accruing to women[1276] assert that incidences of pay gaps exceed tenure of employment to post-retirement.[1277]

All of the above thus provides fertile ground for pay gaps that emanate indirectly (if not directly) from gender, and which, although they cannot be entirely explained by

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[1266] Varkkey, Korde, & Parikh, 'Indian Labour Market and Position of Women: Gender Pay Gap in the Indian Formal Sector' (Paper presented at 5th Conference on Regulating for Decent Work Network, ILO Geneva, 3-5 July 2017) 20.
[1267] 'Women at work' (n 238) 48.
[1268] 'Global Wage Report 2016/17- Wage Inequality in the Workplace' (ILO 2016) 31. See also, 'Women in Business and Management: Gaining momentum in Latin America and the Caribbean' (n 1215) 47.
[1269] A Lawton (n 296) 611-612.
[1270] A Waris & BC Viraktamath, 'Gender Gaps and Women's Empowerment in India- Issues and Strategies' (2013) 3(9) International Journal of Scientific and Research Publications 1-9, 5. See also, 'Global Wage Report 2016/17- Wage Inequality in the Workplace' (n 1268) 42.
[1271] Section 2(g) of the ERA.
[1272] 'National Family Health Survey (NFHS-4)' (n 1193) 517- 518, Table 15.1 and Table 15.2.
[1273] *Id* at 517- Table 15.1.
[1274] A Waris & BC Viraktamath (n 1270) 5.
[1275] 'Women at work' (n 238) 58.
[1276] 'Progress of the World's Women: Transforming Economies, Realizing Rights' (n 1192) 150, 155,156.
[1277] 'Women at work' (n 238) 30, 32.

productive observables such as education, qualifications or real task differentials,[1278] are not illegal.

On a similar note, gender-linked differentials in remuneration for directors, whether executive or non-executive, are noted,[1279] and quite remarkably so.[1280] Female directors earn only a proportion of what their male colleagues do.[1281] This is perhaps because, first, women are mostly concentrated in non-executive roles (which are eligible only for sitting fees and commission) as against male-dominated executive roles that entail hefty salaries.[1282] This does not come as a surprise, considering that such segregation emanates from the law itself, which explicitly refers to executive directors as "whole-time" directors, entitling them to a much higher ceiling of remuneration than non-executive "part-timers".[1283] This is particularly so in the context of independent directors, who can serve up to a maximum of two consecutive terms of five years each, which must be followed by a three-year cooling off period when one can have no direct or indirect association with the company.[1284] If women are confined to such roles, as is likely to follow from the SEBI's announcement for the "one independent woman" quota, this would only strengthen stereotyping of women as passive, secondary or "outsider" leaders, which can only aggravate the gap.

Second, even where female directors are found in executive roles, differences are likely to accrue depending upon the primacy of the function or department they lead. With revenue-generating tags (executive director; sales/executive director; operations/executive director; production/executive director; product development) paid higher than support designations (executive director; communications/executive director; human resources/executive director; public relations/executive director;

[1278] TS Papola & KP Kannan, 'Towards an India Wage Report' (ILO Asia-Pacific Working Paper Series, October 2017) 9. See also, 'Women at work' (n 238) 48.
[1279] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).
[1280] 'Towards Gender Balanced Boards' (KPMG, March 2017) 27. See also, A Mishra, 'Glass Ceiling and Gender Discrimination: A Study on Causes and Impacts on Female Managers' (2014) 3(10) Abhinav National monthly Refereed Journal of Research in Commerce and Management) 67-73, 69.
[1281] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).
[1282] Section 197 of the Act of 2013. See also, 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122); and 'Global Wage Report 2016/17- Wage Inequality in the Workplace' (n 1268) 42.
[1283] Section 197 of the Act of 2013.
[1284] Section 149(10) and (11) of the Act of 2013.

compliance/executive director; CSR),[1285] such differences are seldom backed by objective evaluations of roles or profiles in terms of their real worth to businesses. Even within board committees, female directors are few, with even fewer women in the chair positions of such committees (as revealed in chapter III), which also affects the overall director pay package.

Third, considering the preponderance of female directorships in independent directorship, which is likely to increase with the SEBI announcement for a "one independent woman" quota, the gender pay gap in boardrooms is also expected to widen. This is because, while a male director (even assuming he is the only male member on the board) can still draw higher remuneration as a promoter director,[1286] a similarly placed female director, who must be independent, would not be eligible for this. Further, with constraints relating to any stock options (with only three of 80 women directorships in Nifty 50 companies holding stock options as part of their remuneration),[1287] voting power of 2% or more or pecuniary relationships in any other form with the company,[1288] the crisis can only be expected to become more intense.

Some other factors that contribute to an over-arching pay gap include the unpaid[1289] and low-wage unorganised work sectors, which are densely populated by women.[1290] For instance, it is estimated that women spend 351.9 minutes per day as against only 51.8 minutes by men on unpaid work in India,[1291] which is three times more than the difference globally.[1292] This explains why India is highlighted as a red zone – as excessively unequal – when measured on the parameter of male to female unpaid care work.[1293] This also explains why women, despite working for more time per day, have lower earnings than men.[1294] Further, widespread engagement of hired domestic help on one hand facilitates other women to work outside homes and pursue careers, but

[1285] 'Towards Gender Balanced Boards' (n 1280) 27.
[1286] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).
[1287] Based on data, as of 3 February 2018, sourced from Prime Database.
[1288] Sections 149(6), (9) and 197(7) of the Act of 2013.
[1289] B Smith (n 1177) 120.
[1290] 'Three Year Action Agenda' (n 1005) 152.
[1291] S Mehrotra & S Sinha (n 1221) 58. See also, 'Balancing paid work, unpaid work and leisure' (OECD 2014) < http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure htm> accessed 10 March 2018.
[1292] 'Three Year Action Agenda' (n 1005) 152.
[1293] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 10.
[1294] 'Global Gender Gap Report' (n 134) 177.

adds to the enormity of the female share in the unorganised sector. Thus, engaged in unaccounted[1295] domestic and care services, as well as household work, and despite working for longer hours, the earnings of men far exceed those of women.[1296] Considering that these activities are often not captured within the formal labour force, and much less within the contours of laws and regulatory scanners, remedying the pay disparities that arise within and/or as a result of these appears daunting.

The crisis deepens further, as the gender pay gap that (despite marginally downsizing)[1297] continues to linger within a range of 20–30% across corporate hierarchies,[1298] is not a one-off challenge. One must be cautious of its proliferating effects on a woman's career trajectory. Commencing with gendered roles, and then experiencing what is popularly referred to as "sticky floors"[1299] (i.e., inability to rise above base levels), followed by mid-level filtrations, pay disparities go further to exacerbate the seeping pipeline that stands very diluted by the time it reaches the upper echelons, or the boardroom.[1300]

IV.3D Vanishing Women

Stereotyped roles at work and home, severe levels of segregation and gender pay gaps narrate the story of *why, while men have careers, women have jobs*.[1301]

As Indian women are traditionally confined to households, they are less exposed to education, development of skills and outward-facing roles. With time, it is believed that women were incapable of the latter, and the tasks performed by them (whether within the household or outside) are therefore looked down upon as being less skilled,

[1295] 'XII Five Year Plan Report of the Working Group on Women's Agency and Empowerment' (n 1004) 11.
[1296] N Mukherjee & R Majumder, 'Unpaid Work and Missing Women in the Indian Labour Market' (2015) 9(2) Indian Journal of Human Development 191-217, 199- 200.
[1297] 'Global Wage Report 2016/17- Wage Inequality in the Workplace' (n 1268) 22.
[1298] 'Gender pay gap scenario daunting in India, women get paid 20% less than men' (Economic Times, 7 March 2018) <https://economictimes.indiatimes.com/magazines/panache/gender-pay-gap-scenario-daunting-in-india-women-get-paid-20-less-than-men/articleshow/63204351.cms> accessed 10 April 2018.
[1299] S Sarkhel & A Mukherjee, 'Culture, discrimination and women's work force participation: a study on Indian labor market' 2 <https://www.isid.ac.in/~epu/acegd2014/papers/SukanyaSarkhel.pdf> accessed 10 May 2018.
[1300] S Terjesen & V Singh, 'Female Presence on Corporate Boards: A Multi-country Study of Environmental Context' (2008) 83(1) Journal of Business Ethics 55-63, 60.
[1301] M Thornton & J Bagust (n 1230) 788.

secondary or inferior to what men pursue. Thus, continuing with such assumptions of being "less than men", women continue to be treated with an "out-group" or "outsider to the company" status[1302] and segregated in less challenging and under-valued jobs (which are valued as such as they are performed by women).[1303] Accordingly, they are also paid less than their male counterparts, and this gap increases with age as men progress while women succumb to stagnant career paths. Along with marriage, expanded families and childbirth/care (seen as exclusively a woman's responsibility) impact her ability (or at least, her perceived ability) to adhere to job commitments akin to men. Grappling with such dual encumbrances, women are often compelled to decide or trade off between the family and the workplace. A cost-benefit analysis with children and family on one hand and discouragement of career progression on the other most often yields an outcome that favours the former.[1304] This is because the price of family and children, which women alone have to pay if they choose a career, does not match up to the expected rewards. Further provoked by (sympathetic, not empathetic) employers who tend to offer less challenging tasks and growth prospects to women with families, viewing them as obstacles stifling business,[1305] mid-career attrition has now become a habitual trend. Accordingly, as women discontinue on their way to higher ranks, senior positions tend to become more concentrated with men, and this segregation further strengthens stereotypical perceptions and gender sorting of roles – that only men can lead. Again allocated with under-valued jobs, widening the wage gap,[1306] another cycle of mid-level filtration or drain-out of women from the race to top begins.[1307]

A series that is more typical to the Indian context, where considerable leakages are recorded at 45.87% from entry to mid-level and 35.36% from mid-level to top positions,[1308] suggests that out of what is already a nominal share of the female

[1302] S Basu (n 250) 47.
[1303] A de Jonge (n 1073) 136.
[1304] 'Women in Financial Services' (n 259) 36.
[1305] D Arya, 'Why motherhood makes Indian women quit their jobs' (BBC News, 23 April 2015) < http://www.bbc.co.uk/news/world-asia-india-32377275> accessed 18 September 2016.
[1306] 'Women at work' (n 238) 52.
[1307] V Reding (n 624) chapter 29, 203.
[1308] 'Gender Diversity Benchmark for Asia 2014' (Community Business Limited, July 2014): "junior" connotes entry and subject expert levels; "middle" relates to supervisory positions; and "senior" comprises of departmental or functional heads, senior management and board of directors.

workforce, Indian women are further renouncing their careers at a very young age. More recently, statistics reveal that, although constituting 43% of tertiary-educated graduates, only 25% of entry-level professionals, declining to 16% of middle management, and further down at only 4% of senior management,[1309] are women,[1310] indicating a severe drain-out of female candidature.

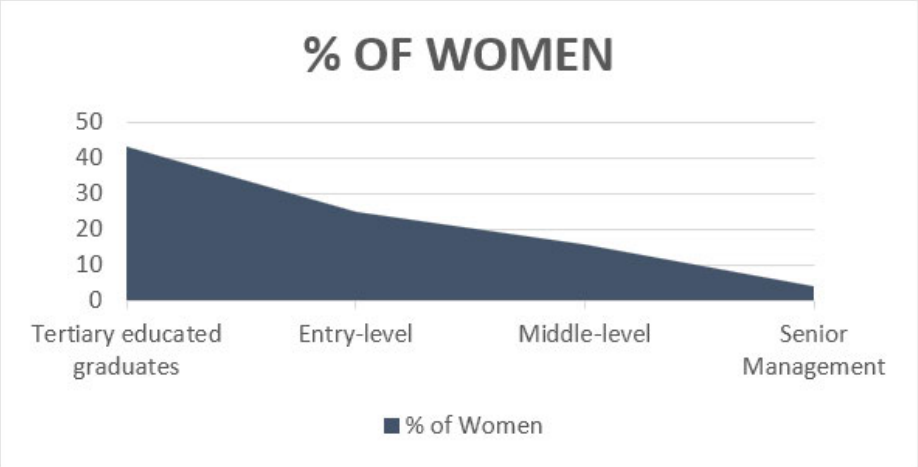

Figure 31: Mid-career Filtration Leaking or Pipeline of Women - India[1311]

The above graph, which shows significant drop-out of Indian women at every stage of the employment lifecycle, clearly suggests a reduced candidature, particularly a pipeline more than leaking for executive directorships.[1312]

Proven empirically, balancing the work–life challenge or the "double burden syndrome",[1313] childbirth/pregnancy, husband re-location, marriage, care of elders, lack of support at home, pressure from family and lack of potential growth are some of the predominant reasons cited for career breaks taken by women in India,[1314] and

[1309] Means CEO and direct reports to CEO. This does not include board.
[1310] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 38.
[1311] Constructed based on data sourced from 'Gender Diversity Benchmark for Asia 2014' (n 1308). See also, S Mookherjee, 'Women cry bias at work - Gender discrimination common, finds CII survey' (The Telegraph, 15 April 2006) < https://www.telegraphindia.com/1060415/asp/nation/story_6101620.asp> accessed 17 March 2017.
[1312] 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223) 15.
[1313] 'Women Matter: An Asian Perspective' (McKinsey & Company 2012) Exhibits 8 and 9.
[1314] 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223) 15. See also, S Chawla & RR Sharma, 'How women traverse an upward journey in Indian industry' (2016) 31(3) Gender in Management: An International Journal 181- 206, 189; S Rajesh & K Ekambaram (n 1209) 89; and 'First Step: India Overview' (n 24) 12.

why Indian companies find it hard to retain female talent.[1315] This fast-eroding candidature permeates up to board level to explain why Indian women are few in corporate leadership and fewer in executive directorships.

(A) Autocracy of Patriarchy

Boardrooms thus abide by the demarcated lines of the strong patriarchy that characterises India more generically.[1316] While the magnitude of its influence varies across social strata, religions, castes, regions and rural/urban locations, the underlying normative ideologies are common and rigidly embedded. Deviance from these is rarely tolerated in the culturally tight national context.[1317] Not only breadwinners, men have, and continue to be, the family heads/"kartas", with the power and authority of decision-making (both in terms of resources and ideology), encompassing the lives of every member of the family. Women, on the other hand, are "obliged"[1318] to run regular household errands, but have little or no say in major decisions. For instance, decisions pertaining to the health and household purchases of 20% of women (in the 15–49 age group) are taken by their husbands, and incidences of wives deciding similarly for men hovers at around 10%.[1319] Likewise, while each wife and husband have similar control over the wife's earnings, the same is not true as regards the husband's earnings (over which men have much greater control).[1320] Next, while 65% and 49% of men in the 15–49 age group own a house or land, women's ownership accounts for only 37% and 28.3% respectively.[1321] It thus follows that, with only a minority of women having access to money and credit,[1322] they are reckoned to be economically dependent on men, so much so that contemporary laws of matrimony vest almost an absolute right on women to claim maintenance from their husbands

[1315] 'The Future is HERe' (CII, EY and Indian Women Network, April 2018) 11.
[1316] S Sen (n 946). See also, S Sarkhel & A Mukherjee (n 1299).
[1317] 'Differences Between Tight and Loose Cultures: A 33-Nation Study' (2011) 332 Science 1100-1104, 1103.
[1318] 'Poverty and Social Exclusion In India' (World Bank 2011), 156.
[1319] 'National Family Health Survey (NFHS-4)' (n 1193) 527, Table 15.6.
[1320] *Id* at 519- 526, Table 15.3, Table 15.4, Table 15.5.
[1321] *Id* at 557, Table 15.20.
[1322] *Id* at 536- Table 15.12.

upon divorce/separation, with the opposite only in exceptions.[1323] Thus, the notion that women are more likely than men to live in poor households follows quite naturally.[1324]

As well as having access to resources, husbands are considered to have the last word in every regular or vital choice, which include decisions as regards how many children and when to have them.[1325] This further extends to controlling the movement of their wives such that only around 40% of women are allowed to visit markets and health services and go beyond their communities alone, while 6.2% are not allowed to do any of the three.[1326] Further, 25% of women (in the 15–49 age group) stay devoid of any exposure to mass media, whether by way of television/cinema, print or radio.[1327] Thus, confined to the boundaries of home and family, and with curtailed choices as regards education, nutrition, health, who to visit/meet and who not to, marriage, childbirth, career, expending monies, ownership of property and control over assets,[1328] the individual growth and exposure of women tends to suffer miserably,[1329] while they remain vulnerable.

With the foremost obligation as a nurturer owed towards the family – a unit that carries a much extended connotation, comprising elderly in-laws and family members of the husband alongside children, commonly referred as a "joint family"[1330] set-up in India, the onus of care-giving falls heavily upon Indian women. This also allegedly brings in a biased allocation of power, authority and resources (which lies with the male head or his wife only), not favourable to other women of the household. Traces of such patriarchal legacy can be seen in some of the major festivities of India, as a girl ties "rakhi" (a decorative band) on her brother's wrist, seeking a pledge that he will protect her all of her life, as well as "karva chauth/teej", where a wife fasts without water and food all day for her husband's long life, "kanyadaan" – a ritual in which the daughter

[1323] Section 125 of the Code of Criminal Procedure of 1973.
[1324] 'Progress of the World's Women: Transforming Economies, Realizing Rights' (n 1192) Annex 1, Figure 1.5.
[1325] 'National Family Health Survey (NFHS-4)' (n 1193) 533- Table 15.9.
[1326] *Id* at 538-539, Table 15.13.
[1327] *Id* at 69- Table 3.5.1.
[1328] 'XII Five Year Plan Report of the Working Group on Women's Agency and Empowerment' (n 1004) 11.
[1329] 'National Family Health Survey (NFHS-4)' (n 1193) 582- Table 16.8. See also, 'Report of the Committee on the Status of Women in India- Towards Equality' (n 1219) 86.
[1330] 'Report of the Committee on the Status of Women in India- Towards Equality' (n 1219) 58.

is given off by her father to the groom as a "pious donation" in marriage, prohibited entry of menstruating women into places of worship, covering of heads and faces with veils/purdahs in the presence of male members, and certain ornaments (mangalsutra/bangles) and vermilion (sindoor) adorned by married women denoting the end of their singlehood, while men carry no such indicative marks. Further, while the bride re-locating to her husband's/in-laws' abode remains the expected norm, such re-location by the groom, and/or the parents of the wife residing or even having food at her husband's home, are looked down upon with abhorrence. Not only a woman or a wife, but even her family, are treated as inferior to that of the man/husband.[1331]

Moreover, commonly referred as "a bird of passage", "another's property", "a guest in her parent's house", "one to be preserved for outsiders", "one who has to be given away", or a "burden on the father's shoulder",[1332] investing in the feast that accompanies her wedding is given more priority than her education or health.[1333] Daughters are still kept from the "pious" right to cremate parents, which continues to be exclusively reserved for sons.[1334] This is more so as a son is believed to bring honour and prestige as the natural descendant or successor of the family head/father. Thus, notwithstanding the advancements made by girls in education and/or earnings, there exists a popular preference for male children, while female foetuses continue to be largely aborted, much against the law.[1335] This is proven by the poor sex at birth ratio,[1336] and further by the direct correlation between the percentage of Indian parents desiring no more children and the number of living sons in their families.[1337]

While a few factors which continue even in contemporary times have been outlined, a list of practices that are now less prevalent but responsible for how India is structured today, can also be made. Examples include sati (where widows were burnt alive along with their husband's pyres), dowries (cash and gifts offered to the groom and his family in marriage, often by compulsion), female foeticide and infanticide, child marriage, restrictions on widow re-marriage, domestic violence and sexual

[1331] *Id* at 65.
[1332] *Id* at 57.
[1333] 'Poverty and Social Exclusion In India' (n 1318) 166.
[1334] *Id* at 138.
[1335] *Id* at 129.
[1336] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 10.
[1337] 'National Family Health Survey (NFHS-4)' (n 1193) 102- Table 4.14.

atrocities,[1338] and denial of property or succession rights. Although complete eradication of such practices remains far from achieved (as can be verified from around a 3% rise in crimes against women in 2016 from the previous year),[1339] many of these are now forbidden through legal sanctions.[1340] Having said this, many such condemnable practices that happen within households seldom cross the periphery of family and friends, so as to be officially reported.[1341] Moreover, notwithstanding such legal and social reforms, marriage remains a life event prioritised over career for women more than men, as around 28% of the former are married upon attaining the minimum marriage age, as against 17.4% of men.[1342] The ratio of women married by age of 25 vis-à-vis that of men is more than double.[1343] Separation after marriage, divorces and single motherhood are still eyed with suspicion, particularly within middle- and lower-income households. Likewise, marital rape is not yet illegal,[1344] and non-culpability of women in charges of adultery,[1345] amongst other things, demonstrates that women continue to be objectified and viewed as "owned" by men.

All of the above construct a shared belief that Indian womanhood gets its right meaning from being a wife and a mother, from which status a woman can never recover. This perpetuates the narrative that women are not to be given access to education. If that is given, they should not be permitted to work outside the home and, if permitted to do this, they ought to be paid less than men. If not, they must only "survive" with less power and authority, to which men have a prior right. If one reads into each of these carefully, women are not the providers, as their rights are subject to being "allowed" by the decision-makers, or men.

Such patriarchal tendencies not only have societal bearings, but significantly impact on property/corporate ownership and control structures, which are mostly

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[1338] *Id* at 573- Table 16.1.
[1339] 'Crime in India 2016' (National Crime Records Bureau, Ministry of Home Affairs, 10 October 2017) 133.
[1340] 'Women, Business and the Law' (The World Bank 2015) 140-141. See also, MS Luschinsky, 'The Impact of some recent Indian government legislation on the women of an Indian village' (1963) 3(12) Asian Survey 573-583, 573.
[1341] 'National Family Health Survey (NFHS-4)' (n 1193) 597- Table 16.18.
[1342] *Id* at 167- Table 6.4.
[1343] 'Global Gender Gap Report' (n 134) 177.
[1344] 'National Family Health Survey (NFHS-4)' (n 1193) 547, 553- Table 15.16.1, Table 15.18.
[1345] Section 497 of the Indian Penal Code of 1860. See also, *Sowmithri Vishnu v Union of India*, AIR 1985 SC 1618; and *V Revathi v Union of India*, AIR 1988 SC 835.

promoter/family-managed firms.[1346] Naturally, family-held beliefs and virtues spill over when designing the rules that govern business, as put by the CEO of one large family-controlled company – "women outperform in care-taking qualities and men outperform in taking-charge qualities"... "it's not in our family culture for women to be in business" – justifying why his son heads the company, while his daughter (despite having graduated in business administration) is just "happily married".[1347] This highlights that patriarchy takes pride in not allowing women to work outside the home.

The staunch and rigid patriarchal structure explains why India finds itself in high-alert zone when measured on parameters of sex ratio at birth, legal protection for women and violence against them, maternal mortality, financial inclusion and digital advancement, while not appearing in the safe or low inequality zone on any of the indices.[1348] Amidst all of the outlined traditional social and business constructs deeply ingrained in the value system right from education and adolescence to marriage, childbirth, families and career, it is difficult for women standing at the "either home or career" junction to decide upon anything other than home, as their outright "choice". Deciding otherwise inculcates a sense of guilt, stress and pressure,[1349] that such divergence, which places her individual career interests over and above her family, is selfish and discerning.[1350] This is why women, grappling with a dissatisfaction of not being enough at home or enough at work, often perceive violence by their husbands, if meted out on grounds of neglecting family/in-laws and children, as justified behaviour.[1351] It is only when a woman is capable of and has fulfilled all of her domestic obligations (primary role), that she should look out for money-making opportunities (secondary option). This has been, and remains, the belief that governs her career choices.[1352]

[1346] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).
[1347] S Basu (n 250) 189. See also, S Majumdar, 'Why there are so few women managers in India' (Rediff Business, 6 October 2006) < http://www rediff.com/money/column/guest/20061006 htm> accessed 8 December 2017.
[1348] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 11.
[1349] S Chawla & RR Sharma (n 1314) 195. See also, S Datta & UA Agarwal (n 1229) 323, 322.
[1350] Banerji, Mahtani, Sealy, & Vinnicombe (n 1200) 26.
[1351] 'National Family Health Survey (NFHS-4)' (n 1193) 541- Table 15.14.1.
[1352] N Jain & S Mukherji (n 241) 38.

Thus, it is seen as natural and expected where they dispense with their careers for family care. In contrast, Indian men spend very nominal time on household work. They perceive this as "derogatory" to their male esteem and honour, and doing so only makes them more "ambitious", depicting how family and career exist as mutually exclusive spheres.[1353] "Couples who stay in are the ones who share the chores and women who fall by the wayside are the ones who do not have a marriage that supports them"[1354] – an experience of a woman director explains why and where Indian women, except a few, disappear in the course of climbing the corporate ladder.

(B) Is the Glass Ceiling Real for Indian Women?

A term coined by Hymowitz and Schellhardt,[1355] the "glass ceiling" denotes a subtle and transparent barrier that prevents women from escalating over and above certain corporate hierarchical ranks. Having said this, mere imbalance in gender constitution where men out-number women (which at best can be described as inequality) is not what the idea of the glass ceiling is about. Rather, it is characterised by gender differences not capable of being explained by any job-relevant parameters (assuming that such parameters themselves are not founded on gender bias), influencing not only the actual number of males or females, but the chances of their progress/promotions and the effects of this intensify as one moves up in career and seniority.[1356] Thus, it indicates towards discrimination that demarcates "between those who prosper and those left behind".[1357]

Insofar as Indian workplaces are concerned, it appears that the glass ceiling exists as an outcome or effect of a combination or sum of all the bottlenecks – stereotyping, segregated roles, gender pay gaps, patriarchal values and mid-career filtration – discussed above.[1358] Intimately linked to one another, segregations, differential promotion, progression and developmental opportunities, widening wage disparities,

[1353] 'Balancing paid work, unpaid work and leisure' (n 1291).
[1354] 'Gender Diversity in Boardrooms' (n 63) 38.
[1355] C Hymowitz & TD Schellhardt, 'The glass-ceiling: Why women can't seem to break the invisible barrier that blocks them from top jobs' (The Wall Street Journal, 24 March 1986).
[1356] Cotter, Hermsen, Ovadia, & Vanneman, 'The Glass Ceiling Effect' (2001) 80(2) Social Forces 655-682, 656-662.
[1357] 'A Solid Investment: Making Full Use of the Nation's Human Capital' (Federal Glass Ceiling Commission, November 1995) 5.
[1358] S Rajesh & K Ekambaram (n 1209) 86.

trade-off between less motivating career tracks and family pressures resulting in mid- and senior-level attritions, and greater male visibility in the higher ranks which perpetuates gender stereotypes, establish that what Indian companies are struggling with is not just gender inequality.

Rather, it resembles the glass ceiling,[1359] or more than just "one" ceiling.[1360] First, it deters the progress of women from entry/junior positions, such that only rarely can they reach the middle levels or senior management/the boardroom; and, again, it re-appears, taking the form of less vital (so perceived) or business-facing responsibilities, less challenging tasks, fewer people to manage, fewer incentives and accreditation, and less power and support, for those few who survive the filtration to reach the top. These double ceilings in the Indian context are demonstrated below:

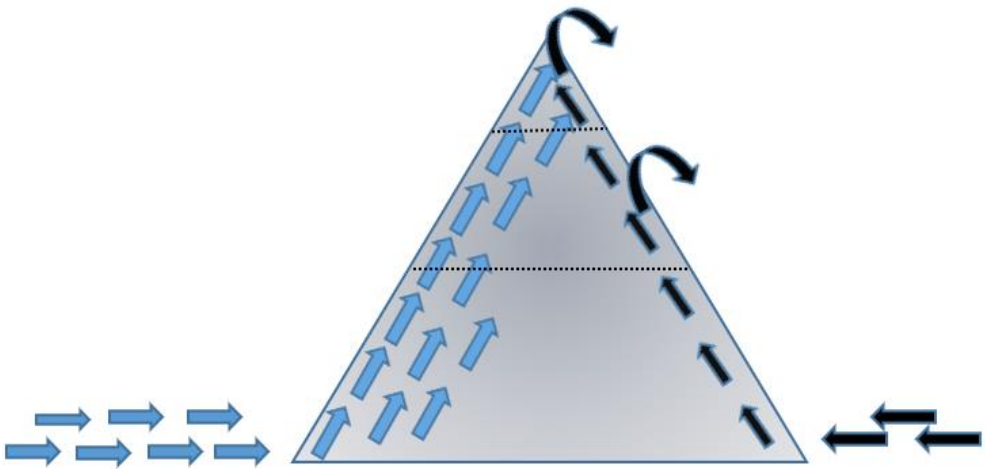

Figure 32: "Double" Ceilings

With women constituting only 4–5% of senior-level employees, compared to the global average of 20%,[1361] the presence of the glass ceiling is re-affirmed by a 2017

[1359] N Jain & S Mukherji (n 241) 38.
[1360] KS Lyness & DE Thompson, 'Above the Glass Ceiling?: A Comparison of Matched Samples of Female and Male Executives' (1997) 82(3) Journal of Applied Psychology 359–375, 371. See also, S Basu (n 250) 3.
[1361] A de Jonge (n 1073) 36.

survey, where women ranked "advancement, promotion and professional development" as a bigger obstacle that influences their career progression as against men.[1362] Women also take longer to move up the ladder than men. For instance, while men on average take six years or more to reach managerial level, women take eight or more.[1363] This is why, in a recent survey, 66% of women, condemning "testosterone-laced" culture, responded: "a female at my company would never get a top position no matter how able or high-performing".[1364]

One may note, however, at this juncture that the severe extent and perversity of the glass ceiling is unmatched by the awareness and required empirical assessment encompassing all of its constituents as they exist, intersect and overlap in contemporary Indian companies.

> *I don't think so (that there is a glass ceiling), particularly when the company is a meritocracy. The only things that matter are – the values, competencies and unbridled passion. These are hygiene for both, men and women. If these are in place, then the sky is the limit.*[1365]

Taking a cue from these words, spoken by the chairperson of a leading Indian company, one realises that Indian companies still overlook how "meritocracy", "values", "competencies" and "passion", although sounding ambitious, are eventually measured through gendered lenses,[1366] and might strengthen the ceiling rather than demolishing it.[1367] What one further fails to recognise is that, however utopian the company's competitive culture might be, women start and live with the disadvantage of a divided life – family and work – that pulls them to opposite extremes in India's typical patriarchal set-up. It is unfortunate that companies are still oblivious to the different sets of challenges that men and women face in workplaces. With very few

[1362] 'From Intention to Impact- Bridging the Diversity Gap in the Workplace' (The Boston Consulting Group, November 2017) 8.
[1363] 'The Power of Parity: Advancing Women's Equality in Asia Pacific- Focus India' (n 1133) 50.
[1364] *Ibid*.
[1365] 'Soon, the glass ceiling will be a myth' (The Times of India, 8 March 2011) <https://timesofindia.indiatimes.com/business/india-business/Soon-the-glass-ceiling-will-be-a-myth/articleshow/7651124.cms> accessed 16 September 2017.
[1366] A Lawton (n 296) 612.
[1367] 'Women Managers in India- Challenges and Opportunities' (Centre for Social Research 2009) 75.

isolated studies on gender stereotypes,[1368] inequality and discrimination,[1369] and effects of family on work–life balance,[1370] there arises a need to address the concern more holistically. If, otherwise, while a "one woman director" quota might enable front-door entry of women, the outcome would only be confined to a few top ranks. A quota alone cannot reverse the glass ceiling, which has a domino effect across all organisational levels and hierarchies, and which eventually permeates up in the form of a leaking pipeline. *It would be like perching on a branch while the roots of the tree are being axed – how long can the bird not fly off?*

IV.3E Boardroom or Parochial Chamber?

What further aggravates the crisis as one reaches the topmost level is the manner in which boardrooms function as "parochial chambers" – i.e., closed circuits of directors resembling one another. Such resemblance not only relates to their physical attributes that emanate from, *inter alia*, gender, but also their leadership styles, like-mindedness, aptitude and decision-making.[1371] Driven by "mini-me syndrome"[1372] – i.e., a look-out for someone mirroring "me" in everyone – boards tend to appoint directors who replicate the attributes of the existing board, and so the predominance of those well connected to its members, mostly male, continues.

Such an insider-facing clique assumes a more intense form in the closely knit family – or promoter-managed control structures widely prevalent in India[1373] – where its effects go beyond just influencing the talent search and appointments to determining who takes control and why. This is because the promoters, who are also the real

[1368] S Basu (n 250).
[1369] Kaushik, Sharma, & Kaushik, 'Equality in the workplace: a study of gender issues in Indian organisations (2014) 33(2) Journal of Management Development 90-106.
[1370] S Buddhapriya, 'Work-Family Challenges and Their Impact on Career Decisions: A Study of Indian Women Professionals' (2009) 34(1) Vikalpa 31-45.
[1371] JW Barnard, 'More Women on Corporate Boards? Not so Fast' (2006-07) 13 William and Mary Journal of Women and the Law 703-726, 711.
[1372] 'The leaking pipeline: Where are our female leaders? 79 women share their stories' (Global Human Capital Gender Advisory Council, March 2008) 11.
[1373] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 3. See also, S Alvy, 'India's Companies Act of 2013- A governance shift into the Sunlight' (2015) II(1) The Indonesian Journal of International & Comparative Law 187-220, 213; and 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).

owners, rarely want dilution in their control over the company and its management.[1374] Accordingly, mainstream or business-engaging roles are succeeded by way of inheritance – i.e., are occupied by sons, daughters, wives, parents or other relatives/kin within the same family. Any one, if chosen even from outside this circle, is usually familiar and someone whom the family trusts to act cohesively and abide by their decisions, or at least without any dissenting opinions.

Such familial hegemony plays out not only within the closed doors of the boardroom, but outside by way of after-work sports, drinks or other social events, from which women are excluded.[1375] For similar reasons, women participate less in pre-meeting or post-meeting discussions, which rarely happen on a formal note during office hours.[1376] This exclusion is particularly so given the patriarchal notions that forbid Indian women to develop any proximate connections with men outside marriage and families, including in workplaces, and much less if they extend to after-work hours.[1377]

Indian boardrooms as parochial chambers need no further corroboration, as it is obvious from the high degrees of familiarity at an average of 43.5 board connections within *inter se* female directors of Nifty 50 companies.[1378] Other directors who have held or continue to hold directorships in common (in the same company at the same time) along with female directors goes up as high as 220.[1379] All of these clearly establish that companies tend to select directors from among those who already serve on other boards, or from referrals within the internal/peer network.[1380] Further, a clear concentration of female directors (a) with backgrounds in management studies, particularly those graduated from IIMs; (b) within the 50–70 year age group;[1381] and (c) with tenure that seems to run over decades in perpetuity,[1382] reveals that India's boardrooms continue to operate as static insulated hubs, even after the enacted "one

[1374] 'Report of the Kotak Committee on Corporate Governance' (n 59) 7.
[1375] Banerji, Mahtani, Sealy, & Vinnicombe (n 1200) 33.
[1376] 'Towards Gender Balanced Boards' (n 1280) 24.
[1377] R Pandey & CT Moore, 'Why Aren't India's Women Working?' (The New York Times, 23 August 2015) < https://www.nytimes.com/2015/08/24/opinion/why-arent-indias-women-working html> accessed 15 April 2017.
[1378] Analysis based on data sourced from Prime Database.
[1379] Analysis based on data sourced from Prime Database.
[1380] 'Towards Gender Balanced Boards' (n 1280) 18.
[1381] Analysis based on data sourced from Prime Database.
[1382] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).

woman director" quota. Only if and when such a quotient of familiarity can be eliminated, can the doors to diversity be opened. Otherwise, companies would continue to re-fill from what they already have, missing out on a wide spectrum of candidates available outside the close confines of existing networks. This is something India, which starts with a weak note of readily available candidature (particularly low education, feeble labour participation/employment and severe mid-career filtration) cannot afford to lose. To avoid this, it is necessary that initiatives towards widening the weak and proximate strings that tie down the hunt for potential candidates are immediately undertaken, simultaneous to strategising regulations.

To sum up IV.3, whether India is ready for a quota in boardrooms:

From a candidature standpoint, a few thoughts that might help in answering this:

Have overall female participation or resources advanced in India? Is the candidature readily available? Is it adequate for the entire board, or only for the non-executive constituent, or even further for independent directorships? Is the pipeline ready for women in executive roles, or does it require to be developed?

With a low labour force participation of 28.5% and low literacy at little more than half the figure for males, India is not so advanced, or is rather immensely deficient, for overall female participation and available female resources. In particular, with only 1,693 women against a total of 10,932 individuals for overall directorships across all NSE listed companies,[1383] and only 903 women of 5,336 individuals as independent directors,[1384] the numbers appear significantly asymmetric. This reduces more when one narrows down further to the executive constituent, as women flush out in the passage from entry-level professionals to middle management, and again from middle management to senior management, in what appears to be a more than leaking pipeline. Thus, the facts are far from what enthusiasts proclaim in support of the "one woman director" quota.

When rushing to impose an over-arching quota, it is therefore necessary to be cautious to investigate further than relying upon superficial claims. It is time that India

[1383] Sourced from Prime Database, as on 18 May 2018.
[1384] Sourced from Prime Database, as on 18 May 2018.

acknowledged the shortage of candidature as a real-time crisis,[1385] against optimistic but less thought of narratives of the availability of "qualified and competent" women.[1386] This is not to negate the idea that "qualified and competent" women exist, but that the candidature is immensely short of what is actually needed, and that companies are further unable to optimally search or hunt from what is available. In addition, leakage in the pipeline further erodes what is an already deficient candidature by the time it reaches board level. Further, what is acclaimed as an "aspirational but achievable 20% club" (imitating the UK's 30% club) is arguably far-fetched (both in spirit and numbers).[1387] Considering that the female share of literacy rate, tertiary education, labour force participation, skilled tasks, mid-level or senior ranks, or representation in boardrooms, does not reveal a promising picture,[1388] there is no apparent basis on which such claims are or can be founded. In other words, India's available candidature does not appear ready with what is needed to meet the immediate demand that an over-arching mandatory quota applicable to entire boards would create, or rather what the "one woman director" quota has created.

Instead of holding onto such forced assertions and tall claims that are oblivious to actual status and perpetuating the errors made, there is a dire need to re-visit the strategy and align it to the candidature available, while simultaneously building upon it in a manner that could run in perpetuity. The remedy is therefore two-fold – i.e., first, optimally using what is readily available, and, second, an emphasis that extends beyond (but does not exclude) boardrooms to build a befitting pipeline. Unless the focus lies on easing the entry and retention of women at every functional and hierarchical level, such candidature is less likely be built, and, amidst all these, a compulsion to adopt an over-arching quota can only have catastrophic business consequences.

[1385] RK Agrawal (n 1088) 4. See also, A de Jonge (n 1073) 3.
[1386] I Kathuria & N Singla, 'The Economics of Women Talent in India: Fact vs Fashion' (Huff Post, 23 December 2016) < https://www huffingtonpost.in/ipsita-kathuria/the-economics-of-women-talent-in-india-fact-vs-fashion_a_21640887/> accessed 18 March 2017.
[1387] 'Cos target 20% women on boards by 2020' (Times of India, 26 May 2017) < https://timesofindia.indiatimes.com/business/india-business/cos-target-20-women-on-boards-by-2020/articleshow/58847605.cms> accessed 5 May 2018.
[1388] As statistically assessed in chapter 3 and chapter 4 of this thesis.

India would do better if it adapts its historic allegiance to quotas, accepts its error in strategising, identifies missing gaps, and restores whatever would work best amidst the realities of its national context.

Recommending the Roadmap

While India, by providing for a "one woman director" quota, has taken a progressive stride to acknowledge the significance of diversity, for the right reasons resembling the dual case on which the concept stands, it has not been able to go much farther. Not realising that corporate governance (particularly boardrooms) with its dynamic content, requires much more than its historic legacy of quotas administered in domains unrelated to commerce, the country has fallen short of regulatory innovation and novelty that was much needed to strategise for evolving diversity. As a consequence, it appears that India, in order to align with the global trend of diversity, has hastily implanted the "one woman director" quota borrowed from its political context[1389] without many deliberations on the policy approach and alternate strategising. In doing so, it has also not attended to the country-specific conditions and challenges which have direct forbearance upon the quota. These include, *inter alia*, a deficient female candidature, which ought to have been readily available to meet the immediate demands created by the quota.

The crisis is, therefore, one that starts with a regulatory mismatch (or error of laws), and which further intensifies because India's candidature is not ready for such an over-arching quota. Any proposals to rectify the regulatory mismatch must therefore be drawn factoring the severe candidature crisis witnessed in India. Hence, the roadmap that this thesis proposes aims to fix the regulatory mismatch through strategising in a manner that would, not only attain the balance in policy approaches between hard law and soft law as warranted by India's mixed rationale, but do so while factoring and building upon the candidature shortfall. To address this two-fold purpose, and to mitigate (if not reverse) the damage already done by an insensitive and apathetic

[1389] Analysed in section III.4 in chapter III of this thesis.

approach to regulation that was oblivious to the precincts of enforcement, this thesis recommends a roadmap built upon *governance rather than just government*.[1390]

In doing so, the thesis has ingeniously developed the proposed strategies and recommendations, and does not engage in transplanting or borrowing any laws or regulations from other countries or jurisdictions. Although the thesis has extensively reviewed the frameworks of Norway, the UK and the EU, the objective and purpose was limited to understanding the law-making mechanism in this regard, and drawing linkages between the strategies and the rationale, so as to derive the general theory for strategising and the formulae for an optimum strategy. The thesis rather believes that such a transplant or replication of laws from these jurisdictions cannot work in the Indian context, and hence, advises against it. This becomes clearer and more obvious from a comparison of the social and cultural contexts of Norway, the UK vis-à-vis India.[1391] Clearly, no parallels can be drawn between the egalitarian ethos that characterise Norway historically, and the legacy of patriarchy which continues to be deep-seeded in India. Much of this is responsible for how the quota at 40% female representation has worked significantly for the former, while India still grapples with the "one woman director" mandate. Likewise, the UK's neo-liberal ideologies and a principle-based governance system[1392] cannot be equated with India's socialist beliefs (forming a basic tenet of the country's constitution)[1393] which necessitates State interventions in distribution of resources. The dissimilarity widens further when one peeks into the corporate ownership and management patterns in India, which is largely promoter-controlled, i.e., the power lies in few male members of the family which in reality owns and runs the company. Considering this peculiarity of India's corporate set-up, a strategy for gender diversity in boardrooms of Indian companies cannot essentially be borrowed from other non-comparable models of corporate governance.[1394] Hence, these jurisdictional reviews are not replicated in the roadmap

[1390] J Richardson, 'New Governance or Old Governance? A Policy Style Perspective' (The Oxford Handbook of Governance, September 2012) 1-16, 2.
[1391] Comparing section II.7D in chapter II with IV.3 in this chapter IV above, of this thesis.
[1392] 'The United Kingdom Corporate Governance Code' (n 418).
[1393] Preamble to the COI.
[1394] A Kamalnath & A Masselot (n 1141) 179-203, 187. See also, J Sarkar & E Salarka, 'Women on Board and Performance of Family Firms: Evidence from India' (Working Paper 130/2015, Madras School of Economics, 2015).

proposed for India, which is rather premised on the proposal for a mix of strategies[1395] that is ingeniously and originally devised by this thesis while exploring what can be an optimum strategy in chapter II.

IV.4 *Fixing the Strategy*

A regulatory re-creation must essentially start with an assessment of what is sought to be achieved through it. Simply replacing laws, without knowing why, is not being wise. It is therefore reiterated that what India seeks to attain (the rationale) is more than gender equality, or representation expressed in numbers. Rather, it strives for women who can bring in functional diversity, which cannot be achieved if it is confined to one sub-section of the boardroom (as it is likely to follow the SEBI's announcement seeking to replace the "one woman director" quota with an "one independent woman director" quota – a result of much hyped but ill-founded allegations of family favours). India's "why" to boardroom gender diversity is thus answered by a mixed rationale of both, social justice and business.[1396] Thus, the roadmap should seek to rectify the regulatory mismatch in a way that can successfully cater to this mixed rationale.

It is also imperative to be reminded at this stage that, while diversity must be all-pervading, a single regulatory strategy must not be so. This is because much depends upon its behaviour and relationships over and above its structure, and, also, the whole of the board cannot be constituted or operate in the same manner.[1397] Moreover, given the evolving and fast-changing constituents of corporate governance, it undisputedly remains an area that cannot be comprehensively captured within only rules or prescriptive laws. This assumes more relevance for boardrooms, which operate mostly as parochial chambers behind closed doors of secrecy and confidentiality.[1398] With such minimal visibility, the outer world remains unfamiliar with boardrooms as regards how they work and decide and processes that go on within. At best, their structure and composition can be grasped, which explains why most laws and regulations focus on these, as against their operational aspects. Through such structure

[1395] Explained in section II.7C(B) in chapter II of this thesis.
[1396] See section III.3 in chapter III of this thesis.
[1397] D Higgs (n 173) para 6.3.
[1398] Discussed in section IV.3E in this chapter IV above.

and composition, lawmakers seek to regulate power, control and undertake related intangible processes that continually run within.

However, as all of these observable and not-so-ostensible aspects are inter-linked, it is neither plausible nor preferred to regulate one without affecting the other. Imposing externally prescribed rules based on what the regulator can see from outside but not knowing what lies within, and affects the internal mechanics, can be catastrophic. This is more so where such rules are intended to apply for all without making any concessions for the peculiar needs that exist at board and business level. Variations in the individual attributes of each director and their backgrounds, knowledge, qualifications, skills, expertise, experiences, personality traits, behaviour, interpersonal relations and group interactions shape each board differently, and in different contexts. As much also depends upon the game of power, ego and wealth that characterises corporate leadership, it is not an exaggeration to state that the effectiveness of a boardroom depends largely upon personalised chemistry between its directors. Naturally, none of these are visible to the regulator or externally regulated, much less through a rigidly defined solitary or self-contained approach.

How can things that can never be fitted in "one size" be made to adorn a "one size fits all" get-up?

Unfortunately, India's "one woman director" quota has done just that. Founded on assumptions of generality that overlook how boardrooms actually operate (and which cannot be exhaustively sensed or captured), the quota leaves no flexibility to accommodate company- or business-specific adjustments. Seeking to affix precision to boardrooms, which are inherently so imprecise, and more so in relation to gender diversity that is still evolving, the quota seems to contradict the very purpose with which India commenced its journey. What further strengthens the opposition is the inadequacy of candidature, which is not yet ready for such an over-arching mandatory and sanction-backed enforcement. While the SEBI announcement that would potentially confine the demand for female directors to only one sub-section of the board (that of independent directorship)[1399] might somewhat de-stress the tension, one must be reminded that the reform was not made with any such intent to address the

[1399] See section III.5E(C) – 'Disguised Connections' in chapter III of this thesis.

shortage. Considering that it comes with an added risk of institutionalising stereotypes and further side-lining female directors to secondary or part-time roles, it is not or rather should never be a plausible solution.

The roadmap should therefore fix the regulatory mismatch by offering a more creative and efficient alternative – one that, although founded or with strong roots in traditional policies, goes beyond to attain a balance with what is needed in contemporary times. "Just as new governance writers argue that the 'new' style is necessary to deal with increased complexity".[1400]

It is never a good idea to eat the cake whole – slice it up!

It is already argued that a "one size fits all" quota for the entire board should be outright rejected.[1401] Instead, a purposive bifurcation of the board is what one should start with, to divide and arrive at two broad constituents – executive directors and non-executive directors, within which others, such as independents, nominees, employees and others are detailed in a typical Indian boardroom. Deriving strategies separately for each of the two constituents can then follow.[1402] Such "slicing" would be a sensible regulatory move, as this can help in devising spot-on strategies that can work optimally for each constituent, as opposed to an over-arching "one woman director" quota not finding enough candidature, or a restricted "one independent woman" quota that comes with increased risks of stereotyping and segregation of roles – neither of which align with India's balance or mixed rationale. Hence re-strategising of regulation must be done in a manner that is cognisant of the peculiarities of each of its constituents of the boardroom, and what each one specifically requires.

IV.4A Non-executive Directors

Prior to recommending what can work best for gender diversity within the non-executive constituent, it becomes necessary to understand what a board expects or seeks from these directors.

[1400] *Id* at 13.
[1401] Reiterating from sections II.7B and II.7C in chapter II of this thesis.
[1402] As proposed in section II.7C in chapter II of this thesis.

(A) What must a Non-executive Director bring to the Boardroom?

Beginning with what is statutorily stated, the Act of 2013 makes no explicit mention as regards the role and functions of non-executive directors. Nonetheless, despite variances in structure, composition and degree of activism, non-executive directors are almost universally ascribed with the responsibility of monitoring executives and management such that the latter act and decide what is in the best interest of the company and its business.[1403] While working on their main responsibility to trigger informed debate and challenge within boardrooms,[1404] they must also connect or act as a link with other stakeholders and the external environment.[1405] While they are expected to be participative – i.e., attend all board/general meetings, constructively contribute to committees, and stay informed of the company and related matters[1406] – they are warned against being too interventionist, which can cause undue obstruction to the board or its committees. With the role of a watchdog to observe and act to fill missing gaps, non-executive directors are expected to come with their monitoring or advisory hats on.[1407] Considered as "part-time" directors, their main accountability arises not for incorrect or poor business performance but only for not having challenged such decisions being made by executives/management. As long as their dissent appears, they are likely to be absolved of strategic aberrations.[1408] Thus, with limited involvement and condensed liabilities much less than those of executive directors,[1409] they have a significant peripheral role to play.

Although the statute once again does not enumerate attributes that are needed in this regard, one can at best infer a few from what are provided in the code of conduct for independent directors,[1410] who form a sub-set within the non-executive constituent. These include, *inter alia*, ethical standards of integrity and probity, objective, critical and constructive judgment (particularly on issues of strategy, performance, risk management, resources, key appointments and standards of conduct), honesty and

[1403] B Gunter (n 117) 143.
[1404] 'Guidance on Board Effectiveness' (The Financial Reporting Council, July 2018) para 77.
[1405] *Id* at para 78.
[1406] CB Carter & JW Lorsch (n 868) 24-26.
[1407] D Higgs (n 173) paras 6.5 and 6.6.
[1408] SEBI Order in the matter of *Zylog Systems Limited*, WTM/GM/EFD/64/2017-18 (16 October 2017).
[1409] D Higgs (n 173) para 14.9.
[1410] Section 149(7) and Schedule IV of the Act of 2013.

strength of character, no conflict of interest, a temperament of scrutiny and vigilance and strong interpersonal skills or alignment to stakeholders.[1411] In view of the relevance of these to what non-executive directors do and are primarily responsible for, they must have attributes resembling (if not imitating) all of the above.[1412] In addition, the need arises for competencies that, although not necessarily niche, match with the business strategy and the environment within which the company operates,[1413] or, in other words, those "relevant to the challenges and opportunities facing the company".[1414]

Most often companies arrive at such desired attributes and competencies measured on what already exists in the boardroom (as companies rarely start drawing up boards from scratch) vis-à-vis what the board strategically requires at that point of time.[1415] For instance, a company in the finance sector requires more financially literate candidates over and above what it might require for its audit committee, while a company in the manufacturing sector would want those with the ability to understand customer preferences for newer product development and a company in construction would search for candidates with some aptitude in engineering/architecture. A company that operates within an extensively regulated sector (such as defence) would prefer to have one with strong governmental/political connectivity. Having said that, it is difficult in contemporary globalised and inter-linked markets to segregate any such characteristics exclusively to any one sector or industry. Rather, certain knowledge of capital access, information technology, human resources, external community and compliances/law cut across all kinds of boards regardless of sector or industry. For sustained competitiveness, companies therefore seek an inter-disciplinary mix of attributes and competencies, although to varying extents and with a range of priorities.[1416] Examples include a director of foreign nationality being sought where an overseas acquisition/expansion is planned, information technology

[1411] 'Guidance on Board Effectiveness' (n 1404) figure 7. See also, D Higgs (n 173) paras 6.12-6.17, 15.1 and Annex C.
[1412] 'Improving Board Effectiveness - ICSA Review of the Higgs Guidance on behalf of the Financial Reporting Council' (Institute of Chartered Secretaries and Administrators, July 2010) 8-9.
[1413] R Leblanc & J Gillies (n 810) 223.
[1414] 'Guidance on Board Effectiveness' (n 1404) para 87.
[1415] CB Carter & JW Lorsch (n 868) chapter 6, 118-119.
[1416] *Id* at 120-121.

expertise being prioritised when a company decides upon a technological overhaul or technically revolutionised product, specialisation in marketing and promotion prior to a product launch, and a trusted face of repute to retain investor faith in times of crisis; and which needs also change with time.[1417]

In sum, when seeking non-executive directors, companies look out for attributes and competencies on a need and time basis,[1418] with the objective to attain a supervisory board that understands the big picture of its business, and be able to entrepreneurially run it. What matters is the width and depth of understanding, enabling one to formulate and express opinions as regards the realities of business and what impedes the company, more than what works best for it. Accordingly, they engage in a trade-off between expertise and independence to arrive at a candidate who (to state the minimum) (a) would balance between being supportive versus being challenging to the management; and (b) would ideally be aware of how the industry and the company is evolving. Having said that, none of the candidates is required to bring in all such attributes and competencies individually, as long as the complete mix is attained at aggregate board level.[1419] A "whole board" approach, in which, while every director is involved, no one takes up the responsibility, is neither practicable nor desired.[1420]

In view of this, it is understood that the candidature for non-executive directors need not comprise specialists or all-encompassing experts. Rather, it is more generalised, and can be sourced across industries and sectors, and from young aspiring board members to experienced ones,[1421] as long as they have a critical and independent aptitude.[1422] Not necessarily from the same domain, it would suffice if one has an understanding of how an organisation and its operations are run, or has been (or is capable to be) a leader, even if from an unconnected area. Intricacies of the business, strategies, risks, operations, culture and workforce specific to the company, which can be familiarised at a later stage, are not prerequisites for an appointment to such a

[1417] P Whitehead, 'Non-executive director: a task for which no one is qualified' (Financial Times, 10 April 2013) < https://www ft.com/content/33ec6b3e-9099-11e2-a456-00144feabdc0> accessed 10 August 2019.
[1418] B Gunter (n 117) 142.
[1419] R Leblanc & J Gillies (n 810) 145. See also, D Weber-Rey (n 79) chapter 26, 184.
[1420] CB Carter & JW Lorsch (n 868) 109.
[1421] M Huse (n 879) 95.
[1422] D Higgs (n 173) paras 10.29-10.32.

directorship.[1423] A search for a non-executive director can therefore ideally look beyond business to a sector or industry, or even beyond to academics, researchers, accountants, lawyers, professionals, entrepreneurs, public servants and not-for-profit areas.[1424]

Having realised the attributes and competencies, as well as the potential candidature, it is now perhaps possible to elucidate how gender diversity in this constituent can be strategised in a manner that would work in the Indian context.

At the outset, it is important to re-iterate that, despite a larger gamut of potential candidature, what is currently and readily available in India may not suffice. This is because, unlike in countries such as Norway and the UK,[1425] India starts with a deficient female resource, as is clear from the nominal female share in labour force/employment and education. Thus, with what starts on a severely deficient note, which erodes further as one goes up the corporate ladder, the available resource, as it stands now, might not be able to cater to an ambitious rigid quota.

Does that mean quotas should be entirely ousted as a choice of strategy?

Doing so might not help either. This is because a complete elimination of quotas would mean losing out on their merits in terms of quantitative or numerical results, which serve as an important catalyst of change.[1426] Further, commencing with hard law can help in communicating a clear message of regulatory emphasis for companies to take serious cognisance, which is much needed until boardroom gender diversity evolves as a fully fledged business norm. This is particularly the case considering that an optimum strategy (as recommended in chapter II) calls for reducing (and not wholly avoiding) compulsory regulation. Particularly for India, ousting the quota might not be a wise move to make, given that it has existed in regulations for over five years now, with much prominence. What further adds to this is the country's dominant

[1423] 'Guidance on Board Effectiveness' (n 1404) paras 75-78.
[1424] 'The Tyson Report on the Recruitment and Development of Non-Executive Directors' (n 173) 3, 13. See also, D Higgs (n 173) paras 10.29-10.32; and R Sealy & S Vinnicombe, 'Women on Boards in the UK: accelerating the pace of change' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 28, 199.
[1425] B Gunter (n 117) 134, 141.
[1426] 'Women Matter: An Asian Perspective' (n 1313) Exhibit 6.

legacy of the quota, and the political inhibitions and social sentiments intrinsically intertwined with it, amidst which a complete reversal might be difficult to implement. This thesis therefore takes a pragmatic stand to retain what has been done, but with modifications that (on one hand) confine its scope to align with what India is ready for in terms of candidature, and (on the other hand) make it more functional, definite and crisp.

(B) Modifying the Quota

One of the greatest infirmities of the current "one woman director" quota stems from "one", which falls grossly short of the critical mass requirements, and is much less of what is required for balance.[1427] Not only does it fail to meet with demographic parity, but it also makes such directorship functionally deficient and dependent on others. Appointing a woman as a director is not the same as allowing her to act as such. Her differences to others would be more heightened, and she is likely to be rendered nothing more than lip-service to what the other members decide. In such surroundings, it becomes all the more challenging for women to break through ceilings and segregations.[1428]

When commencing with the tag of a "quota-d woman", a woman would be seen as an exception to what is otherwise a rule of male leadership. As the only person in a preferred category, the onus to prove her credibility and worthiness would increase manifold.[1429] This is clearly evident where female appointments are made resulting from family connections, which meet with widespread protests, although this has been a trend and continues to be so (without being questioned) for male directors. Further, led by presumptions that women should serve only as spokespersons and raise concerns that speak exclusively of womankind, over-riding business, the probability of a woman's contributions being stereotyped increases, and these are then less likely to be valued or sought.[1430] Furthermore, where a woman's opinion is unique and different from what others commonly arrive at and what is unanimously accepted, she

[1427] RM Kanter, 'Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women' (1977) 82(5) American Journal of Sociology 965-990, 966.
[1428] *Id* at 977. See also, AA Dhir (n 638) 27.
[1429] 'Women in Financial Services' (n 259) 12. See also, S Chawla & RR Sharma (n 1314) 191.
[1430] 'Women in Financial Services' (n 745) 20.

might be misunderstood[1431] and a fear of being detested or ridiculed might arise.[1432] She would prefer to refrain from dissent, debate, probing or any such activism, and eventually succumb to self-censorship to avoid ending a cordial relationship with the CEO or other directors who brought her to the boardroom in the first place.[1433] Such reluctance could run in a spiral of silence and exclusion. Amidst the homogeneity and unwritten rules of cohesion that mark a boardroom, and driven by the belief that women have no real power to make any impact or change and "cannot do anything anyway", they either have to "row in or to ride out".[1434]

With one woman in board sizes set at a minimum of six,[1435] a figure which can go up to 15 directors (or even more, if approved by shareholders), India lags far behind what can be approved for critical mass to be achieved.[1436] Rather, it runs contrary to it. This is because it is often found that male resistance to female progression starts only after one or two tokens have broken through the glass ceiling, whether on their own or by force of law.[1437] As the presence of "one woman director" in itself is a reminder that she is an outsider, the "we" and "they" divide that prevails inside boardrooms can only become stronger.[1438] This is particularly so for Indian companies that are typically promoter-owned and controlled, and where the dependence of such a lone female director would increase manifold. Moreover, as then the likelihood of dominant influences within the boardroom reforming her would be greater than the converse,[1439] her contributions would remain oppressed and unnoticed.[1440] In this way, internal urges for such diversity might eventually fade out, and a business norm may never emerge. What is now a male institution will only become more so,[1441] and it would become just fashionable to have women at the top. This seems to be true in the existing scenario with only very few of the Nifty 50 and Nifty midcap companies having more

[1431] SE Page (n 133) 114.
[1432] KA Merchant & K Pick (n 98) 35.
[1433] R Leblanc & J Gillies (n 810) 41.
[1434] G Mills (n 870) 8.
[1435] 'SEBI Board Meeting' (n 60) 1.
[1436] '2016 Global Board Diversity Analysis' (Egon Zehnder International 2017) 7.
[1437] B Gunter (n 117) 28.
[1438] S Basu (n 250) 7.
[1439] M Thornton (n 299) 412.
[1440] MA O'Connor (n 1248) 491. See also, AA Dhir (n 638) 27.
[1441] RJ Steinberg, 'Gender on the Agenda: Male Advantage in Organizations' (1992) 21(5) Contemporary Sociology 576-581, 576.

than one female director,[1442] hinting at some sort of institutional complacency.[1443] At best, formal compliance, inconsequential in terms of both equal representation and effects, will be celebrated.[1444] To displace this cosmetic notion, and to derive a system in which diversity is normalised and women have influence and participation regardless of whether a man or a woman formally occupies a position, the outcome should go beyond such a feel-good "one woman director" quota.

To ensure that female directors bring their best (and not just minimal or symbolic) selves, the quota must be re-structured in a way adhering to the 30% (or at least three women)[1445] critical mass ratio – firmly established as the tipping point to trigger a positive change.[1446] While this is ideal, one must not hasten to impose such numbers, as this might be an onerous start for India. Rather, in view of its constrained candidature, the quota may be re-structured to attain a critical mass within the non-executive constituent to start with, and this can be planned as progressive – i.e., proportions increasing with time in a phased manner, as suggested below.

Board Size	Total Non-executive Directors (at least 50% of board size)	Number of Female Non-executive Directors (first phase)	Number of Female Non-executive Directors (second phase)
Six or more, but fewer than ten[1447]	Three to five	ONE	TWO
Ten or more, but less than 15	Five to seven	TWO	THREE
15 or more	Eight or more	THREE	30% of Non-executive directors

[1442] Refer to figures 15 and 16 in this thesis.
[1443] 'Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination' (n 300) 2156–2177, 2176.
[1444] M Torchia, 'Women Directors and Corporate Innovation: A Critical Mass Perspective' in Machold, Huse, Hansen, & Brogi (eds), *Getting Women onto Corporate Boards: A Snowball starting in Norway* (Edward Elgar Publishing Ltd 2013) chapter 18, 133.
[1445] Torchia, Calabro, & Huse (n 1058) 312.
[1446] Joecks, Pull, & Vetter, 'Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a ''Critical Mass?''' (2013) 118 Journal of Business Ethics 61–72, 70.
[1447] As per the SEBI's announcement pursuant to the Kotak Committee, the board size of public companies must have a minimum of six directors in the top 1000 listed entities by 1 April 2019, and in the top 2000 listed entities by 1 April 2020- 'SEBI Board Meeting' (n 60) 1.

In a mid-sized board that comprises up to nine directors, compulsorily having one female non-executive director (whether or not independent) is recommended. Given that many companies already have one woman, in compliance with the existing quota, this will not be onerous within the extended timeframes proposed below. Likewise, for boards up to a size of 14, a threshold of two, and for board sizes exceeding that, three female non-executive directors, is recommended. All of this relates to the first phase of the quota.

The thresholds identified are demonstrably still short of a perfect critical mass, and a second phase is therefore suggested for companies to reach such optimum levels. In the second phase, boards with up to nine directors must appoint two women, while boards of up to 14 must appoint three women, and those exceeding 14 members must appoint 30% of the number of non-executive directors, as women. All those advocating for the status quo, who are likely to raise eyebrows at these increasing figures, must be reminded that this is still far from what can be asserted as parity or an equal (1:1) ratio.

Given that at least 50% of the board size must comprise non-executive directors,[1448] female non-executive directorship has been worked out by calculating for critical mass within this constituent – i.e., within half of the board size. For instance, where the board size is nine directors, and comprises 50% (i.e., five) non-executive directors, the female non-executive quota is suggested at 30% of five, or two (where decimals have been rounded off to the next higher figure). Likewise, for a board of up to 14 directors, comprising seven non-executive directors, female directorship should be three directors, and for larger boards, it is fixed at 30% of whatever number of non-executives are present at any given time.

Next, as regards timelines for compliance, while such quotas must not prevail eternally, it is essential that sufficient time must be allowed to implement and then sustain them, so that any results emerge clearly and precisely. These can then be vetted when determining the future regulatory course. Lifting the quota even before it is able to create a stir, or too hastened reforms, would mean bearing the burden of compliance costs but with no corresponding outcome. This can demotivate business reasons for

[1448] Regulation 17(1) of the Listing Regulations.

such gender diversity, as any contributions remain unknown. To this end, deadlines for each of the two phases may be divided for companies based on their market capitalisation. For instance, it may be enforced first for the top 300, then 500, then 1000, and finally 2000 or more listed companies. Accordingly, while the top 300 must accomplish the first phase by the end of 2019, 500 must do so by 2020, then 1000 by 2022, and the rest by 2025. Also, a maximum tenure of the quota might be fixed at 2028 (ten years from now) for completion of both phases – i.e., with a further grace period of three years after the last deadline of the first phase, by which time gender diversity may be reasonably expected to be institutionalised as a necessary board attribute and a business norm, such that the pressure of external impositions would no longer be necessary.

From a regulatory perspective, a phased enforcement will provide enough leverage to measure compliance, identify deficits and missing links, and rectify the gaps, as a parallel process. The role of the regulator thus ought not to stop at just imposing the quota and taking a back seat. Rather, it must extend to a rolling review comprising annual follow-ups, data collection, benchmarking and publicly made reports of non-compliant companies (as against the cryptic responses to requisitions specifically made by persons under the Right to Information Act of 2005).[1449] This will (on one hand) enable the regulator to trigger sanctions, where necessary, and (on the other hand) re-visit the quota if need be, alongside timely curative actions.

From an industry standpoint, this enables more mindful big companies to lead by example and inspire smaller ones to rise up to diversity. Through repetition that develops trust in diversity, and by inspiring others to follow, the effects of each phase leave some lessons for the later phases, gradually paving the way for a self-actualising process within the industry. Allowing companies the necessary time to adjust, such extended timelines further help companies to appoint female directors in consideration of their attributes and competencies, as against hastily complying with only the letter of the law if it is enforced with tight deadlines. This will also help the search to be aligned with a growing candidature that India needs to develop alongside this as a

[1449] *Chandrakant Dheeraj v SEBI* (n 1170).

simultaneous process, which cannot happen overnight. *When the true spirit of diversity cannot be achieved by one stroke of a magic wand anyway, what is the hurry?*

Another significant challenge lies in designing sanctions against non-compliance, which must be unequivocally legislated free from ambiguities and subjective interpretations. While an extreme dissolution (as exists in Norway) is not ideal for India, sanctions may also be incremental. Starting with warnings published on public forums (which could serve on a naming/shaming basis), these can be followed by fines and monetary penalties, leading to the suspension of fees and all benefits accruing to the existing directors and/or nullifying appointments made in violation of the quota, and, finally, restrictions/suspension on trading until the position is regularised. Within this, monetary fines must be carefully crafted in a manner to deter companies from infringing the quota. In other words, the penalties should outweigh the cost of compliance, or else companies would prefer to pay fines and escape conformity with the quota. An effective way to do this is to link the fine with the company turnover or profits – i.e., instead of prescribing absolute quantum that applies uniformly to all companies (and becomes onerous only for the small- and medium-sized ones, while the large and the more influential ones get a free/less onerous rider), it is recommended that the amount should be a percentage of the net profits of the defaulting company. In this way, smaller companies will be required to pay less than bigger ones (while the sanction remains deterrent to both). For example, a fine levied at 2% of the net profits means that a company with profits of INR 1 billion pays 20 million, while another with INR 1 million pays 20,000, serving the purpose in each case. This would expectedly instil waves of deterrence, which the current penalty structure, oblivious to the company size, has unsurprisingly failed to do.

Re-structuring the quota as above might help defy isolation, conformity and domination (on one hand) and legitimise the female novice voice on the other hand.[1450] Such enhanced presence is also expected to help eliminate tendencies of tokenism, and all the side effects that come with it.[1451] All in all, this might help attain real-time outcomes that goes beyond just form and numbers. As a final note, it is important that

[1450] RM Kanter (n 1427) 971.
[1451] *Id* at 971-972, 977.

the regulator, while enforcing quotas, clarifies that, as the recommended quota sets only minimum thresholds, it would encourage additional female appointments by companies, subject to their commercial prudence and business judgment. Companies should not therefore feel complacent once they comply with it. The emphasis should lie only upon listed companies to start with, as it has been so conventionally.[1452] For unlisted companies, it can be kept voluntary at this stage, as opposed to the current quota.

Having determined a strategy that, while retaining the advantages of hard law, is compassionate towards both business autonomy and available resources, it is time to find ways the candidature can be enhanced to keep up with the demands of a re-structured quota. At the outset, as the quota is confined to the non-executive constituent, the pressure that an over-arching quota applies generally to the whole of the board stands automatically reduced or mitigated. It reduces further owing to the phased timelines, and is further divided across companies based on their market capitalisation, within which compliance is sought. Moreover, with the recent increase in board sizes from a minimum of three to double this figure by 2019/2020,[1453] companies falling short of six directors would have to seek out additional appointments anyway. If done by way of female directors, it can serve as a two-fold advantage as companies would then be able to attain both such compliances (gender diversity and minimum board size) by undertaking only one or doing these through the same round of appointments. While the modified quota can make a start with a comparatively larger gamut of candidates available for non-executive roles, to ensure that India is able to utilise its existing candidature and further develop and strengthen the country in such a time span in a manner so as to compete with the quota, the recommended strategy must go beyond this. A few simultaneous and much needed reforms are indicated below.

[1452] 'Twenty-first Report- The Companies Bill 2009' (n 55) point 17. See also, Proposal for a Directive of the European Parliament and of the Council on 'Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures' (n 464) 5.
[1453] 'SEBI Board Meeting' (n 60) 1.

(C) Search Firms and Nomination Committees

Speaking from the statute books, in a general meeting directors are currently appointed.[1454] It therefore appears at the outset that a search for, and the final selection of, a candidate as a director is the shareholders' responsibility. The reality, however, speaks otherwise.

It is rare that new director appointments will completely substitute an existing board. At any time, a board therefore has some existing and some retiring directors, and the vacancies arising from the latter, or a few occasionally made additional appointments, need to be filled in a general meeting. More often than not, such appointments are made from within the group retiring from the board, which is the usual course that the statute also advocates.[1455] Thus, practically speaking, succession is internally sustained through cyclical appointments and re-appointments confined within boardrooms. Even in rare instances of new entrants, the need for which arises exceptionally when it is so decided by existing directors (particularly the CEO), the proposal comes from within the boardroom.[1456] The CEO or existing board member(s) suggests a potential candidate, which is then forwarded to the nomination committee, and further ahead at the general meeting the shareholders rubber-stamp such pre-finalised appointments. Although the statute enables one to propose oneself for a director vacancy, it seldom happens like this from a practical standpoint, more so as this requires an advance deposit of INR 100,000, which is forfeited unless such a candidate is appointed or procures a minimum of 25% of the votes cast in general meetings. Hence, while it is easy for a candidate who unofficially gets sponsored by the CEO/directors of the company, the probability of one managing to do so on an entirely individual and unconnected basis is slim.

Overall, where members are rarely and only internally rotated, and where an occasionally appointed new member upon entering finds pre-existing dominant forces and certain firmly established rules under-pinning what is expected and acceptable behaviour, boardrooms culminate in exclusive power provinces running in legacies.

[1454] Section 152(2) of the Act of 2013.
[1455] Section 152(6)(e) of the Act of 2013.
[1456] Section 160 of the Act of 2013.

This is all the more pertinent for India, where not only boards but also shareholders remain predominantly closely held or family owned, passing from one generation to another. Where the search starts with "who do we know who has …",[1457] it is not astounding that first-time appointments are not so common.[1458] Close connectivity between the directors and their shared backgrounds and career paths, as demonstrated in chapter III and section IV.3E above, also comes as no surprise.

This informal, unstructured and "hush-hush-ed" board selection explains why India remains largely unacquainted with the external sourcing of candidates, and much less with search firms as an agency of such sourcing.[1459] With only a few such firms existing that can be finger counted, and even fewer with their origin in India, this hints at a potentially slow-moving industry. Thus, with an infirm presence and ability to influence the selection and the overall recruitment process even where such a firm is contracted, the search and the outcome of this remains within the firm hands of the controlling CEO/board. This explains why the attributes in terms of age, background, qualifications and competencies among the existing female directors; and connectivity amongst directors of the Nifty 50 and Nifty midcap companies examined remain within close confines.[1460]

All of these offer dissuading precincts within which neither the recommended strategy (much less the quota for non-executives) nor the current "one woman director" quota, can survive. What is immediately needed so that the re-structured quota can be sustained is a joinder – one that could connect the two forces of demand and supply, which might otherwise exist but be oblivious of each other. Here, search firms, the nomination committee and any other agencies that engage in board recruitment have a critical role to play.

A diverse outcome needs a diverse source to begin with. To match the demands of the recommended incremental quota for non-executives (on one hand), and the expansive gamut of candidature spread across varied disciplines (on the other), search firms and

[1457] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 6.
[1458] Based on an in-depth review of individual female director profiles and their *inter se* connectivity for Nifty 50 companies, as discussed in chapter III.
[1459] 'Towards Gender Balanced Boards' (n 1280) 18.
[1460] As revealed from the data analysis in section III.5 in chapter III of this thesis.

nomination committees (which must be statutorily established in every listed company)[1461] must conduct proactive and extensive searches beyond what the CEO and/or the board seeks. Although companies have a wider choice or array of candidature to choose from, it is unfortunate that its vastness remains unrealised and under-utilised, as companies continue to restrict their search to current or retired executives of similar companies.[1462] This is because of a conventional belief that such executives bring in the best of expertise, experience and familiarity with which a non-executive ought to be equipped. Companies should realise that, contrary to such beliefs, a search so confined to executives can rather impede the very essence of objectivity and critical thinking that a non-executive role is associated with. To think that a director who is engaged all year and full time in executory functions would be able to suddenly switch off and wear the non-executive cloak (and also perform at it) for those few hours in a board meeting, and then again disconnect to resume executing as before, appears magical. Such rapid engaging and dis-engaging does not characterise the human minds of those who actually sit on these roles. Moreover, owing to their strong liaisons, networks and familiarity quotient, it is arguably least likely that they would be able to act as such. Such commonality is all the more unwarranted, as such appointments increase the burden of multiple directorships on individuals, who might be found scurrying amidst a jargon of responsibilities requiring varying degrees of attributes, competencies and involvement, unconnected to one another. Amidst all this, drawing up non-executive directors from executive roles can only risk dilution of the spirit and purpose for which the two distinct constituents exist in the first place. Instead, the search should focus upon those who can bring in diverse (not necessarily different) sets of perspectives than the executive constituent.

To this end, search firms and nomination committees must chalk out internal guidelines as regards the fairness of their recruitment procedures, which might include, *inter alia*, (a) intrusion into less explored and unconventional sources, not confined to those with prior executive experience; (b) a review of connections to the CEO and/or other board members; (c) checks on the past experiences/exposure of potential

[1461] Section 178 of the Act of 2013.

[1462] P Parrotta & N Smith, 'Why so Few Women on Boards of Directors? Empirical Evidence from Danish Companies 1998-2010' (2018) 147(2) Journal of Business Ethics 445-467, 447. See also, JW Barnard (n 1371) 707, 725.

candidates, such that backgrounds bearing strong resemblance to one another are not clustered into the boardroom; (d) a shortlist that is not secretive or pre-fixed, and comprises a minimum of five or six names; (e) making provision for first-timers and female candidature in the shortlists, if not final appointments; (f) setting internal targets, say at five female appointees, in a year; (g) reasoned (not arbitrarily made silent) rejections; and visual advocacy on websites/publicity/policy documents exhibiting their commitment to greater diversity.

While the above "best practices" should apply to both search firms and nomination committees, the means to implement these differ for each of the two. This is because, while search firms are external agencies, a nomination committee is in-house or internal group within the company. Accordingly, an effective way to do so for the former may be through a voluntary code drawn up[1463] by the SEBI, which is then managed or monitored by industry bodies such as CII, FICCI and ASSOCHAM. Such codes, emanating from the regulator, although non-binding, serve as reference points for firms as regards what they should ideally strive for. This would also signal that gender diversity, as what the regulator aims for, is much more than quota. Likewise, the SEBI may issue guidelines by way of an addition to Part D Schedule II of the Listing Regulations ("role of nomination and remuneration committee") for nomination committees to follow.[1464]

Having prescribed this, it is vital that voluntary best practices are then followed up with a transparent set-up. Given that the accountability of such firms or committees lies only towards the companies which tend to better reward them for identifying look-alike recruitees from close circles, as against for greater efforts involved in wider searches, they have no motivation to adhere to recommended best practices. What might, however, come to the rescue are disclosure obligations, which may be enumerated (a) for nomination committees, once again along with the best practices in the Listing Regulations, as suggested above, and (b) for search firms, within the voluntary code. Unless such disclosures as regards whether a firm or a committee is adhering to the code or guidelines (as the case may be) are prescribed, these practices

[1463] Inspired from the Enhanced Voluntary Code of Conduct for Executive Search Firms - Davies Review Accreditation (n 435).
[1464] Inspired from the 'Guidance on Board Effectiveness' (n 1404) para 90.

would have no effect. This would necessitate reporting of deviations if any, alongside gender-segregated data relating to mandates received, recruitment panels and procedures, fields searched in, shortlists and final selections/appointments made, on a yearly basis. Such disclosures must be published in the annual reports (in relation to committees) and websites (of firms), accessible to the industry and the public at large.

In terms of composition, ideally, a nomination committee that comprises three or more non-executive/independent directors,[1465] is expected to perform like a "maverick" free from all bias and influence from management when making such director appointments. However, what is ideal is seldom real. Given that the composition of the committee is determined by the board (or in effect the management),[1466] it is tough to imagine how its members and their decisions can remain free from the influence of the latter. Architecturally ousting the CEO or the management out of the committee should not be mistaken as meaning ousting of their influence. Informal and personalised influences impede "independence" (most of which withers away as one spends a day inside the boardroom amidst all pressures, influences, politics, favours and reprimands, often subtle and under-toned, but which dominate), which can at best be retained only structurally.[1467] Despite not having any documented family or monetary relations, such an independent director nonetheless comes from the familiar and close connections referenced by the CEO and/or management, and is thus least likely to protest against another appointment similarly made. Thus, inclusion of independent directors by itself does not guarantee objective and critical judgment. Search firms, which render their services for fees approved by the CEO, also remain vulnerable to such management bias.

It is therefore recommended that the constitution of the nomination (or any board) committee, should require shareholders' approval. While it cannot be denied that shareholders might rubber-stamp what the management decides in this regard, this nonetheless opens up a channel for shareholders to voice their concerns at the outset (and not after a candidate is selected), and also sends across the message that board composition no longer remains a sole prerogative of the management. To this end,

[1465] Section 178 of the Act of 2013.
[1466] Section 178 of the Act of 2013.
[1467] R Leblanc & J Gillies (n 810) 146.

regulation 19 of the Listing Regulations may be amended to insert "subject to shareholders' approval in a general meeting".[1468] Further, efforts should be made to make the composition of such committees more broad-based. To explain, where a nomination committee or recruiting panel comprises male members with similar profiles/backgrounds (such as IIM alumni), it is more likely that they will succumb to management pressure to recruit a male candidate who has also graduated from IIM or has a similar qualification. To prevent this, it is recommended that, every time a recruiting panel is designed, it must be diversely manned or "woman-ed", preferably with at least one woman. Likewise, nomination committees must have at least one woman director as a member, if not chairperson. Accordingly, section 178 of the Act of 2013, which provides for the constitutions of such committees, should be amended to reflect this as a mandatory requirement. As well as extending these to search firms – i.e., requiring shareholders' affirmation for contracting firms and more diversely composed recruitment panels – search firms may consider setting up a separate diversity wing that could focus on diversity mainstreaming in all recruitments within/internal to firms, or outside for client companies.

The Kotak Committee's recommendation as regards the maximum number of nomination committees of which one may be a part (whether as chairman or member), although not as yet accepted, is nonetheless commended.[1469] This would help in preventing appointments being made from amongst the same individuals or repetitive circles. Going one step ahead, by way of an additional safeguard such that the search process retains the warranted levels of objectivity and independence (in terms of thinking about more than a definable structure), it is advised that directors within the nomination committee must be made to rotate – i.e., the composition of the nomination committee must not remain the same for more than three years at a stretch. Similarly, search firms should be appointed by rotations such that a single firm is not contracted for more than three consecutive years. If engaged on a rotational basis, the likelihood of biased influences in dealings and prejudiced appointments would reduce significantly.

[1468] Regulation 19(1) of the Listing Regulations as it currently reads- "The board of directors shall constitute the nomination and remuneration committee as follows…"
[1469] 'Report of the Kotak Committee on Corporate Governance' (n 59) 43.

Overall, the "top-down" approach that is typical of boardroom gender diversity must commence from its recruiting agencies.

(D) Female Directors' Database

A lingering omission that intimidates India, and which search firms can be instrumental in constructing, is the director database. While similar initiatives have commenced in some other parts of the world,[1470] India currently lacks a formalised comprehensive database, despite it being statutorily prescribed for, in the context of independent directors under the Act of 2013.[1471] Although five years have passed since the requirement was legislated upon, and with some fragmented private efforts made in this regard,[1472] a centrally generated and state-authenticated resource bank remains to be contemplated.[1473]

Given this scenario, expecting an "only female" directors' database from the regulator to facilitate companies and search firms to comply with the fast-approaching quota deadlines would be like hoping against hope. This does not, however, mean brooding over the status quo while the industry cries out for such a database as a priority.[1474] Possessed with requisite knowledge, expertise and access to resources, search firms, which are in a more able position to produce the database sooner and with a wider outreach, must instead take the initiative.

While doing so, search firms must always stay reminded that a database that simply re-iterates what is known to exist would add no value. They should therefore enumerate, as well as those with prior board experience or currently serving as directors, prospects from other areas/streams, first-timers and aspiring candidates who (subject to certification as recommended in section IV.4A(E)) might fit into such corporate leadership roles. All of the candidates so identified individually by firms can

[1470] Catalyst Corporate Board Resource, Kellogg School of Management's Center for Executive Women, and Diverse Directors Database, to name a few of such efforts internationally.
[1471] Section 150 of the Act of 2013.
[1472] Database of Professionals Seeking Independent Directorship by Chamber of Indian Micro Small & Medium Enterprises, and Women Corporate Directors- India chapter database (as mentioned in A de Jonge (n 1073) 57).
[1473] 'Govt to set up database of independent directors' (DNA, 12 January 2018) < http://www.dnaindia.com/business/report-govt-to-set-up-database-of-independent-directors-2574767> accessed 10 May 2018.
[1474] 'Towards Gender Balanced Boards' (n 1280) 16-18.

then be summed up or combined to construct one single conglomerated list, which can then be published and administered by the SEBI or the MCA (or whichever is suitable). Doing so would infuse credibility, which otherwise remains suspended or under much apprehension in randomly or privately drawn-up lists.

One must, however, be cautious that drawing up such a database is not a one-time task, as it must be periodically reviewed and updated, and which is possible only through the conjoined efforts of search firms on an ongoing basis.

(E) Non-executive Directorship – a Profession?

While recommendations as regards the best practices and the database relate more to identifying and documenting available resources, search firms can also play a critical role in capacity building – i.e., contributing to, expanding, and/or adding value over and above the existing candidature. Having asserted that non-executives need not be, or rather ought to be, sourced from beyond executive circles, *why not build such candidature (as well as searching for it)*?

Given the advantageous space between companies and candidates that search firms occupy, they are, or at least are expected to, be aware of the needs and anticipations of both sides. They are well versed with the intricate demands specified in the mandates that companies pass on to them, while also being appraised of what is available and can be offered in return. It is time that firms encash upon such knowledge and connections to build up what can institutionalise directorship as a stand-alone profession in itself. While this adds to the existing candidature, it also ensures that such pools comprise the precise values that companies look out for when seeking non-executive appointments. In addition, it perhaps helps reduce the burden of multiple directorships that an individual director, regardless of gender, struggles with.

Akin to chartered accountants and company secretaries, which operate as independent professions, directorship can also be structured where individuals engage in such roles on an exclusive basis. To explain, their professional profile only involves participating in boardrooms of companies, and nothing more. With all the founding competencies, attributes and behavioural traits that a non-executive should bring to the boardroom, such a director can cater to the needs of a wide cross-section of companies. Further,

an "earned" directorship that would come through such certification would help them build their own personalised brand value and enhance their esteem, as against what one is entitled to as a consequence of relations, connectivity, lobbying or simply the quota, as it currently stands. They would perhaps better serve the companies than serving the CEOs. Moreover, as this would be the only task, the chance of errors resulting from lack of time/commitment (frequently complained about when an executive works full time in a company and serves as a non-executive on other boards) is likely to reduce.

Having said that, setting an outer limit to the maximum permissible number of such directorships needs to be well considered, and may be fixed at the maximum statutory limit of seven as applicable to independent directorships.[1475]

For the same reason that these directors would serve professionally and exclusively as such, it is important that their remuneration is fixed at levels that can sustain their living. It is therefore suggested that the statutory ceilings on director remuneration, specifically of non-executives, be re-visited to better align them to the increased commitment that each professional director would be able to generate, and make them more appealing. For instance, the ceiling of 1% of net profits that applies to the permissible remuneration for non-executive directors may be leveraged for newer or more flexible limits. While ascertaining such limits would require expert analysis and industry reviews, and ought to be taken up as a stand-alone query for research at a later stage, this nonetheless remains a suggestion worth examining as, only when such remuneration would suffice, would directors be encouraged to renounce their extra baggage and take it up as a full-fledged profession.

Given that search firms have access to the expertise of existing management and executive and non-executive directors, as well as connections with potential candidates who need their advice, mentorship and training, they can make the two ends meet. For this, it is recommended that a common forum be created, which may be in the form of a director certification programme for all such candidates (who may not necessarily

[1475] Regulation 17(1) of the Listing Regulations. This would also be in line with the maximum permissible limits to overall directorships, which has been reduced to eight by 2019, and seven by 2020, for listed companies, vide SEBI's announcement accepting the Kotak Committee recommendation- 'SEBI Board Meeting' (n 60) 1.

have a business background)[1476] with genuine interest in taking up a directorship as a full-fledged career path and are willing to learn what is necessary. Under this programme, experts may provide input based on their specialisation, skills and experience within boardrooms, coupled with theoretical discourses structured under the guidance of the SEBI or the MCA in consultation with an expert committee to be set up for this purpose.[1477] Such a committee might comprise renowned corporate/industry stalwarts, who would bring in a diverse set of perspectives to the programme/course contents. This would also provide a regulatory authentication to the certification constituted on both theoretical and practical syllabi. The industry, companies and candidates would thus all have a greater level of confidence, and, if run completely on private lines, apprehensions as regards authenticity and credibility might arise.

A concern that might arise in relation to funding of such a programme/institution must not be overlooked, or else the entire proposal might collapse. In this regard, it is suggested that the programme could be partially financed by means of a fee charged from the registering candidates, which should, however, be nominal. This means that there has to be another alternate channel from which finance must flow in, so as to sustain the programme at least in the initial years when interest in this area is still growing. Here, search firms come in handy, over such a programme being run by any other agency. By linking the certification to the directors' database recommended above, search firms would be able to divert such a deficit of funding to invoices it raises to companies for their recruits, given that such companies would be the ultimate beneficiaries. Hence, when fixing the prices for the services they render to companies, firms may factor in and recover the programme costs. Such a revenue structure would ensure that hefty fees do not impede candidates[1478] who otherwise are sincerely committed to pursuing a directorship as a profession, as only this can enhance both the

[1476] It is here, amongst several others, that this thesis or recommendation diverges from the Institute of Directors- India, which requires a minimum of five years' experience in senior management to be eligible for the course. Thus, while the institute and its program may serve as a reference point, its modalities and contents need to be rehashed significantly in line with what this thesis proposes.
[1477] It is ironic that neither the MCA nor the SEBI (which have the most direct and proximate relevance as regulators) is a partner to the existing Institute of Directors- India.
[1478] As is the case with the Institute of Directors- India, which charges a hefty fee for a nominal 3 days' program.

quantity and quality of the potential candidature which India urgently needs. Such linkage drawn through search firms and director databases can also ensure that the certification converts into visible and known candidature that can be accessed by the industry at large.[1479]

Lastly, the programme must be open for registration, regardless of gender. It should not be confined only to female directorship, as this would have stronger stereotyping implications. Instead, the strain of multiple directorships (which is expected to intensify with increased board sizes), equally applying to both genders, must be highlighted. In this way, the gendered myth of the "golden skirt" and temperament that views women as less able directors (and thus requiring programme aid/certification, while men do not) can be avoided. The contents of the programme may, however, be so designed to factor in the complexities and specificities of boardroom diversity, including gender.

To run a centralised director certification programme, as recommended above, would be onerous if undertaken by a single firm. Instead, a conglomerate of search firms operating in India should be formed for this initiative, where firms can enter into a memorandum of understanding ("MoU") that would define the scope and charter of such an "Academy of Corporate Directors". Universities may also be roped in for raising awareness about directorship as a stand-alone profession for potential graduating students. With a new canvas to sketch next-generation directors, such an institute can then work towards affiliation with the Global Network of Directors Institutes (of which India is yet not a member), to learn, expand and lead internationally.

To sum up, for the core strategy of a re-structured quota to work, more intensive efforts need to be invested on the side-lines/periphery. For example, an effective search procedure for the right candidates that uses elements of the conventional unstructured "friends and family" approach could be replaced with more conducive search results. Most often, selection in subordinate ranks is more rigorous and intensive that for

[1479] This is vital as simply putting a certification which is rarely referred or resorted to from a practical standpoint would be meaningless. The existing Institute of Directors can be cited as an apt example in this regard.

directors, while it should be the other way round. Selection using informal processes, herding tendencies and too much reliance on references or the executive suit, represents major interruptions.[1480] These hint at processes that are largely fragmented even where search firms might be engaged, which is not so routinely done by Indian companies.[1481]

It is therefore necessary to have an efficient "casting couch" or search firms in the forefront, which are able to go beyond acting as mere puppets with strings controlled by the CEO/management and just picketing candidates. They should have a more enhanced role of deriving the right match between what the directorship demands vis-à-vis what the candidate has to offer, going even further to build the needed capacity for attaining that match where it cannot be naturally found. Overall, the market/industry of search firms must be made more proactive, competitive and organised if diversity is to create a "win–win" situation for all.

IV.4B Executive Directors

What might suit a comparatively more broad-based non-executive constituent would not necessarily work in the same way for executives, particularly in the Indian context. This is because, first, their functions and role, and, accordingly, the sought attributes and competencies, are different, rather more in-depth and of a greater magnitude. Second, they are expected to be more engaging with substantially greater time commitments and exposure to liability,[1482] and, third, (as follows as a natural consequence of the first two reasons) its candidature is significantly different.

As they are more directly involved and engaged with strategic decision-making and senior management, these directors must have greater awareness, knowledge and expertise relating to the company, as only then can they assist and advise senior managers. As well as industry and sector-related knowledge, they must have direct, specific and more intimate exposure to the company (and all of its core functions, business, strategies/plans, resources, risks, budgets, staffing, communications and

[1480] R Bhattacharya (n 1145).
[1481] 'Towards Gender Balanced Boards' (n 1280) 18.
[1482] Section 2(60) of the Act of 2013.

administration).[1483] Therefore, for an executive position where technical competencies are foremost,[1484] one looks out preferably from internal progression – i.e., escalation from below the board level within the same company or competing companies.[1485] In other words, it correlates to the ratio of female middle- and top-level managers, who have historically demonstrated their ability to perform for the company/business and who can then potentially move up to the boardroom.[1486] The source is therefore located amidst all those women occupying key managerial,[1487] line and staff positions and with first-hand exposure to business-specific nuances within organisations or across competing businesses – described as the "pipeline",[1488] on which India is grossly deficient (as established in section IV.3D).

Amidst the pipeline crisis, extending the mandatory quota to executive directors is almost like saying a *void must fill the space*. Such a compulsion would come with long-term challenges far from what business prudence warrants – only to reveal a treacherous delusion. This is particularly the case as the ever-increasing complexities and continually evolving dynamics of business and corporate structures intensify manifold when it comes to often-indiscernible executive roles. If a boardroom operates behind closed doors, its executive constituent works behind double shields (which, in the case of India, is further hidden beneath the curtains of family-controlled corporate structures). To legislate on this would mean regulating in ignorance of how this constituent actually works, which can neither be uniform nor made known explicitly. Thus, self-restraint and internal motivation should substitute external rules when it comes to executives,[1489] which perhaps explains why no country (not even Norway) has ever sought to impose a quota for executive directors, and India should be no exception to this.

[1483] B Gunter (n 117) 142.
[1484] *Ibid*.
[1485] *Id* at 143.
See also, A Durbin (n 289) 10.
[1486] KR Harrigan (n 370) 621.
[1487] Section 203 of the Act of 2013.
[1488] A Sweigart (n 324) 104A-105A.
[1489] R Leblanc & J Gillies (n 810) 8.

(A) Should Gender Diversity in Executive Directorship be left out of the Regulatory Scanner?

No, a gender-diverse executive constituent must find equal, if not more, emphasis, as much as is ascribed to non-executives. If otherwise – i.e., if the regulator stops at imposing a mandatory quota that would apply only to non-executives – the executive constituent would remain unaddressed, as is the present situation. Only 6 out of 157 and 11 out of 136 (out of which many belong to promoter families)[1490]executive directorships are occupied by women in Nifty 50 and Nifty mid-cap 50 companies. While this indicates a superficial and politically correct "appearance of compliance", it would also generate an impression that women are to be equated with the less-engaging and more generalist non-executive constituent alone, and thus comes with the risk of strengthening stereotypes and segregation of roles, as the current "one independent woman director" quota is likely to do.

Having said this, the policy approach and strategy cannot remain the same. Rather, for this constituent where the quota cannot reach (a typical shortcoming of hard law),[1491] a strategy that would involve minimalist regulatory intervention while also not allowing for absolute market inaction or lethargy must be invented – one that would inspire (and not impose) tailor-made voluntary initiatives by companies that suit their specifications. To ensure progressive change, while not overpowering the business judgment through harsh and counterproductive repercussions of regulatory breach, the preference tilts towards softer options.[1492] This is more so where common interests and trends cannot be assumed.[1493] Given the variances in their roles, functions, nature of tasks, liabilities, and candidature, and also factoring in that much of the processes and subtleties of what happens within can rarely be known or understood from outside, the regulator should intervene only to enunciate broad principles. As regards their implementation, flexibility should be retained at individual company level to suit their needs, strategic priorities and peculiar sector- or business-specific conditions.

[1490] Illustrated in figures 22 and 23, respectively, of this thesis.
[1491] Examined in section II.6 in chapter II of this thesis.
[1492] C Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) chapter 1, 34.
[1493] *Ibid*.

Companies may have different or even antagonistic strategic preferences, or may be placed at varying levels of readiness to undergo a reshuffle of the decision-making body or the management. Hence, where divergent interests and asymmetrical conditions cannot be brought within a single text or cannot be strictly regulated, it must be left to industry discourse, etiquettes and informal commitments.[1494] This will also enable an experimental response, which is much needed for this otherwise significantly untested constituent. Companies may choose to defer, or not conform if not workable, or may easily correct the errors rather than omitting any steps towards such diversity altogether.[1495]

Moreover, with its informative and educative role,[1496] and expectations of systemic behavioural change that it can generate, a strategy of soft policy approach (which would go on to build a future industry norm) is recommended.

(B) Targets on "Conform-or-explain" Basis

A strategy or an approach where the role of game-changer lies with the industry is what would be most appropriate for this constituent of the boardroom. Accordingly, this thesis recommends a combination of targets on a "conform-or-explain" basis. To explain, the SEBI might pronounce a 30% target (in accordance with the critical mass threshold) for female executive directors, which companies may adhere to on a voluntary basis. This means that at least 30% of the executive constituent must be made up of women. For example, where a board of nine directors comprises three executive directors, 30% of three (i.e., one) must be a female executive. When this 30% target is spelt out, it should clearly be indicated as the minimum standard, so that companies may strive beyond it where viable. Although voluntary, such targets should nonetheless operate subject to disclosure by companies in their annual reports regarding non-conformity where it happens. Although no sanctions would apply, the SEBI must elucidate what constitutes a reasonable quality of disclosure. For instance, it should contain reasons explaining why the company has not been able to or has not

[1494] D Shelton, 'Law, Non-law and the Problem of Soft Law' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 12.
[1495] ME O'Connell (n 720) 110.
[1496] CM Chinkin (n 721).

deliberately conformed, and also a description of what the company has tried for, or any alternate measures, in this regard. Such measures must be explained in terms of clear objectives as regards what they seek to attain. Further, the disclosure must illustrate that what the company practises (even if not conforming) is not derogatory to the over-arching principle of diversity. Finally, where falling short of the target, a tentative timeline along with mapped-out steps must be included indicating when the company expects to conform.

Through this recommended strategy, first, companies would realise that the regulatory emphasis on female directorship is not only about monitoring or peripheral non-executive roles. Second, companies would be constantly reminded of standards that they are expected to attain, which essentially means that the regulator would gain access to what is otherwise the most secretive or confidential constituent of the boardroom, and where mandatory interventions cannot reach. Third, non-conformities would occur as exceptions (rather than routinely) only when founded on sound business reasons. Fourth, any unscrupulous omissions would be met with market reprimands in terms of shaming or loss of repute, goodwill and market value, while conformity would be applauded. However, caution must be exercised to retain the target as a conform-or-explain, and not comply-or-explain, strategy – i.e., the focus should be on quality adherence only where appropriate, and not on coercive compliance. The message should be clear from the regulation itself that the emphasis is in the spirit of adherence without any pressure or deterrence to superficially comply, especially where business logic might warrant otherwise. This will help avoid the presumption that compliance (and not its substantive contents) is what the regulator seeks as the end objective, and the apprehensions that accompany it. Fifth, operating on a "conform-or-explain" basis, which has inherent hybrid characteristics, the strategy would attain a balance of hard law and soft law policy approaches within the executive constituent, which is aimed for at overall strategy level. On the other hand, companies would not suffocate under any compulsive pressure to comply where it is otherwise not viable from a business standpoint. They would have the leverage to determine, depending on assessments of costs and benefits peculiar to the business, what ratio (within the 30% target) from time to time works optimally for them. Driven by inner stimuli, companies would be able to construct their own logic and reasons for

attaining and adapting to such targets. This might also take away the stigma otherwise linked to a quota where it operates as a stand-alone strategy. Women do not prefer this: "if I was appointed on the board of a plc, I would rather want to know I was there because I beat every applicant. Not because they were stuck on the quota and I was the best of the 20.7 per cent they could choose from."[1497]

Marking a change from the current "tick-box" quota to real ideological reform, the strategy outlined would be rightly placed as part of the regulator's diversity goals within the framework of corporate governance principles enumerated under the Listing Regulations. This would retain necessary flexibility, while setting the tone for diversity and signalling that irresponsible divergences would not escape the regulatory scanner. However, for this to happen, the contents of such disclosures need to be appraised by the regulator (or this task could be delegated to an expert industry body) from time to time in order to measure progress and identify potential pitfalls, if any. Thus, although not a fore-runner, the regulator would nonetheless have an influential (as opposed to passive) role to play. If that happens, even in the absence of punitive impositions, companies would act under a subtle or indirect deterrence to avoid regulatory confrontations.

Finally, phased-out timelines remain critical in the design of this target-led strategy. Accordingly, the top 300, then 500, 1000 and 2000 listed companies by market capitalisation may be required to conform to the target of 30%, starting four years from now – i.e., by 2022, 2024, 2026, and 2028 respectively. A review of progress may be undertaken at the end of 2028, with a further possible grace period of two years – i.e., by 2030. Once again, apart from avoiding unwarranted pressure on candidature and allowing for the time needed by companies to develop the pipeline, these spaced-out and sequential timelines will help the regulator to appraise progress without being over-burdened with the whole gamut of companies at the same time. This will hopefully enable the regulator to allocate time and effort towards a more thorough and qualitative review of disclosures by companies in relation to conformity or non-adherence to targets. Needless to state, the impetus should lie foremost upon listed companies, with the possibility of later extending to unlisted ones.

[1497] B Gunter (n 117) 48.

All in all, the regulator must abstain from stacking more regulations and micro-managing from outside what is inherently business facing. Where expertise must be proximate to business and should go beyond gender, it might be a good start if companies consider men and women equally while appointing. A more mature regulation would therefore provide leeway for the industry/companies to adjust their "own optimum" against the denominators outlined such that diversity evolves as an institutionalised business norm (rather than a regulated exception).

(C) "Ready Reckoner for In-house Diversity"

While the recommended strategy of targeting conform-or-explain is expected to create momentum across companies for having women in executive directorships, or, expressed differently, to create a demand for women who can serve in this constituent of the boardroom, it cannot be realised unless it is matched with a robust pipeline. What is at 4% in senior management cannot magically go up to 30%, especially with a pipeline that curtails as one goes up the corporate ladder. Fixing a target at the topmost board level without rectifying the roots of the real deficiency, and which will continue to supersede whatever target or thresholds might be set otherwise, can therefore be of little help.

This also finds support from the standpoint of the chosen policy approach, as both hard law and soft law require certain preceding conditions or enabling cultural, social, political and economic precincts to succeed.[1498] Unless the organisational set-up within which the strategy is to be enforced offers these, obstacles will recur and such targets will fall apart. There is only so much that one can be aware of, and one can do from outside, when inertia lies within the organisation. Diversity will meet a dead end if it is not supported by systemic reforms mainstreamed into each sub-system – in other words "genetically" within the company.

To this end, while a top-down approach (fixing a target or quota for female presence directly at board level, which definitely makes them more visible) is a good start, diversity must flow both ways. If not, it will not take long for stagnancy to set in. Simply increasing the numbers will not redress the glass ceiling resulting from

[1498] As discussed in section II.6 in chapter II of this thesis.

stereotypic temperaments, gender segregation, pay disparity and mid-level attritions, which will continue to erode the candidature.[1499] This is particularly the case in the context of the pipeline for executive positions, of which the catchment or source lies below hierarchies within the organisation or across companies within the sector.[1500] Only when women are engaged in prime roles down the hierarchy will they identify and associate themselves with the success or failure of business, and only then will they develop interests in managing and leadership.

One of the best ways to break the traditional typecasting of men as leaders can be broken only by having more women in the labour and potential pipeline.[1501] Given that what transpires down translates upwards to top management,[1502] unless a bottom-up escalation of diversity is thought of, mid-level areas will continue to disappear and upper echelons will soon collapse. It would be analogous to a situation where one is made to sit on top and the ladder is taken away. To ensure that India does not experience a similar situation, it is quintessential that a strong foundation underlies the outer mass – i.e., gender diversity becomes part of the core strategy that can be mainstreamed into all functions and departments (or sub-systems) within companies. This finds support in the findings of the global study undertaken by the Peterson Institute for International Economics,[1503] which suggests a pipeline theory, as against random placement of women at the top for gender diversity.

The above recommendation does not, however, seek to suggest that the regulator should enact laws that work on "do it-or-face it" basis. Given that this recommendation for in-house capacity building is more intimately linked to the creation of an executive pipeline, the scope, extent and means must remain the prerogative of companies. The SEBI may, at best, promulgate guidance that would (a) offer a direction or broad framework upon which companies may then formulate their own tailor-made

[1499] 'From Intention to Impact- Bridging the Diversity Gap in the Workplace' (n 1362) 11.
[1500] Banerji, Mahtani, Sealy, & Vinnicombe (n 1200) 29. See also, 'Women in Financial Services' (n 259) 24.
[1501] O Banks (n 264) 229.
[1502] GF Dreher, 'Breaking the Glass ceiling: The Effects of sex ratios and work-life programs on female leadership at the top' (2003) 56(5) Human Relations 541-562, 556. See also, S Terjesen & V Singh (n 1300) 60.
[1503] Noland, Moran, & Kotschwar (n 182). See also, N Singh, 'Women rise in key management roles' (Times of India, 9 March 2018) < https://timesofindia.indiatimes.com/business/india-business/women-rise-in-key-management-roles/articleshow/63224671.cms> accessed 10 July 2018.

practices; (b) re-emphasise the need for a separate earmarked policy on diversity, but one that extends beyond boardrooms; and (c) set the ball rolling with a message that diversity comes as a package (and not just a one-time compliance). This is critically needed as most Indian companies have not yet been able to conceive formal diversity policies or plans on their own,[1504] and particularly given the boiler-plate or minimalist contents even where such policies are devised.[1505] To offer direction where the industry still seems clueless, as well as the regulator, a model policy or "ready reckoner for in-house diversity" is proposed (along with a snapshot in Annexure A). Provisions that already exist in enacted laws or regulations in terms of broad principles suggesting an optimum mix for boardrooms and non-discrimination are not repeated here for the sake of brevity.

Endorsing both, a top-down and bottom-up approach, this ready reckoner resonates the relational feminist approach,[1506] in which lies a string advocacy for such diversity. Taking note of the concerns affecting the pipeline, starting with (a) identifying the specific role and necessary attributes and competencies of each director position; (b) supported by a more broad-based search and selection of candidates with attributes and competencies befitting the role; (c) followed by carefully defining the work profile and task allocation distinctly and individually for each director in a manner that enables fixation of liability; (d) emphasising enabling work conditions that would prevent pipeline leakage across the organisation; (e) mainstreaming diversity as a criterion for evaluating performance in individual director, non-executive and executive constituents, and at committee and overall board level, and then extending such evaluation outcomes to remuneration and future appointments; and (f) finally, monitoring all of these areas through data collection, record-keeping and audit to identify missing gaps, formulate action plans and compare with those of previous years, so the proposed reckoner completes what can then re-trigger an organic and self-stimulating cycle of diversity. The idea is, aside to changing attitudes (which although is a necessary part of it), systemically reforming the structure of the workplace to make

[1504] 'Towards Gender Balanced Boards' (n 1280) 13.
[1505] Examined in section III.5G in chapter III of this thesis.
[1506] Discussed in section I.3B(D) in chapter I of this thesis.

it more inclusive. Founded on proactive (as against reactive or complaints-led) ideals, this may outline the SEBI's guidance:

I. *Recruitment/Progression Criteria*

What aggravates the already existing glass ceiling is the practice of gender tagging. Sometimes adverse and other times favourable, gender tags are all-pervading.[1507] Even a benefit exclusive to women, although helpful, comes with a reminder that it is for her because she is a woman. Such reminders with gender tags come with the risk of further strengthening segregation and stereotypes that already exist.[1508] While such preferences, with a quota being one example, can work when one is concerned only about equality and demographic justice, they do not suffice when the ultimate goal is diversity, which is more functional and systemic.[1509] Amidst a business-set-up where demarcated male and female spheres are hard to sustain, efforts must be taken by companies to ensure that such tags gradually make way for a more ungendered and undivided work environment.

However, elimination of benefits/facilities, as if gender barriers do not exist, is not what is sought. The fact that some benefits are at times more relevant to, or may have more impact or influence on, one over the other gender, is also not contested. Rather, what is advocated is a policy that incorporates all of these, but with a less gendered appearance.

Not getting too ambitious with it, blind recruitment is not what is proposed here. While some practical group experiments suggest that assessments, when made on a no-name basis, yield less prejudiced and better outcomes for women,[1510] one must not be detached from the practicality of this. It is not viable to make board recruitments on a no-name basis. This is because directors are normally chosen based on their publicly

[1507] L Wirth (n 1199) 107-109.
[1508] R Rubio-Marin, 'A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States' (2012) 60 The American Journal of Comparative Law 99-125, 116.
[1509] L Wirth (n 1199) 123.
[1510] C Rice, 'How blind auditions help orchestras to eliminate gender bias' (The Guardian, 14 October 2013) < https://www.theguardian.com/women-in-leadership/2013/oct/14/blind-auditions-orchestras-gender-bias> accessed 10 November 2016. Such experiments are commonly termed as "Goldberg Paradigm", where gender or names are varied to hide identities while keeping other characteristics constant- R Pande & D Ford, 'Gender Quotas and Female Leadership' (World Development Report 2012) 23.

known experience and accomplishments (such that the person can be easily identified from the resume, even if the name is hidden), and much depends upon interpersonal influences, all of which needs to be factored in when making a selection. Nonetheless, a gender-blind selection process should not be rejected altogether, as it might come in handy for recruitments/promotions at hierarchies that ultimately feed the board.

As for the boardroom, the task of formulating the recruitment criteria for directors lies with the nomination committee.[1511] While doing this, such committees should refrain from personifying the definition of a good fit. In other words, one must start by asking what the role needs, and not whom the role needs. Only once those requirements or attributes for the position are determined must the search for candidates commence. It therefore essentially follows that, when selecting an internal candidate to the board, care must be taken that such a candidate is elevated to the boardroom for his/her leadership attributes that the role demands, and not by way of promotion for having excelled in the current position. This is because a board position is distinct from others, with demands and attributes peculiar to it, and ought not be moulded to fit with a pre-fixed candidate profile. The process should be one where the right candidate fits the role, and not the other way round – i.e., a role is made to fit a pre-selected candidate.

How can women enter and sustain a role that starts with a description, explicit or implicit, relating to their exclusion?

Where a role is defined in terms of gendered attributes to start with, one cannot expect the procedure and appointment that follows to be free from such connotations. For example:[1512] (i) use of "he" or "she" gendered pronouns when codifying or even verbally discussing roles – rectification must start from the regulator itself; (ii) executive/boardroom experience, which is less likely to be found among women than men considering that the former have historically been denied access to it,[1513]and which might then act to her prejudice (this finds support in findings stating that, where the gender of a female candidate is revealed in an application, selectors tend to

[1511] Section 178 of the Act of 2013.
[1512] 'Gender Diversity in Boardrooms' (n 63) 13, 35-40. See also, 'Towards Gender Balanced Boards' (n 1280) 16.
[1513] S Machold (n 400) chapter 5, 29.

emphasise experience rather than what they would otherwise do);[1514] (iii) merit and past background, as against forward-looking eligibilities (such connotations have an inherent bias against women to start with); (iv) work profile or competence in line functions, as women are mostly confined to staff roles; (v) previous international travel and assignments, as women are discouraged from extensive travel; (vi) compulsory hours of desk work or on-site presence, as women with double responsibilities of family and workplace would find these more difficult to manage, particularly given the strong patriarchal values on which Indian families are founded; (vii) late-night shifts, which would once again impede female participation, as their movements are often hindered as a result of family responsibilities, spouse re-location and, most importantly, safety and security; (viii) "on call" availability – i.e., an undertaking to be always accessible and ready for work (which for men, minimally contributing to unpaid domestic work, is easier to commit to); (ix) network and industry-specific repute or acquaintance, which only a few selective women would have, as most others are new entrants; (x) behavioural traits such as a "can-do, will-do" attitude,[1515] or leadership styles that are autocratic, assertive, aggressive and risk-taking, with which men are stereotypically associated;[1516] and (xi) specific qualifications (such as an MBA or B.Tech/M.Tech) or specific disciplinary background (such as science, architecture or law) where women are under-represented, unless absolutely relevant.

The nomination committee must watch out for any of these direct or indirect gender references in the recruitment and progression criteria. In doing so, one must be cautious that not only explicit mentions of "male" or "female" should be scanned for, but subtle and implicit indications, enough to establish those gender tags, should also be noted. For instance, traditional notions that equate leadership with masculine attributes, or built on consensus[1517] (as women, owing to stereotypes, can rarely find such consensus in their favour) should be substituted. Instead, the perception of good leadership should be re-defined, further replacing the gendered connotation of

[1514] Norton, Vandello, & Darley, 'Casuistry and Social Category Bias' (2004) 87(6) Journal of Personality and Social Psychology 817–831, 821.
[1515] B Gunter (n 117) 52.
[1516] A de Jonge (n 1073) 82. See also, 'Challenges and strategies for retention of women talent in India' (n 1238) 20.
[1517] B Gunter (n 117) 46.

merit,[1518] to capture both masculine and feminine attributes, but without personifying these. For instance, directorship may be re-defined in terms of, *inter alia*, attributes such as integrity, interpersonal skills, a commitment to contribute, ability to lead and take initiative, responsiveness, proactiveness, individualist, a critical and analytical approach to dealing with challenges, an intellect/aptitude to understand business, competitiveness, strategic inclination, and vision,[1519] and other forward-looking attributes, logically/functionally linked to performance, without having any gender imprints. While other competencies and conditions peculiar and essential to the vacancy may be added, caution must be exercised to minimise, if not fully avoid, gendering of these.

In addition to the boardroom, similar gender un-tagging is recommended for recruitment and promotion across all divisions and levels (including the management) within organisations. Commencing with what is far from a level playing pitch, the gap infiltrates deep within and keeps widening as one moves further up in the race.[1520] A scan of the existing criteria to red-flag the prejudices, and revise these (where necessary), would help in doing away with such entry- and promotion-level impediments, as a result of which women make a slow start at the outset. Further, for greater objectivity, criteria for progression should be divulged to the candidates at time of appointment, so that one is aware of what parameters would help in advancement and may compete towards this. By opening up more opportunities for the entry and progression of women, but not unilaterally doing so (in detriment to men), gender neutralising the recruitment and promotion criteria is likely to make it fairer.

Next, all of such criteria must be clearly and accurately disclosed. It is worthwhile to note here that statutory compulsion in relation to disclosure of the criteria for board appointments to be made in the annual report already exists.[1521] Further recommendations are therefore made for disclosures – first, by way of extensive advertising of the vacancy that arises on the company website, and other forums with wide outreach; second, in the internal human resource/diversity manual or in-house

[1518] M Thornton (n 299) 402.
[1519] CB Carter & JW Lorsch (n 868) 116-117. See also, B Gunter (n 117) 38-39; and 'Women in Financial Services' (n 745) 13.
[1520] S Chawla & RR Sharma (n 1314) 189.
[1521] Section 134 of the Act of 2013.

publications/notices/signposts; third, in the shareholders' meeting where the director appointment is sought to be approved; and fourth, in the annual report of the company, specifically in relation to mid-level management, key management and C-suite positions, including any deviations from such criteria that might occur when selecting the candidate.

Structured interviews and cognitive tests, which are seldom applied at board level, must then follow. In essence, the procedure must be a two-way dialogue. If otherwise, the spirit of diversity will be lost as, for greater acceptance and easy assimilation, women (even if their presence is ensured by means of a quota or otherwise) will struggle to fit into such pre-defined gender shoes typically designed for men.[1522]

II. *Work Profile and Fixing of Liability*

The recruiting criteria for a position essentially emanates from the job profile, which although commonly drawn up in cases of employment, is seldom done for directors. This is particularly so in the context of non-executive directors who serve only in such capacity, as against executive ones who are often bound by more definite employment agreements for their C-suite engagements. Thus, while executive directors are better informed of their well-outlined duties and responsibilities, the work profile for non-executives (appointed by means of shareholder resolution, with no further agreements) remains blurred and vague. This uncertainty intensifies further when it comes to independent directors, although there exists a statutory compulsion on companies to execute a formal letter of appointment with such a director.[1523]

The alleged ambiguity can be traced to the Act of 2013, which, although it prescribes certain over-arching director duties (without making a bifurcation between executive and non-executive),[1524] hints at varying levels of responsibilities when it comes to enforcing them and fixing liabilities. For instance, the executive directors and key management, included within the definition of "officer who is in default",[1525] would have a greater onus and be more vulnerable to penalties and even imprisonment in the

[1522] KL Ashcraft, 'The Glass Slipper: "Incorporating" Occupational Identity in Management Studies' (2013) 38(1) Academy of Management Review 6-31, 26.
[1523] Clause IV(4) of Schedule IV of the Act of 2013.
[1524] Section 166 of the Act of 2013.
[1525] Section 2(60) of the Act of 2013.

event of legal contraventions by the company. This is in contrast to the liability affixed on independent directors, which is triggered only when a wrong occurs with their knowledge, and they consent to it or do not act with diligence.[1526] As long as independent directors put in their best efforts, they are normally absolved of any further charges or accusations.[1527] The reduced onus that flows from the statute itself on such non-executive and independent roles would keep judges struggling with where to draw the line, particularly for "quota-ed" women mostly serving as non-executives.[1528]

In the scenario outlined, companies are recommended to infuse the necessary precision and predictability, and one of the ways in which this can be done is through augmenting the contents of letters of appointment, to be executed with each director (not just executive and independent directors, as is currently needed), regardless of gender. This is quintessential, given that the recommended strategy seeks female appointments to every constituent of the board.

Such letters must enumerate, without gender tags, all the specific tasks and activities for which each director would be responsible and accountable, set benchmarks aligned to their competencies and the purpose of their appointment, justify the remuneration based on tasks allocated, and clarify which acts or omissions are likely to make them liable, and the extent of such liability. A good team is not formed simply in a collection of the best individuals – rather, each individual must have a clear knowledge of their specific role to play. Not every director needs to do all that is needed from a board, but each one must contribute to the sum of it and be responsible for what he/she is expected to bring to the board. This would mean that, as the expected standards of skills differ on a director-to-director basis based on the type and degree of skill in which he/she has expertise, the scale of onus would also vary.[1529] To define such boundaries, each letter must be tailor-made for the role concerned in view of its specific purpose and be substantially distinct from one another, as against boiler-plate templates replicating only statutory fiduciary duties. Merely formalising the execution of such letters (the

[1526] Sections 2(60) and 149(12) of the Act of 2013.
[1527] SEBI Order in the matter of *Zylog Systems Limited* (n 1408).
[1528] *SEBI v Sahara India Real Estate Corp Ltd*, (2014) 8 SCC 751, para 5.
[1529] Section 166 of the Act of 2013. See also, *Norman v Theodore Goddard*, [1991] BCC 14, which would continue to hold relevance as a common law precedent in interpreting standards of director duties.

apparent usual practice) is not enough[1530] – rather, they should be made more purposive and functional.

All of this will help in doing away with alleged gender-based disparities in formulating expected work standards.[1531] With better planning, distribution and allocation of responsibilities across the boardroom, repetition, overlap and duplication of work can be avoided. Such narrowed and spot-on accountability, where what members are actually required to do is known, can further ensure greater productivity and levels of commitment,[1532] particularly for the non-executives who otherwise, unaware of their precise roles, are unable to find reasons why they should be at all proactive. This will also prevent free riding where, compared to working individually, one tends to put in less efforts and hide beneath the collective of the group.[1533] All of these factors will add to India's efforts to define director liability.[1534]

Undertaking this exercise distinctly for each directorship will further ensure that exchange of dialogue and negotiations precede such profiling, where each director has more choice and say in relation to designing his/her role, work profile, location and commitments. In addition, this will relate to the criteria for appointment vis-a-vis the candidate's attributes and competencies – all of this must be placed before the shareholders to enable a holistic assessment at the time of approving a director appointment. Any ambiguity, overlap or contradictions, if spotted, must be voiced and sorted out prior to a director taking up a role. Given that the need for documentation is more critical in relation to non-executives, search firms can play a major role in formalising this procedure.

Moving a step ahead, what is spelt out in the letter of appointment should be further expounded through structured induction/orientation discourses (which remain largely informal at present)[1535] for newly recruited directors. When work profiles are so distinctly marked, standardised overviews or manuals need to be augmented with more

[1530] 'Consultative paper on review of corporate governance norms in India' (n 58) 13.
[1531] 'The Future is HERe' (n 1315) 12.
[1532] CB Carter & JW Lorsch (n 868) 83.
[1533] KA Merchant & K Pick (n 98) 14.
[1534] With a score of 7/10 in respect of extent of director liability- 'Doing Business 2018 Reforming to Create Jobs' (World Bank 2018) 167.
[1535] 'Towards Gender Balanced Boards' (n 1280) 20.

purposive and individual on-board sessions that serve the precise needs of each distinct role. Definite programmes should thus be carved out which, notwithstanding certain indispensable overlaps in terms of general conduct and duties, should provide input relevant and necessary for each director. Such programmes should then factor in what the role demands (on one hand), and the attributes, competencies, background/experience and personality of the candidate (on the other hand), so as to the bridge the gap, if any. More intricate company-specific knowledge relevant to the position in question, and which one should be cognisant of, and alignment to the business strategy, can be imparted at this stage of induction (instead of seeking it as a prerequisite for selection of non-executives, in effect curtailing the candidature). This would require directors to be connected with and gather input/information and explanations (where necessary) from the management and the rest of the company, in such a manner that they receive a multi-perception insight into the business. Further, to prevent stagnation, such programmes should be administered on a recurring (and not one-time) basis during the tenure of each directorship, particularly to re-integrate those returning from parental leave. For this, it is imperative that the contents of the programme are reviewed periodically for modifications needed to keep pace with evolving board dynamics. Similar inductions, adapted to the needs of each board committee, are also recommended.

If otherwise – i.e., directorships remain vague and not delineated – the gendered implications, as witnessed in the *Sahara* verdict where a female director was exonerated for being a "woman" (as discussed in section IV.3B), would continue.[1536] While this illustrates an instance where lack of clarity has passed over an unintended advantage to a female director, this may potentially act to women's detriment too. Such vagueness and unpredictability, which is only expected to become more customary with the SEBI's announcement for the "one independent woman" quota, which is likely to see more women clustered in what are considered to be "outsider" roles, can deter female candidates from seeking directorship opportunities, especially when they are not very familiar with the management. In addition to curtailing the candidature critically needed for any strategy to succeed, not knowing what they are responsible

[1536] *SEBI v Sahara India Real Estate Corp Ltd*, (2014) 8 SCC 751, para 5.

and accountable for can have a severe and perpetuating adverse impact on the motivation levels of those serving as directors.

III. *Work–Life Conditions*

To seal the points of leakage, it is necessary that companies glimpse within and examine what has caused fissures in the past. The most common answers are likely to be those that are systemically responsible (the degree might vary across companies and sectors) for creating the glass ceiling – namely gender-segregated roles, pay disparity, and family and work conflict resulting in mid-level filtration (as discussed in section IV.3). Without confronting these challenges, it is therefore least likely that India will ever be ready with a candidature to suffice for any diversity strategy, particularly for the executive constituent of the board.

To this end, it is recommended that a day-to-day work set-up be established that, while compassionate to the challenges historically faced and the effects of these which continue, suggests a benevolent and empathetic way forward that suits both genders. Drawing substance from the specific context of each gender and individual as the relational theory of feminism requires,[1537] such a set-up should encompass all facilities (which, owing to India's social context, may be more peculiar to women), but on a gender-neutral and gender integrating note.[1538]

For example, first, flexible hours and off-site working may be regularised for everyone. Flexibility, which is often treated synonymously to invisibility, becomes detracted where value is equated with physical presence on a desk.[1539] A work culture that demands strict or extra hours and measures performance by who sits in the office until late or until the superior leaves should be discouraged. Most importantly, such work hours or premises should not be reflected in the pay or evaluation structure, which should be results based and not time based. As long as productivity does not fall below any performance benchmark set for a role, it should not be compared against hours or shifts put in by others in similar roles. On this issue, companies may move a step ahead of the law to invent pay structures that recognise "work of equal value"

[1537] Discussed in chapter I (I.3B(D)).
[1538] C Bacchi & J Eveline (n 263) chapter 4, 100.
[1539] M Thornton & J Bagust (n 1230) 790-791.

measured on objective parameters, as against differentials based on experience, merit and certain disciplinary qualifications, all of which most often start with a latent bias against women. If pay or evaluation is based on actual performances and work value (as against number of hours or late shifts, whether on-site or out of the office, or comparisons drawn with others), more and more people, including men, will eventually be willing to make available such flexible hours and off-site work schemes (which will then no longer be looked down upon as feminised[1540] or shams).[1541] This will help in increasing men's participation within family and unpaid domestic chores (currently ascribed exclusively to women).[1542]

Further, such flexible schemes should be voluntary, and not compulsory. This means that not only should it be possible to elect whether to offer this or not, but participants should further have a say as regards how to structure schemes in terms of hours and logistics. Companies may consider re-working these based on the ILO's Part-time Work Convention,[1543] which India has not yet ratified. In doing so, and also when deciding upon designations, whether for directors or down the hierarchies, it is, however, necessary to be thoughtful in omitting explicit references to "whole-time" or "part-time" work, which might cause undue assumptions as regards performance (even before vetting it). If a work scheme is thus re-vamped and practised over time, this will take away the notion that only women are part-timers, and therefore less involved, and attracting lower pay.

Second, with no compulsory or paid paternity leave recognised in law (in stark contrast to Norway's daddy quota),[1544] it is high time that companies, at their own level, make provision for this. Further, policies prescribing it could be re-worded as gender non-specific "parental leave", such that they send across the message that childbirth and nurturing are shared responsibilities of both genders, and that men need to "be at home". Utilising such leave must not only be encouraged, but made compulsory for

[1540] *Id* at 793.
[1541] 'Challenges and strategies for retention of women talent in India' (n 1238) 20.
[1542] B Smith (n 1177) 121.
[1543] C175 - Part-Time Work Convention, 1994 (No 175) Convention concerning Part-Time Work (International Labour Organization, 24 Jun 1994).
[1544] Norway provides for mandatory 15 weeks' paternal leave, aside to shared parental and maternal leave all aggregating to 49 weeks at 100% pay coverage, and 59 weeks at 80% pay coverage, with effect from 1 July 2018 < https://www.norge no/en/life_situation/having-child> accessed 10 December 2018.

both parents, with no penalising side effects on payments or benefits offered, task allocation, performance evaluation, growth opportunities, and subsequent re-instatement to work. This can be done only if such leave is perceived as a natural occurrence in the sequence of events in one's work life, and not typecast as an interrupting "career break". Congratulatory tokens or gifts to celebrate marriage and new parenthood can go a long way in re-vamping such perceptions. Furthermore, facilities such as crèches and child feeding areas (although recently made compulsory by law in establishments with 50 or more employees)[1545] are not yet considered essential by many.[1546] It is time that such amenities are made more routinely available across all offices and sectors. Companies may further interact with their directors and employees to identify other infrastructural support mechanisms that might help in this regard.

It must be realised that, to retain women at such a critical juncture, they need to see that their workplaces are extending support to them, both as employees and valued individuals. Only when women are assured that the two forces (work and childcare) are moving hand in hand, and not conflicting with one another, can a mid-career trade-off between the two be avoided.

Third, holidays should be specifically earmarked for "family time", regardless of gender. Given that many Indian families are structured as joint with both parents and children, elderly care forms a big responsibility often exclusively managed by women. By providing for explicit "family time" for both men and women, a message of shared responsibility can be signalled, which is expected to reform the psychological gender barriers that ascribe such care-giving roles only to women.[1547] A transparent compensatory leave policy will ensure that women are not penalised, while winning rewards for men for taking the necessary time off for family responsibilities. Having said this, caution needs to be exercised while defining what would constitute a "family" for this purpose.[1548]

[1545] Section 11A of the Maternity Benefit Act of 1961, vide Section 4 of the Maternity Benefit (Amendment) Act of 2017.
[1546] 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223) 27.
[1547] B Smith (n 1177) 122.
[1548] US' Family and Medical Leave Act of 1993 may be cited, which refers to parents, spouse and children in this regard.

Fourth, the transfer and re-location policy should be drawn up in a way that factors in the patriarchal set-up that dominates the social construct, where, while women are expected to turn down growth assignments if these require them to stay away from their families, they are compelled to even renounce jobs and re-locate when their spouses move for better prospects.[1549] It is, however, acknowledged that, while this can be easier where a company has offices in multiple locations, such a policy would be of little aid if otherwise – i.e., if the company is a stand-alone entity with no other presence or not in the place to which her family re-locates.

Fifth, although there exists a legal compulsion to disclose whether induction/training is imparted to directors,[1550] no guidance can be found as regards the form, contents and structure of such programmes (or the disclosure of these). While acknowledging that much depends upon the context (such as department, functions and hierarchical rank) for which a programme is designed, the relevance of defining some of its over-arching fundamentals cannot be denied.

The first step in this regard is to identify the need – i.e., the areas in which training is required. This depends upon the composition of the board, and the skill/competency matrices that define it. Further, as well as such task-specific expertise, training on behavioural and leadership attributes is also essential. This has greater significance in view of the need to unshackle conventionally applied styles and techniques that are largely perceived as masculine. Considering that these traits or styles cannot be standardised or ostensibly measured, such learning should be well merged as serious undertakings in work profiles and performance evaluation to form part of continual appraisal. Next, training should feature ways to confront and survive through some real-life challenges and hindrances, including those which are personal in nature. Likewise, sessions on unconscious bias are universally prevalent[1551] and become a necessity for individuals and groups across entire companies. Although the industry is widely talking about diversity, India has still not developed awareness as regards unconscious bias, and how this has a recurring impact on day-to-day choices. Naturally, training programmes addressing such bias are even rarer. This may be

[1549] 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223) 33.
[1550] 'Guidance Note on Board Evaluation' (n 58).
[1551] 'Hampton–Alexander Review' (n 431) 24.

because, as the name suggests, it is "unconscious" and perhaps has not yet been realised enough for conscious steps to be taken or investments to be made in programmes to address it.

Emanating from, *inter alia*, upbringing, environment, cultural background, education, lifestyle, experience, industry perceptions and media, the effects of programmes are as pervasive as their causes, with the most dominant relating to affinity bias (inclination to prefer others who are similar – typical of boardrooms).[1552] The process of unconscious bias starts rolling with, *inter alia*, name, gender, age, dress, hairstyle, complexion, height and weight, religion, domicile, marital status, family background, language and accent, and even institutional affiliations.[1553] For example,[1554] in terms of physical appearance, a photograph of a candidate in formal dress with a corporate hairstyle earns a few extra points, as against a photograph showing a candidate with a beard or in casuals or traditional attire. Similar preconceptions come into play when two people have the same domicile or language, or have graduated from the same institution. Gender and marital status also have vital ramifications.[1555] An unmarried male candidate, as against a married one, will be assumed to be more committed and accessible than a married candidate. Likewise, the titles of "Miss/Ms" over "Mrs" create a positive perception even before the person is met or interviewed. On a similar note, a woman without children is perceived as someone who would perform better than another woman with a child. This emerged clearly in a study where applicants responded to job advertisements with the same curriculum vitae, but as women with children, to find that such fictitious women applicants were only half as likely to be called for interview as against when they did not mention having children.[1556] Differences in competence evaluations and salaries linked with motherhood were also noted. Specifically, in relation to directorship, age also has an influence, as someone who is middle-aged or older is more likely to be appointed than a person in their twenties or thirties (unless he/she belongs to the family ownership).

[1552] 'The Nature of Unconscious Bias' (Shire Professional Chartered Psychologists, 6 June 2017)- The author has attended the unconscious bias training that was organized for by the University of Edinburgh.
[1553] *Ibid*.
[1554] *Ibid*.
[1555] 'Women at work' (n 238) 57. See also, L Wirth (n 1199) 102-103.
[1556] Correll, Benard, & Paik, 'Getting a Job: Is There a Motherhood Penalty?' (2007) 112(5) American Journal of Sociology 1297-1338, 1330.

Unconscious bias therefore refers to preferences that flow from classifications made in the mind, which is habituated to be selective, unintentionally, automatically, intuitively and often without realising. It occurs quite automatically and without any effort as such.[1557] Founded on certain assumed shared values, it affects how we see, hear, perceive, select and decide things, and is reflected in the manner we greet someone, shake hands, make eye contact, share information or socialise, and all of our routine gestures.[1558] Men, as much as women, may fall prey to it even in the most diverse-looking set-up.[1559] It might further seep into more grave consequences by way of harassment triggered by similar unconsciously made sexual perceptions (which may be subtle yet so deeply entrenched as to take it out of the radar of any sexual harassment/abuse laws or workplace policies). It is common that a married woman in a saree (traditional Indian dress) is perceived as more sexually introverted that an unmarried woman dressed in a western outfit or one who smokes or consumes alcohol in official gatherings. Such an outlook influences the manner in which a woman may be greeted, conversed with or assigned tasks.

Not identified or capable of being comprehensively defined in any policy, but given the severity of its effects, which infiltrate into every sphere of decision-making (including but not limited to recruitment and task allocation),[1560] training discourses specific to such bias need to be critically administered, regardless of gender. This is all the more critical for those responsible for recruitment and task allocation, which is why it should form a compulsory component of any induction programme for all directors constituting the nomination committee, and also for search firms. Considering the magnitude of impact such cognitive limitations described as "board myopia"[1561] can have on decisions of business, investment, risk assessment and strategic concerns, the significance of the unconscious bias training cannot no longer be underestimated. This is more so, as such bias can have a significant bearing or

[1557] Bearing resemblance to, or maybe a constituent of, what Kahneman refers to as the "system 1"- D Kahneman, *Thinking, Fast and Slow* (Penguin UK 2011) part 1, chapter 1.
[1558] H Turnbull, *The Illusion of Inclusion- Global Inclusion, Unconscious Bias and the Bottom Line* (Business expert Press 2016) 11.
[1559] *Id* at 7, 94.
[1560] *Id* at 94.
[1561] E Avgouleas, & J Cullen (n 634) 28-50, 33.

multiplying effects on stereotyping and gender segregation, which is otherwise rampant, and which adds to the vicious cycle of candidature crisis in India.[1562]

The essence of the training would lie upon creating the constructive "nudge factors",[1563] which might re-organize the context in which biases trigger and people take decisions under the influence of such biases. An example being, the herding bias in decision-making, such that people, influenced by peers, seek to conform to the group behaviour so as not to be left out. People might succumb to such bias for either not falling apart from the group agreement, or due to suspicions of one's own individual decision being ill-founded. Similar short-termism and herding tendencies can be found in any group at any hierarchical level within the organization, or even outside amongst shareholders and institutional investors. To recall, the adverse effect on share prices due to shareholders' bias against boardroom gender diversity in the Dobbin and Jung study (discussed in chapter 1) can be attributed to such biases. In such a situation, anonymity of the decisions so taken by the participants might serve as the nudge factor. In the alternate, re-arranging the sequence of the information or facts needed for the decision-making might be a "nudge" to reflect how that impacts such decisions, or whether it still retains the herd effect or not.[1564]

This may be explained in simpler terms to state that the unconscious bias training would aim to monitor, modify or supress the prompt, intuitive and almost automatic biases (system 1) by arousing "check and control" mechanisms of reasoning and rationality (system 2) of the human mind itself.[1565] While such bias cannot be completely eliminated, bringing it up from unconscious to conscious level and realising that it exists can help to better deal with it.[1566] Aptly, "There are no bad people, just bad thinking habits. Unconscious bias is a thinking habit we have learned and which we can unlearn."[1567]

[1562] Elaborated in section IV.3 in this chapter IV above.
[1563] RH Thaler & CR Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press 2008) 6.
[1564] *Id* at 58-59.
[1565] D Kahneman (n 1557) part 1, chapter 3.
[1566] *Id* at 44.
[1567] T Devine in 'Thinking Fast and Slow: Growing awareness of unconscious bias event review' < https://www.imperial.ac.uk/business-school/intelligence/alumni/thinking-fast-slow-growing-awareness-unconscious-bias-event-review/> accessed 18 December 2017.

All training programmes so administered should be accessible to all, and one way to do this is to schedule such programmes within work time. If sessions are held at weekends or after office hours, the attendance of women, who juggle work and family responsibilities, would be low. Likewise, companies and directors must refrain from discussing and deciding upon business matters informally when socialising outside office hours, or in places other than office premises, as women are discouraged from this, and often looked down upon with suspicion, if they do engage in such "extras".[1568] As a consequence, they are often not a part of major decisions made in such gatherings, and remain isolated from much of what goes within (but actually, outside the four walls of) the boardroom.[1569] Given the group matrices upon which a boardroom works, such seclusion often creates *groupism* within groups, as a result of which tokenism may become all the more difficult to surmount. One other contributing factor to all of this is the concern for women's security amidst severe gender-linked crime rates. At this kind of risk, women are often not willing to engage in such out-of-office events. Where any such after events or retreats are planned, they should therefore be held preferably in day-time in places that are safe for women, and should be communicated well in advance, provide for safe or late-night transport, and, wherever possible, involve families/spouses too.

Last, whenever any employee or director resigns, an exit interview must be undertaken. Given that formal resignations most often cite generic reasons,[1570] such one-on-one interactions might reveal the real causes behind such decisions, and help in identifying any organisational obstacles that trigger them. Even where the reason is personal, effort should be made to understand if the company could have extended any help that might have mitigated the crisis. Such interactions would enable companies to learn from real-life experiences, mend gaps (if any), and further improvise work conditions to retain talent.

A company, when enforcing such work–life measures, must be mindful of doing so with sensitivity to each individual. This is because neither all men nor all women are

[1568] S Basu (n 250) 190. See also, 'The Future is HERe' (n 1315) 12.
[1569] A de Jonge (n 1073) 137. See also, Vinnicombe, Singh, & Sturges, 'Making it to the top in Britain' in RJ Burke & MC Mattis (eds), *Women on Corporate Boards of Directors- International Challenges and Opportunities* (Springer 2000) 57-73, 60.
[1570] 'Report on Board Composition and Board Remuneration of Top 500 Companies' (n 1122).

the same or have the same sets of values, goals and interests.[1571] Rather, their needs and challenges differ and are peculiar to their individual experiences and life conditions. This includes, *inter alia*, age, background, marital status, number of children, schooling/education, family structures and support, financial status, and other work–life trajectories.[1572] Much also depends upon the stage at which one's career stands (for instance, mid-level is more vulnerable to work–life imbalances and societal pressures).[1573] It is crucial to identify not only what the needs are, but who actually needs those. Generalising or restricting a set of facilities to only one classified group or gender (men or women) might, as well as re-instating stereotypes,[1574] leave many grievances unnoticed or unaddressed while not reaching out to where they are really needed. For instance, a male worker who is a single parent might share similar worries to a female colleague. In such an event, allowing for flexible timings or crèche facilities only for female employees would have little effect in accommodating a diverse workforce. On a similar note, arranging for training confined only to women might, instead of mitigating the gender gap, re-instate the perception of them being inferior or having competencies that are deemed "not good enough". Given that competency gaps may arise for both male and female workers, training should be given to fill all such gaps without delineating on lines of gender. However, a gender-neutral approach is by no means gender insensitive. Instead, what should be sought is an individualised and inclusive work–life framework that is engineered factoring in all of one's encumbrances (which might include those arising from gender on a case-to-case basis), but without gender labels/tags attached. The idea is to mainstream diversity but "without essentializing gender".[1575]

[1571] J Sarra, 'The Gender Implications of Corporate Governance Change' (2002-2003) 1 Seattle Journal for social Justice 457-502, 485.
[1572] S Buddhapriya (n 1370).
[1573] *Id* at 40.
[1574] R Rubio-Marin (n 1508) 116.
[1575] There exists significant debate, more particularly in feminist literature, as regards mainstreaming of "diversity versus gender". This thesis is of the opinion that diversity (as against gender) mainstreaming is more inclusive and far-reaching, as it factors the individuality, heterogeneity or intersectionality within gender. This conforms to Squires' advocacy for diversity mainstreaming. Most of the opposition to this view lies in the managerial focus or influence on diversity, which (this thesis argues) pertains to how such diversity or mainstreaming is rather administered – J Squires, 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12(3) Social Politics: International Studies in Gender, State and Society 366-388. See also, Eveline, Bacchi, & Binns, 'Gender mainstreaming versus diversity mainstreaming: Methodology as emancipatory

IV. *Board Evaluation*

Although explicitly mentioned as part of the role and functions of the nomination committee,[1576] evaluation of board performance remains nascent in India. Determined at each company level, the criteria, constituents and procedure of this are largely at a formative stage, and yet to be regularised.[1577] Nonetheless, keeping in view the non-obligatory guidance issued by the SEBI ("Guidance Note")[1578] in this regard, a few suggestions are made as regards how gender diversity can be better integrated into such evaluation:

❖ In terms of structure, including that of board committees:

(i) recognition of what attributes are needed, and then assessing if the board has the right diverse mix for it (including for gender). Assessment should be undertaken separately for non-executive and executive constituents vis-à-vis quota or targets respectively, while vetting the veracity of reasons for defaults/non-adherences, as the case may be;

(ii) experience of directors (as currently is)[1579] should not be a condition for evaluation, as this will deter first-timers, even if they have the knowledge and expertise needed for the position;

(iii) whether recruitment criteria are well defined and devoid of gender tags;

(iv) levels of prior connectivity/familiarity amongst directors (a high average would hint at less diverse sources);

(v) how often a director regains his/her directorship after statutorily retiring from the board;

(vi) whether the composition of committees, both membership and chairpersons is diverse;

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politics' in C Bacchi & J Eveline (eds), *Mainstreaming Politics* (University of Adelaide Press 2010) chapter 10, 243-245.

[1576] Section 178(2) of the Act of 2013, read with Regulation 19(4) and Schedule II of the Listing Regulations.

[1577] While the Kotak Committee makes some preliminary recommendations as regards what could be the skill-set at board level, this thesis disagrees with such a standardised "one-size-fits-all" kind of template. Instead, this thesis argues for distinct skill-sets for the two constituents: non-executive and executive directors- 'Report of the Kotak Committee on Corporate Governance' (n 59) Annexure 4, 159.

[1578] 'Guidance Note on Board Evaluation' (n 58).

[1579] Section A(a)(ii) of the Guidance Note.

(vii) whether the selection process involves external nominations or recruiting agencies, such as search firms;

(viii) composition of the interviewing or selection panel (if diverse);

(ix) deviations, if any, from recommendations made by the nomination committee or search firms;

(x) whether appointments are made in replacement of previous directors, or they are simply added to the board size (the former is preferred, so as to avoid tokenism);

(xi) whether compulsorily administered and individualised induction/orientation programmes are put in place, and if such programmes continue over the entire tenure of each directorship;

(xii) rotation of committee membership and chairpersons, if at all undertaken;

(xiii) reasons for exit/resigning, if any, from directorships; and

(xiv) whether the succession plan is broad based, and seeks to build up an in-house pipeline, alongside external searches (in this way, diversity can be integrated into board succession).

❖ In terms of objectives and governance:

(i) whether diversity is recognised to have strategic and functional significance;

(ii) whether diversity forms a part of risk assessment and budgeting decisions;

(iii) whether an all-encompassing (not restricted to board level) diversity policy along with an appropriate framework and resources to implement it is etched out, and published in the annual report;

(iv) whether the board monitors and tracks diversity at every level/rank within the organisation; and

(v) whether concerns raised (diversity may be one) in general meetings are followed up with subsequent action points, or further deliberations with shareholders.

❖ In terms of conduct or proceedings, including that of board committees:

(i) the quorum of each meeting should be reviewed to check upon diverse presence and participation (this is because it is possible that meetings may be confined to a few decision-makers, even where overall membership is diverse);

(ii) whether meetings are conducted at accessible hours and locations;

(iii) the process by which agendas for meetings are drawn up; whether unilaterally conveyed, or involving a consultative procedure engaging all members;

(iv) duration of the meetings, and whether time is spaced out to cover items of the agenda along with substantive discussions and debates;

(v) division of tasks and responsibilities (as per definite competencies), vis-à-vis overlaps or duplication, if any (as this would impact individual accountability and fixation of liability);

(vi) the influence of any pre- or post-meeting deliberations held outside the office upon decisions being made;

(vii) extent of participation – i.e., whether the same set of directors are making presentations or engaging in discussions, while others remain a passive audience;

(viii) pattern of dissent – i.e., tracking who are the recurring dissenters, and how often decisions are reversed or modified to accommodate such dissent (simply recording dissent in the minutes is not sufficient to check lobbying and in-group favouritism);

(ix) devil's advocacy, if institutionalised or prevalent in meetings; and

(x) particularly for committees, incidences of disagreements, if any, with the management.

❖ In terms of individual director appraisal:

(i) attending to (aside from board/committee meetings) induction, orientation and training programmes;

(ii) involvement – i.e., whether directors raise questions, seek information in addition to what is provided by the management, connect with the rest of the company, or add value or perspective to decision-making;

(iii) longevity of experience and spans of networking and whether these are replaced with specific contributions measured on objective parameters set out in work profiles (as against subjective assessments in the Guidance Note judging whether one is "adequately" committed or is an "effective" member, which opens up incidences of personalised interpretations and bias);

(iv) leadership style and behavioural attributes – whether inclusive and participatory as diversity should apply for individuals too;

(v) growth (and not just "sufficiency") in terms of knowledge, competency and skills –these must be verified on an ongoing basis, so as to avoid stagnancy,[1580] which is likely to set in soon after one enters the boardroom (comparison should be drawn against individual past indices);

(vi) whether, and to what extent, directors contribute as a mentor/sponsor; and

(vii) objective/critical thinking and independence in temperament – these should be a criterion for evaluating all (not only independent) directors, including executive directors who may also be a part of management.

Next, it is recommended that the evaluation criteria for non-executive directors should be different from those of executives, in contrast to the generalising approach reflected in the Guidance Note (which makes no such distinction). This becomes quintessential for reasons of variance in their composition, roles and functions. As these vary from one company to another (more so for executives), and from time to time, distinction in the criteria may not be possible within the regulatory guidance. Nonetheless, this should advise companies to draw such classification based on the relevance of, or any additional criteria for, the two constituents at their own individual levels.

In addition to and for deriving optimum results, it is recommended that an external evaluation (on a rotational basis) should be made mandatory. This is because, as per the current scheme, the task of evaluation lies upon the board itself, such that independent directors appraise the non-independent ones and the board as a whole, while the entire board does it for independent directors (excluding the one being evaluated). The expected levels of objectivity and fairness are least likely to survive amidst such reciprocal arrangement, particularly given the close interpersonal

[1580] 'Challenges and strategies for retention of women talent in India' (n 1238) 21.

allegiance on which boardrooms, especially family-owned and controlled ones, are founded. Further, given that the nomination committee is also allocated the task of evaluating every director, duplication seems to arise as regards who is the real evaluator. This ambiguity takes a more intense turn when it comes to evaluating board committees (the Guidance Note does not offer any advice on this). It would be truly impracticable to allow the nomination committee to evaluate itself. Moreover, to make the evaluation more interactive and engaging, individual directors should be encouraged to undertake self-evaluation. As well as realising the problems and challenges at such levels, this would explain how differences of perception and interpretation might influence performance and evaluation results. The outcome of such evaluation, as well as deciding upon re-appointments, should be factored in when determining the remuneration of directors. Accordingly, section 178(4) of the Act of 2013 could be amended to insert an explanatory note, stating that the remuneration policy to be drawn up by the nomination committee must reflect the board evaluation, and its criteria and outcomes. In this way, diversity can be mainstreamed into remuneration, strengthening the incentives (at both individual director and board level) to attain it.

A final safeguard against discrepancies in such evaluation lies in disclosures. While disclosure as regards the manner of evaluation is compulsory,[1581] more extensive disclosures in terms of criteria applicable to all (not just independent) directors, and a detailed outcome against each criterion of the evaluation at all levels (individual, non-executive, executive, overall board and committee) should be required in the annual reports.[1582] While reducing the chances of procedural bias, this would inspire the board to act upon each of the evaluation parameters (including diversity), and gaps, if any, more proactively, before alarm bells ring for stakeholders or the industry.

V. *Data Collection and Audit*

What emanates from all of the outlined recommendations [(a) starting with identifying the specific role and necessary attributes and competencies of each position; (b)

[1581] Section 134(3)(p) of the Act of 2013, read with Regulation 34(2)(d) of the Listing Regulations.
[1582] In this regard, SEBI has sought to introduce disclosure of observations alongside comparison with those of previous year, vide SEBI/HO/CFD/CMD/CIR/P/2018/79 (n 60).

followed by a more broad-based search and selection of candidates (who fit the relevant roles and attributes and competencies, and not *vice versa*); (c) based on the roles in question, crafting a definite work profile for each director that could help streamline task allocation, accountability and fixation of liability; (d) ensuring optimum work conditions across the organisation that would facilitate not only the directors in performing their allocated responsibilities, but also in preventing what causes leakage at lower ranks; (e) next, in evaluating such performance (measured against, *inter alia*, diversity-linked criteria) for individual director, non-executive and executive constituents, committee and overall board levels; and (f) finally, linking the evaluation outcome with re-appointments and remuneration/incentives for each director (encouraging self-stimulation to re-trigger the cycle for more diverse results)] is a cycle that is expected to cultivate more inclusive and gender-diverse boardrooms (both in terms of structure and processes). This is illustrated below:

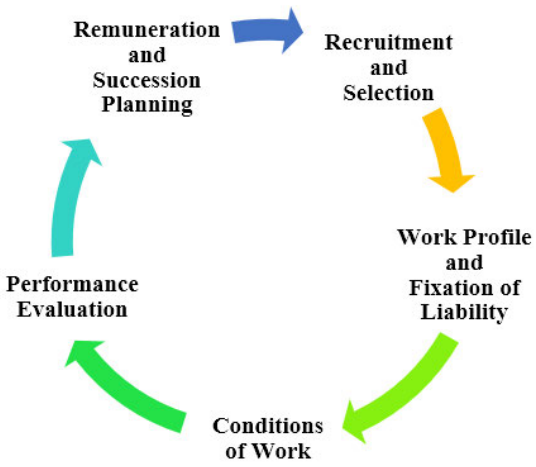

Figure 33: A Diversity Cycle

However, to sustain long-term need and the spontaneity of this cycle and so that it runs progressively, real-time data must go hand in hand with it. This is because what is measured or quantified can be more easily fixed. Although awareness has risen, what partly hinders the pace of such diversity in India is that it remains scantily collated, introspected, reviewed or realised. This has been a major shortcoming insofar as the implementation of the strategy in India goes, as neither the regulator nor the industry has been able to track the progress of the quota. As a result, although reforms at the law-making stage can be seen to make occasional reappearances, they subsequently

lose direction, and are lost amidst other reforms. The "one woman director" quota, which has not been followed up with any official reviews or assessments since its enactment five years back, confirms this.

To be aware of what is wrong before any attempts are made to rectify it, due diligence/audit should be undertaken to collect data, preferably gender segregated, as regards, *inter alia*, (a) composition of the entire workforce for all ranks, including board, committee, management (including key managerial personnel) and supervisory levels; (b) quorum and attendance in board and committee meetings; (c) composition across functions – line versus staff; (d) composition of part-timers versus full-time workers; (e) sources from which recruitment is undertaken – internal or external; (f) who is promoted; (g) composition of recruiting/promoting panels; (h) shortlists drawn up for appointments and promotions; (i) work outside office hours; (j) composition of attendees in induction and training programmes; (k) subjects and themes of training; (l) transfers and re-locations; (m) overseas or out-of-town assignments; (n) comparatives of pay packages offered; (o) stock options offered; (p) duration and reasons for leave, including parental leave, taken; (q) attrition at every level, including dismissals/termination during pregnancy, or before/after maternity leave; (r) proportion of women returning from childbirth; and (s) exits/resignations and their underlying causes.

All of the data so collected must then be documented and disclosed, perhaps by way of a "diversity report", as part of or in addition to the corporate governance report within the annual report of the company,[1583] and on the company's website.[1584] This is distinct from the diversity policy, which is currently required by law to be devised by the nomination committee.[1585] While the policy is intended as a direction for the future, the report will comprise data that relates to actual execution of such a policy, or may be used to appraise status prior to devising or amending such a policy. Such data collection and assessment will help in identifying red flags with evidence to substantiate these. For instance, it is possible to decipher from the composition of the board and its committees, chairpersons and quorums/attendance in meetings if women

[1583] Regulation 34, read with Schedule V of the Listing Regulations.
[1584] Regulation 46 of the Listing Regulations.
[1585] Regulation 19(4), read with Schedule II, Part D, A(3) of the Listing Regulations.

are more than tokens. Further down, the composition of the workforce across levels can help in locating areas of leakage or filtration, and across functions would reflect upon the extent of prevailing stereotypes. This, along with work–life imbalance, might cause gender pay gaps, which it is possible to detect from a review of part-timers versus full-timers, alongside comparatives of pay across parallel positions. Similarly, learning from disparities in patterns of leave taken, and resignations and the reasons cited, companies can discover where they fall short, and can improvise in terms of work–life conditions. On another note, revelations of women missing in promotions and shortlists on a recurring basis should be suspected of hidden (if not ostensible) bias. Likewise, predominance (more so if continuing) of any one gender in training/induction, mainstream projects or assignments with greater levels of exposure or growth prospects needs to be scrutinised.

Only once gaps are spotted can companies then devise suitable corrective measures or action points, which may be implemented on a "best endeavour" basis. For example, (a) compulsory female presence to constitute a minimal quorum for board or committee meetings, or in committee memberships (including in those involved with strategic functions); (b) female chairpersons in such committees; (c) internally set targets for female appointments at key management and supervisory levels; (d) breaking down to smaller and phased targets at each hierarchical level, and across departments/functions; (e) tie-breaker rules when deciding for promotions at all ranks and levels (such that when a male and a female candidate are equally eligible, preference is made in favour of the latter); (f) compulsory shortlisting of female candidates, where shortlists appear to be weighted; (g) re-considering the logistics and contents of training/induction programmes to increase accessibility and convenience; (h) offering ownership of shares or stock options as added incentives for greater levels of engagement and belonging;[1586] and (i) shuffling of projects/assignments and rotating teams to evenly distribute growth prospects (given that stagnancy in roles is allegedly a rampant cause of workplace stress among women),[1587] to cite a few.

[1586] In the context of political quotas, it was argued that increased economic rights (title to property and land) correlates to greater female participation and power- B Mohanty (n 973) 3349. See also, 'Gender Equality around the World- Articles from World of Work Magazine 1999-2006' (ILO 2007) 41; and Domingo, Holmes, O'Neil, Jones, Bird, Larson, Presler-Marshall, & Valters (n 1079) 62.
[1587] 'Challenges and strategies for retention of women talent in India' (n 1238) 16, 19.

Such extensive due diligence must be followed up with subsequent periodic audits to check upon the actions taken and lingering discrepancies, if any. What happens once may be discounted as an error, accident or coincidence, but, when repeated, it reveals habitual disorder. It is only from regular and continuing reviews of the outlined trends that it is possible to assess if a company believes in the functional value of diversity, has imbibed it in its true systemic spirit, and whether or not the momentum is maintained. Once this is so, one can be hopeful of reforms and progression to continue over, above and beyond what externally imposed regulations/quotas can only initiate.

VI. *Who Administers Diversity?*

Having recommended in-house and internally re-enforcing diversity, which is quintessential in developing a non-leaking pipeline (particularly for sufficient female candidature for executive directors), the next step is to decide who runs this.

❖ Specialised in-house department, board committee or external consultancy

Given the vast spans of data, the complexity of the issues involved, and factoring in the depth of diligence that is needed, administering gender diversity cannot be added as one of the many errands with which the human resource officer/department or the nomination committee is linked or held responsible for. Currently vested with the task of formulating a diversity policy,[1588] amongst many other tasks including recruitment and remuneration,[1589] it would be impracticable for the nomination committee to attend to all of what encompasses diversity on a day-to-day basis, particularly as this committee meets only occasionally, like all other board committees. Moreover, largely made up of independent directors, it cannot be expected to access all corners of the organisation, without which such diversity would remain superficial and decorative. If so, it would not be long before diversity would wither away amidst all of the other concerns perceived to be more vital, which the committee conventionally and routinely deals with. Moreover, doing so would appear as if the relevance of diversity was confined to matters that concern this committee or the human resource department alone, in exclusion of others – much contrary to the extensive outreach of diversity

[1588] Regulation 19(4), read with Schedule II, Part D, A(3) of the Listing Regulations.
[1589] Section 178 of the Act of 2013.

that sweeps through every function and level, and over the entire lifespan of the company.

This is particularly the case because the suggestions made as regards the contents of the considerations outlined in this thesis are by no means exhaustive, but only indicative. Based on scantily documented and widely spaced industry surveys on gender diversity,[1590] this only seeks to offer a broad-level direction or checklist. Based on this, companies may devise their own tailor-made kits or policies, appropriate to the peculiar needs and conditions of the relevant sector/industry and organisation. Much also depends upon the diversity conditions prevailing already within the organisation. However, specialised knowledge and skills (as against a generalised overview) and a significant time commitment are essential.

What is therefore necessary is a stand-alone agency that has the understanding and expertise pertaining to diversity as a fully fledged function. This will be responsible for formulating and revising from time to time the company-specific diversity policy, implementing it across all departments and functions, managing its nuances, complications, risks and downsides, data collection and periodic audits to measure its execution, setting up of action plans that emanate from such audits, and dealing with grievances and complaints and all related compliances, defaults and disclosures, including the diversity report recommended. This will ensure that, first, diversity becomes an over-arching mission, which will help it to gain access to (without being accused of trespassing into) all areas and domains. Second, diversity would gain undivided and full-time attention and emphasis, as opposed to being consolidated with, and so hidden amidst, what are considered by companies as more vital functions. This trend emerges clearly upon a review of annual reports of companies (discussed in chapter III), where diversity policies, if published at all, are most often found to be superficial and side-lined within other more extensive disclosures and agendas. Last,

[1590] S Rajesh & K Ekambaram (n 1209). See also, 'Challenges and strategies for retention of women talent in India' (n 1238); A Mishra (n 1280); Banerji, Mahtani, Sealy, & Vinnicombe (n 1200); S Datta & UA Agarwal (n 1229); S Buddhapriya (n 1370); 'Towards Gender Balanced Boards' (n 1280); 'Report on Enablers for Women Empowerment at Workplace in India' (n 1223); and 'Women Managers in India- Challenges and Opportunities' (n 1367).

this will make accountability more visible and streamlined, enabling the people in charge wholly and exclusively to be definitely fixed.

There may be several ways to attain this, including the creation of a separate in-house diversity department with a diversity officer ("chief diversity officer"/ "CDO") heading it. Taking a cue from a few universities in the US where the position of CDO already exists,[1591] the idea could be borrowed into the corporate domain to conceptualise and develop an organisational culture of inclusion and diversity. The office may be included within the definitions of "key management personnel",[1592] and "officer who is in default",[1593] such that liability can fixed with precision in cases of default or omissions. The department must further provide for easy access and safe redressal of related grievances or complaints, preferably on a no-name basis if needed. In addition, a committee for diversity at board level could be set up to monitor the performances of such a diversity officer/department. This will ensure both insider efforts and outsider supervision – how it normally works within a company. Needless to say, diversity developed in this way would be more organic and self-perpetuating.

An alternative option, where the company may not be able to invest resources to establish or run an in-house department, or until it is able to do so, involves engaging diversity consultants for a fee, who expertise in due diligence, audits and advisory services linked to diversity. This would be somewhat similar to financial audit firms and law firms, providing dedicated finance/accounts and law-related services respectively. Not yet commonly prevalent, but given the fast-moving diversity reforms in India, such specialised diversity-linked services may be sought as a potentially lucrative but as yet untapped commercial proposition in future.

❖ Setting the Tone from the Top

A company will be what its management wants it to be,[1594] as senior managers decide and shape up the culture and surroundings within an organisation. Nothing proves this

[1591] DA Williams & KC Wade-Golden, 'What Is a Chief Diversity Officer?' < https://workforcediversitynetwork.com/docs/Article_goldemwilliams_WhatisaChief%20DiversityOfficer.pdf> accessed 5 December 2018.
[1592] Section 2(51) of the Act of 2013- this includes the CEO, managing director, company secretary, chief financial officer, and such functional heads as may be prescribed.
[1593] Section 2(60) of the Act of 2013.
[1594] 'From Intention to Impact- Bridging the Diversity Gap in the Workplace' (n 1362) 11.

better than India's example, where control remains with a few promoters occupying top leadership positions and outlining "both the centre and the circumference"[1595] of the company. This also holds good for how a board is composed[1596]- i.e., whether the CEO wishes the directors to bring in objective and critical thinking, or rubber-stamp what they decide.[1597]

Only when the person who is the face of an organisation, such as the CEO/managing director, C-suite/key management personnel or the chairperson, value women and emphasise how they have contributed to the company, their achievements, and key changes in financial indicators (in other words, narrating the business case of diversity, which is specific to individual companies and their results), can the message permeate into all relationships within and outside the company and translate into actual results.[1598] This is proven by a few instances of companies with female CEOs/directors that appear to be more diversity sensitised.[1599]

Likewise, for an effective company-specific in-house policy to be devised and implemented with success, the right tone has to be set from the top, particularly from the management, which decides the architecture of the organisation. Where this is not done, it not only causes stress at work,[1600] but also makes it less likely that a company will seek to enforce diversity over and above what the law mandatorily requires.

Some of the ways that can help set the top tone in motion include, first, spelling out that diversity is no longer a soft ancillary topic that can be side-tracked, which still appears to be the persisting mood.[1601] It should form part of the core strategy and financial budgets such that resources are allocated and expended on promoting diversity in every function and department of organisations. Further, thinking of

[1595] G Mills (n 870) 122.
[1596] Anastasopoulos, Brown, & Brown (n 129) 11.
[1597] CB Carter & JW Lorsch (n 868) 171.
[1598] 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 4. See also, 'Women at the Top of Corporations: Making It Happen' (McKinsey & Co 2010) 14.
[1599] D Bilimoria, 'Building the Business Case for Women Corporate Directors' in RJ Burke & MC Mattis (eds), *Women on Corporate Boards of Directors- International Challenges and Opportunities* (Springer 2000) 25-40, 31-32. See also, A Mishra (n 1280) 71; 'Women Matter: An Asian Perspective' (n 1313) 12; and Anastasopoulos, Brown, & Brown (n 129) 10.
[1600] 'Challenges and strategies for retention of women talent in India' (n 1238) 17.
[1601] 'The Future is HERe' (n 1315) 11.

diversity in all third-party dealings (with, for example, vendors, distributors, contractors, creditors/debtors, auditors, lawyers and consultants/advisors) can go a long way in institutionalising diversity as a norm. All of these would cultivate a sense of belonging and send out positive comforting vibes down the hierarchical levels, along with reassurances for a more inclusive workplace.

Second, for an environment soliciting open dissent and normalising disagreements, codified pointers as regards chairing of meetings at all levels might help. Codification will help in setting reminders that diversity is not detached or isolated, but is present regardless of the agenda. It can further advise how best the chair can constitute the quorum and conduct proceedings while managing and utilising differences across the table.

Third, similar to the situation for the board, diversity can be specified as one of the criteria for evaluating the performance of "key management personnel",[1602] and then linking such evaluation to their remuneration/incentives.

Fourth, diversity should be seen and rewarded. One way to do this is through gifts or bonuses for teams or departments based on how inclusive and diverse they are. Further, acclaiming individual successes at all ranks and levels, if done with names and photographs, can increase the achiever's visibility. All of these approaches can have a two-fold advantage. They can unshackle the connection most commonly drawn between men and what success looks like,[1603] and help diversify the face of leadership, not necessarily featuring styles traditionally attributed to men.[1604] In addition, by disproving the fallacy that Indian women lack career interest,[1605] this can "further" inspire and motivate them. Revelations of role models and learning from their examples/experience can form part of the company website, as well as in-house publications and awards.

[1602] Section 2(51) of the Act of 2013- this includes the CEO, managing director, company secretary, chief financial officer, and such functional heads as may be prescribed.
[1603] 'Women in Financial Services' (n 745) 12.
[1604] L Wirth (n 1199) 101.
[1605] S Basu (n 250) 73. See also, A Durbin (n 289) 6; and 'Challenges and strategies for retention of women talent in India' (n 1238) 13-14.

Fifth, there is a need to regularise navigational support for career advancement[1606] through mentorship and sponsorship, which can be arranged right from the start of a career (and is not confined to board level). This can be drawn up on a cross-gender (men championing gender diversity might have a greater impact, if one goes by the Norwegian example of Gabrielsen) and cross-department basis (which might help in breaking the functional barriers that exist as a result of gender-segregated roles), such that men in senior line functions may advise women in staff positions, and *vice versa*. The advantages and viability of reverse mentorship,[1607] not yet very familiar in the Indian context, may also be verified. Where mentors are scarce[1608] and concerns of confidentiality do not conflict, cross-company mentorship[1609] might come to the rescue. With enhanced interactions across differences, the chance of pre-conceived bias and stereotypes is likely to reduce.[1610] Caution must, however, be exercised to check upon any patronising tendencies that such mentorship/sponsorship might acquire over time. Moreover, to prevent redundancy and to ensure that such arrangements reap actual benefits, they may be included within the criteria for performance evaluation of such mentors/sponsors, and then co-linked to their remuneration. In this way, one can be assured that mentorship/sponsorship is mutually benefitting, and retains its reciprocity, continuity, worth and seriousness.

Sixth, company-financed networking events can help emancipate connections and outreach, which is of great relevance to female directors, particularly first-timers and those from unrelated sectors/industries entering into such directorship following the introduction of the quota. It is important that such new entrants are visible to the right audience.[1611] Related to this, it would be helpful if CEOs, chairpersons and senior management across companies come together (like Australia's Male Champions of Change initiative) and exercise their individual and collective influence to create and facilitate such networks to expand and gain prominence.

[1606] 'From Intention to Impact- Bridging the Diversity Gap in the Workplace' (n 1362) 11.
[1607] 'Women in Financial Services' (n 745) 49. See also, 'More women in senior positions: Key to economic stability and growth' (n 549) 40.
[1608] 'Women Managers in India- Challenges and Opportunities' (n 1367) 76.
[1609] A de Jonge (n 1073) 57.
[1610] S Basu (n 250) 9, 45-46.
[1611] Vinnicombe, Singh, & Sturges (n 1569) 57-73, 69.

Finally, actuating the "best endeavour" measures (recommended under point V – data collection and audit), if announced and documented as part of the diversity policy, can set the ball rolling. It must be realised that diversity is not what women alone can attain.[1612] Rather, the onus for where they are absent lies more on men, who must acknowledge their value and make space. If anything goes wrong, a need therefore arises to look back and examine whether the tone was set right from the top.

To conclude section IV.4B(C), what must emanate from consciousness within can never be externally imposed, particularly when the issue is peculiar to the surrounding environment, and cannot be made to fit into a "one size fits all" regime. For the recommended strategy (particularly the 30% target on a conform-or-explain basis for the executive constituent) to work, it is critical that the catchment is developed with the aid of organic effort within companies. To this end, an indicative (not exhaustive) checklist is suggested. Although extensive, it is not absolute. It seeks to provide a broad layout, which can then be altered or further lengthened to provide for sector- or company-specific adjustments. Such enabling groundwork becomes all the more vital for the executive constituent, as voluntary measures (like any soft law) recommended for such directorships need inspiration from market-driven forces. For this, a strong business norm for gender diversity must be present as an incentive, if not as a prerequisite. However, prior to being called an industry or business norm, diversity needs to be set up as an organisational norm, and its leaders have an instrumental role to play in this. In particular, the CDO is required to liaise closely, co-ordinate and work in direct connection with the CEO and all other functional heads. Further, as what is tangible and visually exists can be better assimilated, diversity needs to be seen and spoken about through company-wide publications, signposts, newsletters, billboards, posters, illustrations, documentation and displays, advertisements (including a dedicated page on the company website stating the diversity policy alongside reports of compliance and explanation for non-adherence (if any) and details of officers in charge with their co-ordinates). All of these can further signal the organisation's strong commitment to diversity. To further incentivise and enable companies to undertake all of what is suggested here in the "ready reckoner for in-house diversity", and in line

[1612] M Mannak, 'It's not a man's world' in *Financial Mail Women- Driving Gender Diversity* (Picasso Headline 2018) 21.

with the recommendation for balancing of policy approaches, the MCA or SEBI must require mandatory disclosure of the diversity policy devised in the annual reports of companies, similar to what is prescribed for others (such as for policies on remuneration, dividends, appointments to boards and corporate social responsibility). In addition, such policies, along with audit reports, can serve a dual purpose as a diversity index, which the anti-discrimination and equality bill of 2016 proposes.

IV.4C Outside Boardrooms – to the Industry

As the proverb says, *beauty lies in the eyes of the beholder*. Considering that one of the most popular contributions of gender diversity lies in its salutary and signalling effects (discussed in chapter 1), forces outside companies that behold such repute and goodwill can play a vital role in enforcing diversity. It is therefore recommended that the "beholders of the beauty of diversity" – i.e., stakeholders and market players – should make use of their power and influence to ensure that the demand for diversity, as created by the regulator, continues or remains sustained. Their role and activism become all the more vital as diversity is still evolving and is yet to take the shape of a fully fledged business norm.

(A) Institutional Investors

Without re-entering the debate about outcomes on profits, it is possible to infer with certainty from the empirical study undertaken by Dobbin and Jung[1613] that perceptions of shareholders, particularly institutional investors, can make or break the case for boardroom gender diversity. This is further proven through examples[1614] at global level where institutional investors have been instrumental in reforming boardrooms[1615] into

[1613] F Dobbin & J Jung (n 185).

[1614] State Street Global Advisors, BlackRock, Australian Council of Superannuation Investors, CalPERS, Council of Institutional Investors, TIAA-CREF, to name a few, have formulated governance rules and adapted their voting/investment policies in a manner that disfavours companies not having female directors – JW Barnard (n 1371) 721. See also, M Fust, 'Have You Checked the Mirror? Institutional Investor Focus on Board Diversity Is Closer Than It Appears' <https://www.thealexandergroup.com/blog-press-room/2017/have-you-checked-mirror-institutional-investor-focus-board-diversity-closer-it-appears/> accessed 3 July 2018. See also, 'Institutional Investors, Leading Women's Organizations Urge Russell 1000 Companies to Add Women to Their Boards' (Thirty Percent Coalition, 5 February 2013) <https://paxworld.com/wp-content/uploads/2017/04/65-20130226-30-percent-coalition.pdf?pwm=9340> accessed 3 July 2018.

[1615] For instance, persistent investor announcements and efforts could successfully result in dismissal of top executives in General Motors, Burton Group and British Airways- P David & R Kochhar, 'Barriers

more inclusive and diverse spaces. However, this enthusiasm has not been so vehement when it comes to India, with occasional interventions (mainly by proxy advisory firms, such as the Institutional Investor Advisory Services) confined to only a few selected sectors where institutional ownership is high.[1616] It is time that India also realises the significance of and cashes in on the influence of institutional investors, particularly blockholders who share interest in long-term growth,[1617] on diversity constituents of their investee companies.[1618] This assumes greater significance in the context of the recommended strategy for the executive constituent – i.e., the 30% target – which works on a conform-or-explain basis. Considering that the strength of the strategy lies in "naming and shaming", market forces are required to be more involved, proactive and engaging, and keenly scrutinise conformities or explanations cited for non-adherence.

One of the easiest ways to do this, and which India has commenced,[1619] is through a stewardship code. While a review of the principles applicable to insurers[1620] and pension funds[1621] (which are likely to be replicated in construction of the code and be applicable to all categories of institutional investors) reveals that the investee company's board structure and composition (including diversity) is enumerated as one of the parameters that should be over-seen by such investors, they go no further to explain how it is to be monitored. Thus, unless practical guidance is issued, institutional investors will continue to be relevant only in theory, even if such a code emerges.

What is therefore needed is a market-facing mechanism, keeping in view how these institutions operate, that will enable the code to work from a practical standpoint. First

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to Effective Corporate Governance by Institutional Investors- Implications for Theory and Practice' (1996) 14(5) European Management Journal 457-466, 463.

[1616] 'Corporate India: women on Boards' (n 1089) 10.

[1617] T McNulty & D Nordberg, 'Ownership, Activism and Engagement: Institutional Investors as Active Owners' (2016) 24(3) Corporate Governance: An International Review 346- 358, 349.

[1618] EA Nowicki, 'Economic Concerns, Beleaguered Corporations, and Women in Corporate Boardrooms' (2009) 30(2) Hamline Journal of Public Law & Policy 549-561, 558.

[1619] 'SEBI to finalise common stewardship code soon' (Outlook, 21 June 2018) < https://www.outlookindia.com/newsscroll/sebi-to-finalise-common-stewardship-code-soon/1334891> accessed 2 July 2018. See also, 'Report of the Kotak Committee on Corporate Governance' (n 59) 93.

[1620] 'Guidelines on Stewardship Code for Insurers in India' (IRDA/F&A/GDL/CMP/059/03/2017, Insurance Regulatory and Development Authority of India, 22 March 2017).

[1621] 'Common Stewardship Code' (PFRDA/2018/01/PF/01, Pension Fund Regulatory and Development Authority, 4 May 2018).

and foremost, the regulator should start by asking why institutional investors would be interested at all in the gender diversity of investee companies. This becomes relevant because such diversity (not having a clear linkage to corporate profits) offers no direct incentives to such institutions, which are interested primarily in the returns on their investments, for which they are accountable to their beneficiaries. Unless linked to an actual market-based incentive, any external coercion would remain ineffective. Alongside constructing the code, the regulator should therefore think of ways that such incentives could be created such that investors could develop an internally driven urge to adhere to the code.

Considering that what reaps advantages and adds to the value of investments generates investor interest,[1622] the answer lies in the contributions of gender diversity to board effectiveness (if not directly to profits) – i.e., the business case. It becomes vital that the code, unlike the enactment of the "one woman director" quota, reasons out clearly and explicitly why diversity is a responsibility of institutional investors, with cogent utility-based justifications specific to India. Given that institutional investors symbolise a cluster of informed shareholders and decision-makers,[1623] dissemination of such information is a prerequisite. Only after having done this can the next level of incentives follow.

A further incentive can be crafted by providing gender diversity (in tandem with the recommended strategy) as one of the explicit investment criteria in the agreement between such investors and underlying clients/beneficiaries. This can be coupled with disclosures as regards the choices made of investee companies along with comparative scoring of their diversity. By providing for this, institutional investors would be mindful of the diversity of investee companies when making a decision to invest in one over another. While this relates to investee companies, diversity within the institution of the institutional investor may also be set as an eligibility or preferred condition to operate as such – for example, when registering as a mutual fund,[1624]

[1622] M Mizuno & H Shimizu, 'The Influence of Institutional Investors on Corporate Governance and Firm Performance: Evidence from Japan' (2015) 3 Kindai Management Review 75-89, 87.
[1623] 'G20/OECD Principles of Corporate Governance' (n 875) 30.
[1624] Regulation 7 of the SEBI (Mutual Funds) Regulations of 1996.

portfolio investor[1625] or collective investment scheme[1626] – with the regulator. This would help in asserting that diversity is as much a strategic concern to them as for the companies in which they invest, and indicating that they can no longer escape or evade the onus.

Having answered the *why* question, with incentives in place and investors willing to engage, the next question is *how*. Considering that diversity is the antithesis of kinship and consequent secrecy, systemic transparency (which is largely missing from how the national set-up works in India,[1627] but appears to be improving in terms of doing business)[1628] is a vital constituent. Rather, transparency and diversity can be mutually re-enforcing – i.e., while the latter reveals what otherwise might remain concealed within close homogenous circles, transparency would ensure that nothing which, if disclosed, would bring shame, exists, including favouritism and bias to curtail diversity. It is therefore to infuse greater levels of diversity-linked transparency and accountability that significant and extensive disclosures, in addition to what is already required by law, have been recommended in the preceding sections of this chapter. Such disclosures can come in handy to institutional investors in gathering relevant information that is a prerequisite[1629] for them to review, appraise and strengthen gender diversity in investee companies. In other words, given their proven reliance on the twin mechanisms of "voice" and "exit",[1630] institutional investors can start with a close scrutiny of disclosures reported by companies. This becomes all the more vital given that it may not be possible for the regulator to scrutinise all such disclosures with the levels of precision, depth and interest (and these might then escape the regulatory scanner) that shareholders or investors at company level can. Phased and further

[1625] Regulation 4 of the SEBI (Foreign Portfolio Investors) Regulations of 2014.
[1626] Regulation 9 of the SEBI (Collective Investment Scheme) Regulations of 1999.
[1627] India has a score of 40/100, with a rank of 81 in corruption perceptions index of 2017 (Transparency International, 21 February 2018) < https://www.transparency.org/news/feature/corruption_perceptions_index_2017> accessed 5 May 2018.
[1628] With a disclosure index score of 8/10- 'Doing Business 2018 Reforming to Create Jobs' (n 1534) 167.
[1629] B Black & R Kraakman (n 669) 1952.
[1630] Theurillat, Corpataux, & Crevoisier, 'The Impact of Institutional Investors on Corporate Governance: A View of Swiss Pension Funds in a Changing Financial Environment' (2008) 12(4) Competition and Change 307-327, 313.

categorised timelines can come to their aid too, which means that they need to focus sequentially – i.e., on only a few investee companies at any given time.

As indicated, the devil lies in the detail[1631] – what is needed is more than a cursory review of the contents. Investors should look beyond the form and volume of disclosures to review the substance and examine the reasons why deviations (if any) have occurred, if such deviation could have been avoided, and if any alternative solutions were adopted,[1632] and then voice any concerns that arise. All of this is possible only if, aside from the information procured from such disclosures, institutional investors further engage in dialogue with the company in a routine and consistent manner. This can happen at general meetings if investors engage and do not just attend as silent onlookers, as well as in deciding, *inter alia*, about director appointments, criteria for recruitment, processes of search and selection, candidates shortlisted and, finally, selected, work profiles/letters of appointment, induction of new directors, board and director evaluation, removal of directors and nullification of the board where it does not conform to the diversity criterion, as recommended. To do this, they must ensure that the duration of meetings is adequate to accommodate questions and debate. Further, they may call for new items in the agenda for general meetings. Following this, the investor should disclose and compare with what the investee company reports on all deliberations, rights exercised or votes cast.

In addition to general meetings, institutional investors can connect directly by requesting separate meetings with the management or the board. Seeking quorums requiring the presence of nominee directors (if appointed), and liaising with the stakeholders relationship committee, can further help in this regard.[1633] Finally, particularly as regards the diversity policy, its implementation, the diversity report and related grievances, investors can connect and work closely with the diversity committee and the CDO.

Another less explored way by which institutional investors can trigger diversity is by sponsoring new candidates for directorship. As discussed in section IV.4A(C), what

[1631] CB Carter & JW Lorsch (n 868) 29.
[1632] 'Green Paper- The EU Corporate Governance Framework' (n 545) 19.
[1633] Section 178 of the Act of 2013.

hinders a person from outside the boardroom from contesting for directorship is the advance deposit of INR 100,000, which stands forfeited unless a candidate is appointed or procures a minimum of 25% of the votes cast in a general meeting.[1634] Institutional investors who are better positioned (as against individual candidates) to sponsor such proposals and to secure a further 25% votes (if not elected by a majority), can help expand the search for more diverse boards. Last, as outlined in the Guidance Note, redressal of investors' grievances (listed as one of the criteria for evaluating the board)[1635] can be made use of by institutional investors to enforce their right to be listened to and heard when they speak about diversity.

To better channel all of this, the SEBI might consider examining the viability of a compulsory "say-on-diversity" vote[1636]in the Indian context. This could be included as a principle under "rights of shareholders", enumerated in regulation 4(2) of the Listing Regulations (which list the principles or objectives that companies, while complying with and implementing corporate governance measures, ought to achieve). Further, where the board/management remains unenthusiastic or unresponsive to investors' "voice", or where the investee company falls short of the investment criterion in the client agreement, institutional investors can opt for the "exit" mechanism. To explain, where, after having invested, it is discovered that diversity in the investee company no longer matches what is set as an investment criterion (as recommended), institutional investors would be compelled to withdraw their investments made, owing to their commitment made in the agreement with clients/beneficiaries – in other words, exit the investee company. To be able to do this, it is recommended that diversity, specified as an investment criterion in the agreement with clients/beneficiaries, should be negotiated for and replicated back-to-back as a condition for continued investment in the shareholder/share subscription agreement executed between the investor and the investee company. As well as enabling actual exit, such a contractual provision would be no less than a hanging sword – a pressure tactic to trigger action where, driven by

[1634] Section 160 of the Act of 2013.
[1635] Section C(2)(c)(v) of the Guidance Note.
[1636] Similar to United States' "say-on-pay" vote in relation to executive remuneration- Section 14A of the SEC Act of 1934.

the fear of losing invested monies coupled with threat of reputational loss, the investee company would seek to continue with its diversity commitments.

Considering that much of what is recommended for institutional investors gains its impetus from what is written on paper – i.e., in a shareholders' agreement or contract with clients/beneficiaries – the success of this largely depends upon the bargaining power and will of each party. The chance that diversity could be altogether omitted by the consent of all parties cannot be completely denied. Further, its effectiveness, and how frequently an investor can resort to the exit option, would depend upon, *inter alia*, the liquidity of the shares, the bulk of shares owned, the spread of portfolios that the investor has in other companies, and levels of conflict of interest.[1637] Likewise, whether or not to voice a concern, and how effectively a company is able to do so, depends upon its investment goals – whether long term or short term (for instance, investments based on indices or index tracking, as against company-specific shares, are less likely to be engaging)[1638] – allied voting rights, reputation and size (including of underlying beneficiaries/clients), how revenue is derived, the ownership structure of the investee company, and costs involved in intervention (often culminating in concerns about free riders[1639] – i.e., incurring costs for only a fraction of the benefits that are distributed to all investors, including those who do not expend).[1640]

While there are limits to what the stewardship code or the outlined recommendations can achieve, they nonetheless come as a continual reminder that diversity is a responsibility of both investors and investees. As an added attempt to infuse some greater certainty, the SEBI might consider "recommending" boardroom gender diversity as a criterion in the investment rules applicable to institutional investor categories – for example, in the seventh schedule of the SEBI (Mutual Funds) Regulations of 1996 and chapter III of the SEBI (Collective Investment Scheme) Regulations of 1999. Emanating from the regulator, this could be expected to offer greater levels of persuasion and incentive for diversity-linked contractual

[1637] A Edmans, 'Blockholders and Corporate Governance' (2014) 6 The Annual Review of Financial Economics 23-50, 27. See also, 'The Role of Institutional Investors in Promoting Good Corporate Governance' (OECD 2011) 43. See also, 'Green Paper- The EU Corporate Governance Framework' (n 545) 14.
[1638] 'The Role of Institutional Investors in Promoting Good Corporate Governance' (n 1637) 47.
[1639] 'Green Paper- The EU Corporate Governance Framework' (n 545) 11.
[1640] A Edmans (n 1637) 25.

obligations. On another note, the relevance of similar techniques in the context of foreign direct investors is worth examining. With statements such as "tag along" and "drag along", alongside veto powers and more extensive termination rights, their investment agreements are comparatively stronger, which essentially means that they have greater levels of participation and power than portfolio investors. For instance, company-wide or boardroom gender diversity can be referred to as an explicit condition for such investment, non-adherence to which might be followed up with the exercise of such contractual powers. To persuade investors to negotiate, the regulator concerned – the Reserve Bank of India – may consider issuing guidelines with reporting requirements (for example, within the filings of form FC-GPR, the single master form and the entity master form)[1641] in this regard.

To make the advocacy more constructive and collaborative, and for greater impact on investee companies,[1642] harnessing a coalition of investor groups and proxy advisors[1643] (for example, with a charter to which they voluntarily become signatories) might help.[1644] As well as offering a conjoined and formalised platform, such a charter could bring greater clarity and consensus as regards incentives for investors to engage more in gender diversity for wider experience of business cases, devising further mechanisms through which they might potentially engage with investee companies. Given that institutional investors and diversity share a common objective to oppose the concentration of power in the hands of a few controlling insiders,[1645] a strategy that omits reference to, or does not strive to cash in upon, their influence (which appears

[1641] 'Foreign Investment in India -Reporting in Single Master Form' (RBI/2017-18/194 AP (DIR Series) Circular No 30, Reserve Bank of India, 7 June 2018).
[1642] For example, the resolution at EMC Corp's 2002 meeting requiring a more diverse board was an initiative of a coalition of 20 institutional directors- 'EMC Shareholders Vote for More Independent Board' (CRN, 10 May 2002) < https://www.crn.com/news/channel-programs/18828368/emc-shareholders-vote-for-more-independent-board htm> accessed 15 October 2017.
[1643] Examples being, Institutional Advisory Services and Stakeholders Empowerment Services, which have made occasional interventions in relation to board composition and diversity- NS Subramanian, 'At BASF, a woman alternative turns heads, raises eyebrows' (Business Standard, 19 August 2015) <http://smartinvestor.business-standard.com/common/srchoutdet-330811-car-At_BASF_a_woman_alternative_turns_heads_raises_eyebrows htm> accessed 10 May 2017.
[1644] This may be drawn up akin to the statement of principles and responsibilities adopted by the Institutional Shareholders Committee in the United Kingdom.
[1645] 'The Role of Institutional Investors in Promoting Good Corporate Governance' (n 1637) 14.

to be intensifying with increasing ratios of institutional ownership)[1646] remains only half-baked.

(B) Other Industry Initiatives

To ensure that the industry retains its pace, contributions of gender diversity – i.e., the overall business case, along with examples – need to be widely propagated. It would be too onerous to expect that the SEBI, amidst all of its regulatory commitments, would be able to do this with equal fervour to industry bodies (such as CII, FICCI, ASSOCHAM, chambers of commerce and women's organisations), which are market rooted and more intricately connected to all of their stakeholders.

For India, the experience in this regard largely comprises a few scattered mentorship programmes and female conglomerates, which arguably serve as a forum for self-promotion of members, rather than broad objectives of diversity. Moreover, with hefty fees and registration costs, and eligibility that requires directorship experience, restricting access to only a few, these agencies themselves run as parochial chambers no less than boardrooms. It is time that their fragmented programmes and occasional dialogues were replaced with more synergic, consolidated and structured efforts at pan-India level. With combined resources and infrastructure, this would help to multiply their outreach and impact, while re-enforcing each other.

With the "Academy of Corporate Directors" recommended in section IV.4A(E), which would be a more appropriate forum for formalised mentorship, the role of industry bodies must go beyond this. Instead of duplicating and adding to the volume that already exists, such bodies should focus on areas that, although vital, remain untapped. For instance, a void that needs to be promptly replenished relates to the allegedly incomprehensive data pertaining to the diversity performances of companies.[1647] Given the vast and recurring nature of data collection, and the due diligence, reviews and activities involved, specialised and dedicated agencies are required to step in. It must be realised that data management should be an ongoing exercise, and must not be confined to times when the regulator introduces some new reforms. As reforms

[1646] 'Stewardship Code for India – IRDA intensifies the agenda' (Institutional Investor Advisory Services, March 2017) 3.
[1647] *Chandrakant Dheeraj v SEBI*, Appeal no 2828 of 2017 (29 November 2017) 2.

have been recurring for India after the "one woman director" quota was first introduced in 2015, several statistics measuring the quota have clustered around since then, but very few of these reviews analyse the quality of such numbers, and even fewer are comprehensive enough to capture entire sectors, industries or countries. Industry and market agencies are therefore recommended to come together and establish formalised machineries to collate exhaustive records at sector, industry and national level.[1648] In doing so, they must factor in and be mindful of the time spans of their reviews, which are critical for arriving at or deducing any conclusions. If not, it is possible to become carried away by statistics to hastily and superficially conclude what might not be real. For instance, a review of the effects of gender diversity on board performance or corporate profits, if undertaken immediately after an announcement of a quota or the entry of a female director, might be too premature or even mislead. This is because such a reform takes time to adjust and be accepted before any real-time effects can appear from it. This is particularly the case as behavioural enhancements cannot be immediate or instantaneous. If hurried, a negative outcome or no outcome at all might result from such adjustments, or the initial costs of compliance might be attributed to female directorship, which might then weaken the case for diversity.

Next, based on records and data, industry bodies can initiate periodic publications in the form of brochures or newsletters to disseminate information and awareness as regards how diversity is evolving in India (as against global comparatives), the obstacles/challenges faced, and any achievers and defaulters.

They can further take up the task of gender diversity rating – i.e., rankings of companies based on their diversity scores measured on parameters resembling the "ready reckoner for in-house diversity" recommended in section IV.4B(C). Drawing inspiration from the Corporate Human Rights Benchmark (which seeks to assess and rank companies on their human rights performance),[1649] this can form the basis for creating a diversity index that is indicative of the readiness of companies and their transition from where they currently stand.

[1648] This can be structured along the lines of Women on Board Index of Germany- M Schulz-Strelow (n 625) chapter 25, 180-181.

[1649] <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf> last accessed 2 May 2019.

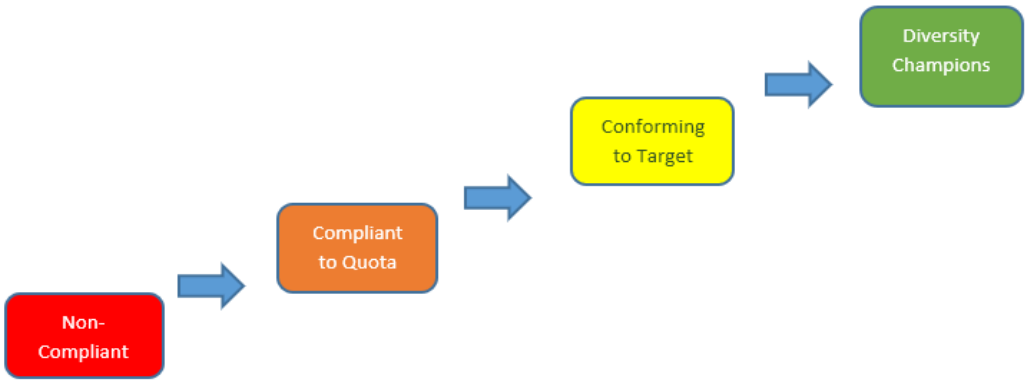

Figure 34: Proposal for Diversity Index and Rating[1650]

As illustrated in figure 34, companies that are non-compliant and low ranked might be listed in the red zone, followed by those complying with the mandatory quota in orange, then the ones conforming to the targets in yellow, and finally top rankers exceeding regulations in green. This would help track industry-wide progress (or relegation) over time, as, while a transition from orange to yellow would mean progress, a reverse should ring alarm bells. Such a colour-schemed rating and index further enhances the visibility of diversity outcomes, performances and omissions that often go unnoticed. This can help in "naming and shaming" to strengthen market forces, which is particularly needed for soft law executive targets.

If organised as a unified or centralised framework through a combined initiative of all (as against scattered private rankings), the ratings are likely to be more transparent and objective, and would be able to fetch greater credibility and value. These ratings could then form the basis of industry-sponsored awards and acclaims for diversity champions – companies and individuals. Such ratings can also serve as a ready reference for institutional investors when deciding upon diversity criteria, as recommended here. In addition, tremors from such industry-sponsored ratings/rankings are likely to be felt in movements of stock prices and consequent trading of securities, as an indirect means to trigger market forces and increase or decline (as the case may be) the interests of investors and other stakeholders.

[1650] This is inspired by Australia's Women on Boards Traffic Light Index.

Last, and on a final note, the path needs to be exemplified by those who prescribe such regulations and enforce them – i.e., the regulator itself. The SEBI and stock exchanges must therefore start with gender diversity within their own leadership and organisational set-up, thus leading by example.

IV.5 *Resolving the Mismatch*

Seeking to attain an end result of functional diversity with at least a critical mass of women in boardrooms, a mandatory but phased-out quota for non-executive directors, and targets that operate on a conform-or-explain basis for executive directors must take place in a systematised and purposive manner. The recommended roadmap diverges from the "one size fits all" approach that currently handicaps the over-arching "one woman director" quota for the entire boardroom. Such strategising, stemming from functional categorisation of directorships (instead of one that simply seeks to add numbers) would get along well with a mixed rationale, with which India started. With a combination of regulatory interventions and stringency of laws vis-à-vis business judgment and flexibility, this creates a balance between the two contrasting hard law and soft law policy approaches, which should ideally be sought when strategising for boardroom gender diversity (discussed in chapter II). This would further ensure leeway for the regulator to respond, adjust and adapt faster as per changing needs and complexities, and to experiment or innovate when confronted with uncertainties.[1651]

Combining voluntary targets can further ensure that the mandatory quota attains more allegiance, as the latter will more likely be seen as a part of an all-encompassing diversity movement, and can avoid being stigmatised. This will keep the wheel of diversity spinning, which might otherwise stop if institutional complacency sets in, as normally follows a stand-alone quota. The recommendations gain further relevance in light of the candidature for each of the two constituents. Simply imposing laws without factoring in the supply of potential candidates to abide by such laws would be an irresponsible regulatory move. This thesis therefore abstains from making any such superficial or theoretical suggestions. Rather, why a compulsory sanction-backed

[1651] E Ferran, & K Alexander, 'Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board' (2011) University of Cambridge Faculty of Law Legal Studies
Research Paper Series Paper 36/2011, 1-33, 7.

quota for non-executives as against discretionary targets for executives is recommended can be justified or finds its direct linkage with a wider candidature that may soon (if not immediately or readily) become available for the former versus a more gradually evolving pipeline for the latter.[1652] With expectations of such symmetry, it becomes imperative to assess if the recommended strategies are together able to rectify the regulatory mismatch described in section IV.2. *Do such recommendations remedy the deviation from what could be the optimum, as illustrated in figure 29?*

Re-visiting the formula and the mismatch against it:

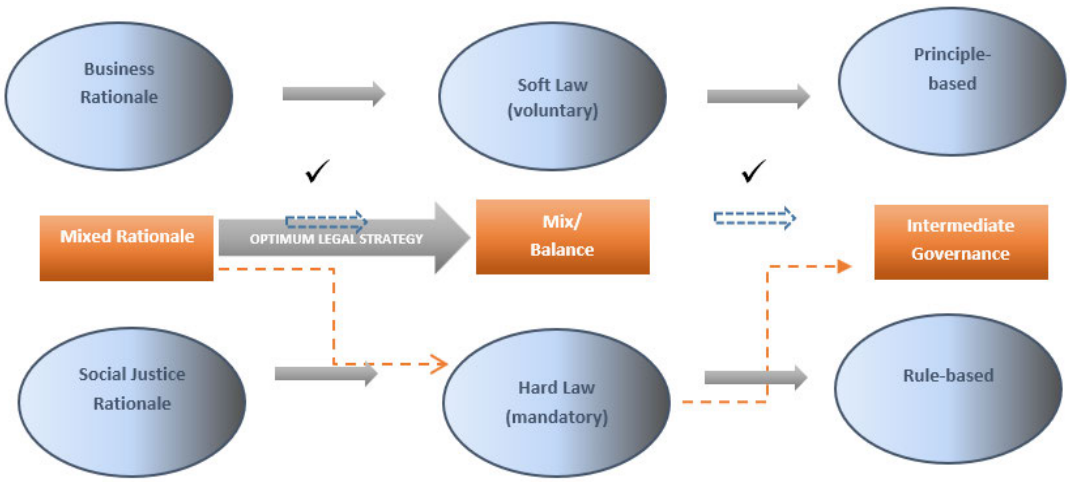

Figure 35: Resolving the Mismatch

In the above illustration, the orange dashed arrows denote the current legal position, which is intended to be fixed and replaced by the recommended strategy, denoted by blue dashed arrows. Combining mandatory sanction-backed quotas and "conform-or-explain" target-led measures, the aggregate strategy derived attains a balance of hard law and soft law approaches. This is in contrast to the current "one woman director" quota, which is arguably a rather flawed or miscalculated (or not calculated at all) regulatory choice, neither matching the country's rationale nor its candidature. Starting

[1652] L Wirth (n 1199) 38. See also, Doldor, Vinnicombe, Gaughan, & Sealy, 'Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms' (International Centre for Women Leaders, Cranfield School of Management, Cranfield University, Equality and Human Rights Commission 2012) 17.

from India's mixed rationale, the recommended strategy avoids making unsolicited divergence down to hard law or mandatory measures. Instead, it follows a linear mid-way path on lines of what is recommended as the formula for an optimum strategy in chapter II. Moreover, given its emphasis on a few rules amidst an over-arching principle of diversity, the recommendation is likely to find its optimum governance set-up within India's intermediate framework.

In resolving the mismatch and crafting strategies to that end, more complex procedural permutations (such as consideration of equal competence, as seen in the EU directive) are deliberately avoided. This is because what already has a softer discretionary approach need not be made more so through subjective assessments for which Indian markets may not be mature enough yet. If otherwise, companies might escape compliance with the quota or conformity with the target by manipulating procedures and disclosing reasons such as there being no female candidate, or a female candidate was not as competent as another male. More industry sophistication is needed prior to allowance for any such procedures being made in India. At this stage, instead of providing for such concessions, the emphasis should rather lie upon establishing firm roots for diversity, realising the best enforcement of these strategies and building upon a robust candidature through penetrating searches, creating new female resources and sealing pipeline leakages.

Striking a balance between regulatory interventions and self-reflection by companies, without losing track of the ultimate vision that is aimed for, is a sensitive task. Having done this, the regulator should be cautious to next enforce it more responsibly – i.e., in a manner that is more inclusive. Given the mixed underlying rationale, the law should ideally be enforced in consultation with the Ministry of Women and Child Development, alongside industry expert. None of this emerges in relation to the "one woman director" quota. It might therefore be helpful if the recommended strategy included input from related ministries and industry bodies, and was personified by those who championed and brainstormed for it, or have lived through what is promulgated. This would, expectedly, create a greater stir. Not only will this ensure that the industry reacts more passionately towards and least resists such diversity, but also would create an exemplar of "practise what one preaches", starting with the regulator itself. Finally, the strategy, when pronounced by the regulator, must come

with an over-arching declaration that the end objective is a boardroom that nurtures all forms of diversity, and that gender is only the first stepping stone. The message that diversity includes (and does not equate to) gender must be sent out loud and clear. This will not only help mitigate any likely stereotype, but also ensure that the ball of diversity keeps rolling beyond one-time gestures.

By responsibly enforcing the outlined strategy, avoiding regulatory discrepancies and accommodating real-time challenges that are peculiar to India, India is more likely to progress from a purely structure-based to a more procedural and substance-based connotation of diversity. If this helps in evolving such diversity as a business norm, the need for stifling rule-making would be further curtailed. With a more judgment-based compliance framework in future, diversity is expected to gradually move from "government" to "governance" in a real sense. Amidst such progression, the "one woman director" quota should not, however, be entirely forgotten. Rather, it should stay as a lesson in hindsight or as a reminder or warning that crafting of laws must be well informed and not undertaken blindly or habitually without adequate brainstorming. In particular, this is the case when it concerns boardrooms that operate as a function of internal and external (uncontrollable) forces, amidst a history within which it grows and the environment and culture that influences how it reacts.[1653] Thus, what worked for Norway (which has historically championed egalitarianism, experienced success with its political quota and is supported by a substantial female labour force/employment)[1654] cannot be expected to succeed *as is* in the Indian context, which is founded on a completely different set of opportunities, incentives and constraints marked by staunch levels of patriarchy. This is, however, not to discourage a review or research of existing positions world-wide, but to caution that such research (although it might inspire and generate ideas) must not be replicated *ipso facto*,[1655] when what is required is an organically developed strategy to suit what India uniquely needs.

[1653] G Mills (n 870) 106.
[1654] AA Dhir (n 168) chapter 5, 147, 162.
[1655] A de Jonge (n 1073) Preface. See also, 'Report of the Committee constituted by the MCA to formulate a policy document on corporate governance- Godrej Committee' (n 1021) 3.

IV.6 *Conclusion*

This final chapter undertakes what ideally ought to have been the regulatory stance at the reformative stages of India's "one woman director" quota, i.e., revisiting the quota that was imposed in 2013 introducing gender diversity in Indian boardrooms. The need for such a re-visit arises from the not so impressive outcomes of the quota revealed in the in-depth analysis of boards of India's 100 (Nifty 50 and Nifty mid-cap 50) companies undertaken in chapter III; coupled with the insufficiency of candidature, as discussed in section IV.3 above. Much of this can be attributed to the incongruence between the choice of a purely hard law approach (and mandatory quota as the consequential strategy) and India's mixed rationale (combining both, the social justice and business reasons), referred in this thesis as the "regulatory mismatch" illustrated in figure 29 above. [1656] To summarise, when the rationale underlying why India seeks to attain boardroom gender diversity is mapped against the quota imposed, it reveals a deviation from the general theory of strategising and the formulae to an optimum strategy, as was derived in chapter II. The theory suggests that, where the social justice rationale is predominant, the policy approach is hard law; and where such diversity is sought for business reasons, the approach would be soft law. It further establishes that the strategy in case where the predominance is of the social justice rationale (and so, exists a preference for hard law) would be mandatory, binding quotas backed by sanctions. In contrast, the business rationale (and so, the choice of soft law) would lead to industry led voluntary measures. In case where both prevail, and the rationale is a combination or mix of both, the optimum approach would be one that lies mid-way between the hard law and soft law (or a mix of such mandatory and voluntary strategies) An assessment of India's "one woman director" quota vis-à-vis its mixed rationale, thus, arrives at an outright mismatch.

To rectify this irregularity, this chapter recommends a re-strategising, involving a mix of strategies such that a mid-way policy approach between hard law and soft can be attained, as would be ideal for India's rationale. Accordingly, based on the broad-level proposals (for what can be an optimum strategy for boardroom gender diversity)

[1656] Explained in section IV.2 of this chapter.

suggested in chapter II,[1657] this chapter attempts to fix the mismatch through a mix of strategies- distinct for the non-executive (i.e., mandatory quota) and executive (i.e., voluntary measures) constituents of the board. Having said that, this chapter slightly modifies the proposal made in chapter II to cater to the India-specific needs or context. In doing so, the chapter reveals the challenge of candidature and pipeline, i.e., a severe shortfall of potential female candidates for both the constituents. This may be explained through India's strikingly low female labour force participation at 28.5%; low female literacy rate at a little more than half of that of male; and a vicious cycle of gender segregation, stereotyping, mid-level filtration, severe leakage in the pipeline, and a "double" glass ceiling, escalated by its deep-seeded patriarchal legacy.[1658] Hence, the proposal for mandatory quota for non-executive directors and voluntary measures for the executive directors (as broadly proposed in chapter II) must be so strategised that, aside to rectifying the regulatory mismatch, they also consider and mitigate the candidature crisis. Only if it addresses both these concerns, the roadmap would be an appropriate one specific and focused on the Indian context.

The roadmap proposed in this chapter thus has two-fold objectives (i.e., (a) to rectify the regulatory mismatch, and (b) doing that in a way that factors and alleviates the candidature crisis). To attain these, the roadmap proposes a detailed re-strategising, as follows:

Firstly, it proposes for a modified quota with phased implementation and timelines for the non-executive directors. In doing so, the chapter acknowledges that, as these directors have supervisory and representative roles for which a generalised skill-set may suffice, and which do not necessitate company-specific expertise as a pre-requisite to appointment, the talent pool from which these directors may be sourced is larger than that of executive directors. Hence, a mandatory quota with structured sanctions, is likely to work for this constituent. This chapter thus provides for a quota with progressive thresholds, i.e., the requisite number of female directors increases with the board size of the company. Care is also taken to ensure that such quota eventually conforms to the 30% critical mass ratio. Further, to enforce the quota by

[1657] See section II.7C(B) in chapter II of this thesis.
[1658] Explained in section IV.3 in this chapter IV.

way of deterrance, the proposal prescribes an incremental structure of sanctions (i.e., one which escalates from warnings, then fines/penalties, up to suspension of trading, and the severity of which would apply based on the defaulting company's turnover). Furthermore, to build an enhanced future candidature for non-executive directorship, the chapter makes several recommendations towards greater involvement and more active participation of search firms and nomination committees, creation of centralised databases for female directors (as is provided for independent directors), and institutionalising professional directorships.[1659] It is expected that this approach founded on hard law would, aside to ensuring compliance, emphasise that such gender diversity can no longer be avoided or overlooked by the industry.

In contrast to the above, voluntary targets on a conform-or-explain basis are proposed for the executive constituent.[1660] Considering the functional and strategic expertise required of these roles, and the need for flexibility in regulations to adapt to changing needs of the business, this strategy would be most appropriate for the executive directorships. The targets are rolled out in a phased manner, in harmony with the timelines for the non-executive quota. Further, to avoid its transformation into a hard law compliance (which is not intended), these targets are designed to work on a "conform-or-explain" (and not "comply-or-explain) basis. Moreover, owing to the characteristic of soft law that works on "naming and shaming" mechanism, this proposal comes with disclosure obligations, coupled with recommendations for greater industry activism. This is sought to be attained through regulatory reforms increasing the onus of obligations on the industry participants (more specifically, the institutional investors). These include ways to incentivise and arouse the interest of such investors by, *inter alia*, providing for gender diversity as a parameter in their registration eligibilities, investment criteria, and so on. [1661]

As regards the candidature for executive directorships or the "pipeline" as defined in this chapter,[1662] the scope is further curtailed. This is because, women (due to the "double" glass ceiling) rarely reaches up to the strategic managerial positions or higher

[1659] Detailed explanation in section IV.4A in this chapter IV.
[1660] Detailed explanation in section IV.4B in this chapter IV.
[1661] Detailed explanation in section IV.4C in this chapter IV.
[1662] Mentioned in section IV.4B in this chapter IV above.

echelons of the corporate hierarchy, from where such executive directors are sourced. Hence, to address the shortfall in candidature for this constituent, the thesis proposes a model diversity policy (referred as the "ready reckoner"). With an aim to mainstream diversity at all levels and across all functional domains of the company, the ready reckoner specifically addresses recruitments/progression, work profiles and fixing of liabilities/accountability, work-life conditions, and board evaluation. On one hand, this can offer a direction to companies as regards how to devise a diversity policy, which has become a mandatory obligation for them. Also, this can offer some help to the SEBI in promulgating a regulatory guidance in this regard, which the industry may then follow.

Considering that the reckoner, if adopted and implemented, can go a long way to systemically redress the concerns of gender segregation, stereotyping, pay-gaps, mid-level filtration, severe leakage in the pipeline, and the "double" glass ceiling, it is expected to mend the severe pipeline crisis (which is a consequence of all of these running in a vicious cycle) experienced in India. This may also help in evolving gender diversity as a business and institutional norm, and an inevitable way of life.

Finally, considering that no policy can run successfully as such unless administered and followed-up properly, the reckoner provides for a carefully drawn implementation and audit mechanism in this regard. An aspect that India's regulator has grossly missed out, the roadmap seeks to bring periodic reviews, due diligence and audit of diversity back on to the regulatory agenda. It also advocates for in-house diversity experts/officers to this end.

With all of the above, the two-fold objective that the roadmap aims for (i.e., the rectification of regulatory mismatch, and doing so while factoring and building up on the candidature crisis specific to the Indian context) would most likely be attained. The mix of strategies as proposed with the modified quota and the targets on conform-or-explain basis (for the non-executive and executive constituents, respectively) helps achieve a policy approach that lies mid-way between hard law and soft law. This rectifies the incongruence which was caused by the strict hard law quota imposed in

2013, unmatched with India's mixed rationale.[1663] These strategies (which require actions by the regulator, not just on the quota or targets, but also on related incidental matters) take care of the candidature shortage too. Designed to be implemented in a phased manner, they also work towards building on the candidature through, *inter alia*, enhanced participation and active involvement of the search firms and nomination committees; centralised databases; professionalised directorships; the "ready reckoner" that offers a guidance on the formulation of an all-encompassing diversity policy (which the regulator and the industry seem to be equally clueless about); and increased industry/stakeholders' participation. Thus, with an all-inclusive multi-party approach, all of these recommendations, a few as obligatory mandates and the remainder as guidance, are interwoven to offer a preferred way forward, or roadmap, for India. Once again, it is reiterated that this roadmap, which negates a "one-size-fits-all" approach, has been ingeniously devised specific to the needs and context of India.

To conclude, this chapter responds to the final research question, and accomplishes the ultimate objective of this thesis. Numbers are just one part of regulation, as otherwise companies would be in a hurry to conclude that "they have done their bit".[1664] As reaching the set thresholds is not an end objective, particularly where the rationale extends beyond gender equality to a more functional diversity, this must not stop at numbers. Crafting a strategy as outlined can therefore be considered as only the tip of the iceberg, as much lies beneath. The movement of diversity starts from here, only to unfold a never-ending story that is yet to be scripted, and where the regulator is not the only protagonist.

[1663] Illustrated in figure 29 of this thesis.
[1664] B Gunter (n 117) 28.

CONCLUSION

To summarise so far:

This thesis starts with an attempt to understand the concept of boardroom gender diversity from a corporate governance perspective in chapter I. In doing so, it examines the nuances of gender diversity in the organizational and the boardroom context, and arrives at the seemingly competing rationales of the social justice and the business. Although the thesis does not engage in an independent investigation (instead relies upon the existing literature) as regards the justifications for such diversity, it nonetheless asks the question-

Why Boardroom Gender Diversity?

"Whether or not to have diversity in boardrooms" is not the debate anymore. Notwithstanding a mixed bag effect on corporate profits, gender diversity is proven to have a positive impact on overall board function and effectiveness, particularly in relation to use of talent and human resources, market access, more participative and democratic work culture, reduced levels of conflict, mitigating group-think to bring in a wider range of perspectives and innovative or critical thinking, improved performances of other directors in meetings, greater efficiency in risk management, ethical or less corrupt standards, and more inclusive leadership.[1665] While the above makes a strong business case, the social justice rationale supports diversity for reasons of gender equality; fair distribution of power, resources and decision-making authority; dismantling gender stereotypes; injustice in terms of pay-gaps; and as a form of feminist advocacy.[1666] All of these together send out signals of benevolence and positivity, which in turn create what is termed as a "salutary" effect, and which adds to institutional legitimacy.[1667]

Thus, the rationales which appear at the outset to be at loggerheads, instead construct a strong dual case of "gender plus" (i.e., social justice and business rationale combined) for such diversity.[1668] The debate *inter se* the rationales insofar as justifying

[1665] Discussed in section I.3A in chapter I of this thesis.
[1666] Discussed in section I.3B in chapter I of this thesis.
[1667] Fanto, Solan, & Darley (n 90).
[1668] Established in section I.3C in chapter I of this thesis.

boardroom gender diversity as a concept has thus become obsolete, more so from an industry standpoint, which seldom differentiates between the two. The chapter therefore concludes with the finding that,[1669] with no proven disadvantages or arguments to negate it, boardroom gender diversity is perceived as a good governance practice from both, an industry and regulatory standpoint.[1670] It is based on this assumption that the thesis proceeds to examine such diversity in terms of its law-making and legal strategising, more specifically in the Indian context, in the subsequent chapters.

Hence, the focus shifts to understanding how countries in general engage in strategising of laws and regulations for such diversity, and whether the rationales have any role to play in that.

How – Deriving the Legal Strategy

To understand how countries strategise laws and regulations on boardroom gender diversity, and to propound a general theory to this end (which is largely absent in the existing literature), this thesis engages in jurisdictional reviews of Norway, the UK and at pan-EU level. The aim is to find *why* countries seek such diversity, *how* they regulate for it, and what determines their choice of policy approach or strategy.

Most of the existing literature stops at the stage of reviewing the existing laws of countries, and go no further. This thesis takes a step ahead to engage in a more purposive analysis of these laws and regulations, so as to identify any linkages between them and the underlying rationales. In other words, it explores, through a review of these selected countries, whether the rationale of social justice or business has any bearing on the choice of policy approach (hard law or soft law) and strategies (mandatory or voluntary) that these countries adopt.

The findings are, in case of Norway, the mandatory 40% quota imposed by section 6-11(a) of the Public Limited Liability Companies Act of 1997, appears to be an extension of the country's historic reliance on affirmative actions, and underpinning

[1669] Refer to section I.4 in chapter I of this thesis.
[1670] 'How Diverse should Boards be' (n 63). See also, 'Gender Diversity in Boardrooms' (n 63) vii.

egalitarian social and cultural ethos.[1671] This finds support from the significant State control and stake-holding in the Norwegian corporate sector, which sort of justifies the State interventions needed to enforce the quota and its severe sanctions. Seeking for substantive equality as an end objective in itself, which implies the predominance of the social justice rationale,[1672] the policy approach adopted is purely and strictly hard law. The twist of diversity in the ultimate stages of the enactment appears to be merely an attempt to give it a more business-friendly appearance such that it could be enforced with the least resistance possible from the industry.[1673]

On the contrary, business motives appear to have run almost independently of the social justice rationale in the UK.[1674] Accordingly, female directorship is not seen as an end objective, rather as a means to derive better functional boards.[1675] The two rationales do not seem to coincide, except until the proposed 2018 Code, which for the first time makes a footnote reference to the 2010 Act, hinting at what could perhaps transform into a relational approach in future.[1676] Even assuming this for later, it is less likely that the country will replace its voluntary targets with a quota given the predominance of business judgment over any gender preferences (with a ban on positive discrimination).[1677] This becomes clearer from the example of Scotland, where, even for public boards, such preferences apply only after or subservient to the "best qualified" criterion for business.[1678]

[1671] Discussed in section II.2 in chapter II, and chapter IV 'recommending the roadmap' in this thesis. More specifically, the Propositions 97 and 77 to the parliament advanced by the Norwegian Ministry of Children and Family Affairs offering related legislative discussions; the Norwegian Code of Practice for Corporate Governance of 2014; the Accounting Act of 1998; the Gender Equality Act of 1979 (now replaced by the Gender Equality Act of 2013); and various other governmental action plans and policy statements issued from time to time, have been relied upon.

[1672] Established in section II.2 and compared in section II.5, in chapter II of this thesis.

[1673] Parliamentary Debate (2002) – H Bjørkhaug & S Sørensen (n 385) chapter 6, 185, 199–200.

[1674] This finds support from, more specifically, the deliberations in the House of Commons debates, and the consultation documents, feedback statements, and guidance notes issued by the Financial Reporting Council; the Companies Act 2006 (Strategic Report and Director's Report) Regulations of 2013; the most prominent Davies Report of 2011, followed up by annual reviews and the five years' summary in 2015; the Hampton-Alexander Reviews; and the industry led voluntary codes of conduct for search firms. Alongside, the Equality Act 2010- particularly sections 158 and 159 are relied upon.

[1675] Established in section II.3 in chapter II of this thesis.

[1676] Footnote 5 in the Principles under Part 3 of 'The United Kingdom Corporate Governance Code' (n 418).

[1677] Lord Davies (n 80).

[1678] The Gender Representation on Public Boards (Scotland) Act of 2018.

The connections between predominance of rationale and choice of policy approach or strategy find further corroboration from the EU,[1679] which has borrowed reasons relating to both business and gender equality to construct the EU Directive.[1680] Accordingly, the binding targets, subject to objective assessments that it proposes, do not fall squarely or exclusively within either hard law or soft law. With gender equality on one hand, and emphasis on value addition to the board on the other, the binding targets reflect upon an intersection or mix of rationale. In other words, the EU stands mid-way between the UK and Norway, depicting a greater level of interplay between the two rationales.

Thus, these jurisdictional reviews (alongside a cursory review of a few other countries) reveal that, although choice of rationales may not have much role to play in justifying the case for boardroom gender diversity, it has a significant practical relevance in determining the choice of policy approaches and strategising regulations at the country levels.

Chapter II further takes note of the range or variance within which such strategies lie, i.e., between the two polarised and extreme policy approaches of hard law and soft law.[1681] In this regard, the thesis compares the two to understand their suitability, and pros and cons of each, with specific references to Norway and the UK. Also, instances of international law, financial regulation (more specifically, in the post-crisis period), and corporate governance are cited.[1682] The comparison finds that, hard law, the efficiency of which necessitates State intervention and deterrence of sanctions, has certain advantages in terms of faster results, measurable enforcement, and precise and detailed obligations. However, owing to its over-emphasis on compliance, it often overlooks the absence of systemic or behavioural reforms or substantive changes, and thus tends to result in institutional complacency. Also, its dependency on the

[1679] Discussed in section II.4 in chapter II of this thesis.
[1680] Also, based on a review of similar directives as regards disclosure of non-financial and diversity information in 2014, followed by 2017; general framework for equal treatment in employment and occupation of 2000; equal treatment between men and women in the access to and supply of goods and services of 2004; equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions of 1976 and 2006; and other working papers and recommendations for balanced participation of women and men in the decision-making process. Please also refer to the case law as discussed in section II.4 in chapter II of this thesis.
[1681] See section II.6 in chapter II of this thesis.
[1682] Discussed in section II.6 in chapter II of this thesis.

appropriate political and State enforcement set-up, lack of flexibility to adapt to changing situations, and its inability to access more innate or intrinsic concerns (like executive directorship) make it not the best option, if applied on an exclusive basis, for a dynamic and evolving concept like boardroom gender diversity.

Turning to soft law, this too has its own advantages and riders. For instance, in view of its flexible nature and easy adaptability, reduced costs of compliance, and ability to influence behavioural or foundational reforms, this is popularly used for international regulation and corporate governance matters. Rather, it appears to be more preferred even for board room gender diversity, given that the latter involves behavioural aspects within the boardroom, and necessarily requires the flexibility to adapt to its fast-evolving conditions. Moreover, this approach can be used to address concerns like executive directorship and tokenism, which hard law cannot access. Having said that, as soft laws are difficult to measure and audit, reliance on it as a standalone policy approach can be called in question, as it may not create the ripples in the industry (especially, for such diversity which is yet to evolve into a business norm) unless supported by a regulatory pressure.[1683]

Considering that the choice of hard law over soft law, and vice versa, does not have an absolute answer, and much depends on the context or the issue to be regulated (boardroom gender diversity in this case), a strict bifurcation or an exclusive reliance on any one of the rationales or policy approaches, is neither plausible nor desirable. Instead, through the comparison at country levels,[1684] this thesis carves out the linkages between the rationales and policy approaches, to propound a theory expressing in more general terms how legal strategising for boardroom gender diversity happens. Illustrated in figure 7, the theory states that where the social justice objectives (which are of more compelling nature) are predominant, the policy approach adopted would be hard law involving mandatory and State-enforced measures like binding quotas. As opposed to this, where a country is inspired by the business rationale, preference would be for an approach that is considerate towards business judgment, or soft law comprising of industry led voluntary measures.

[1683] U Morth, (n 704) 4.
[1684] See sections II.5 and II.6 in chapter II of this thesis.

With the above theory of strategising propounded,[1685] this thesis uses it further to derive a way in which an optimum strategy may be formulated in this regard. In doing so, the thesis visits the seminal Hart-Devlin debate,[1686] which (although in an unrelated domain of criminal law) offers a valuable discussion as regards to what extent should people's behaviour and conduct be regulated, and when such regulation must draw a line such that it does not intervene into the private choices, life and liberty of individuals. Hence, to derive the "optimum", it is necessary to strike a trade-off or balance between such compelling concerns of social justice but without transgressing into the private space of corporations. Accordingly, as illustrated in figure 8, the thesis finds that an optimum policy approach and strategy for boardroom gender diversity would be one that lies mid-way between the two- hard law and soft law, or mandatory and voluntary measures. This finds support from the comparison of policy approaches,[1687] which finds that neither of the two, if adopted on a standalone basis, can suffice or achieve the desired results. This is more so, in relation to boardroom gender diversity, which involves the dynamics of within boardrooms, and is still evolving across the globe. The unique dual case concept (combination of both social justice and business rationales) of such diversity further reinforces that.

The above approach harmonises formal regulation and costs associated with business autonomy and its much needed flexibility. Given the complexities within boardrooms where interplay of power, control, money, interpersonal interactions and connections, decision-making, conflict management and group dynamics, over and above structural composition, determines behaviour, this balance of hard law and soft law is much needed. This allows for the necessary innovation and flexibility required for both the regulator and the industry to adapt to changing or evolving surroundings, while also offering some degree of certainty and predictability. This would also make companies more internally responsible, not because they would follow what the regulator directs, but because they would direct their own actions towards legally responsible behaviour, which might then strengthen the law itself.

[1685] Derived in section II.7A in chapter II of this thesis.
[1686] P Cane (n 796) 21-51, 22.
[1687] Discussed in section II.6 in chapter II of this thesis.

Next, with the theory for strategising, and which is used to derived the formulation of an optimum strategy, couple of proposals[1688] are advanced as regards what could be such an optimum strategy. While one being, the comply-or-explain mechanism is commonly found in corporate governance codes of countries, the other proposal is originally contributed by this thesis. That being, a mix of mandatory and voluntary strategies implemented for the two constituents of a boardroom- non-executive and executive directorships. While non-executive directors are expected to be generalists, executive directors must have more direct expertise and hands-on involvement pertinent to the company. Given the significant differences in terms of their composition, eligibilities and functions, enforcing a single over-arching strategy for the entire board (applying uniformly to both constituents) is not ideal, even from a candidature standpoint, which is more broad based for non-executive directorship as against considerably restricted for executive directors.

To briefly explain, the proposal provides a mandatory and binding quota for the non-executive constituent, considering that the nature of such directorships is supervisory and representative in nature, for which generalised skill-set would suffice. In contrast to this, voluntary targets or similar soft law measures are recommended for the executive directorships, as such appointments are more individualistic and function-oriented, and thus require specialised and strategic expertise specific to the roles.

This chapter however concludes with a final note of caution[1689] that all of the above – the general theory for strategising of regulations for boardroom gender diversity, the formulae to derive an optimum strategy, and the proposals for what could be such an optimum strategy, are all advanced at a broad-level. Prior to adopting or implementing these, one must not lose sight of, and must necessarily modify or adapt to, the specific national contexts and conditions within which they are sought to be enforced.[1690]

With this, the thesis arrives at the national context of India- the core contribution of it.

[1688] See section II.7C in chapter II of this thesis.
[1689] See section II.8 in chapter II of this thesis.
[1690] Explained with specific reference to the national contexts of Norway and the UK in section II.7D in chapter II of this thesis.

Where does India stand in relation to Boardroom Gender Diversity?

Prior to suggesting any adapted forms of the proposals made above to be applied to India, it is necessary to understand and critically analyse India's legal position on boardroom gender diversity in some detail. Accordingly, this thesis engages in the first of its kind critical review unique to India of the "one woman director" quota, its policy approach, the underlying rationale, and the outcomes (based on an in-depth, comprehensive and purposive analysis of boards of 50 large companies and 50 mid-size (Nifty 50 and Nifty mid-cap 50) companies.

The quota that was introduced in 2013 with an implementation deadline of 2015 (coupled with a notified fine structure) indicates towards an unsteady trajectory, as it has since been substituted with "one independent woman director" in 2018 with renewed deadlines of 2019/2020.[1691] What adds to the shaky character of the quota is the uncertainty as regards the sanctions, considering that the fine structure introduced in 2015[1692] no longer applies.[1693] Moving to its rationale, the picture is no clearer. A major challenge confronted at this stage has been procuring the relevant materials or sources of information, as none of the existing literature (including the scantily available legislative debates or records) explicitly mentions whether the introduction of the female directorship requirement was designed to secure gender equality or value addition to the business. Hence, inferences had to be drawn from indirect sources and other suggestive materials, which include the draft company law bills, standing committee reports on such bills, regulatory notifications/circulars and concept papers (addressing diversity as one of the many issues), and expert committee views.[1694]

[1691] Discussed in section III.2 in chapter III of this thesis.
[1692] 'Fine structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement' (n 58).
[1693] Regulation 103 and Schedule X of the Listing Regulations.
[1694] Mentioned in the introduction chapter of this thesis; the thesis primarily relies upon, *inter alia*, the following sources- Companies Act of 2013 read with Companies (Appointment and Qualification of Directors) Rules 2014; the Standing Committee Reports on the preceding bills of 2009 and 2011; a concept paper as a note on the approach for revising the company law statute in 2013 from the 1956 legislation; the Listing Regulations of 2015 and other notifications/circulars issued by the SEBI from time to time; and the expert Kotak Committee report of 2017; followed by amendments to the timelines and application of the quota notified more recently in 2018.

India's experiences from its legacy of political quotas were also examined in this regard.[1695]

The foregoing sources reveal that India is seemingly inspired by a mix of both, the social justice and business rationales.[1696] For instance, on one hand, the Godrej Committee of 2012, the SEBI's consultative paper on corporate governance reforms, the Kotak Committee, and even few occasional public speeches made by the former SEBI chairperson and ministers, emphasise upon diverse skill-sets, board effectiveness and contributions to the business. On the other hand, the Standing Committee reports describe this quota to be in furtherance of the government's policy towards representative equality and gender balance. Therefore, the rationale resonated by India appears to be a mixed rationale, i.e., based on social-cum-business reasons or objectives.[1697]

So far, it is gathered that the "one woman director" quota backed by sanctions (although, of which the structure is not too clear), as strategized by India, emanates from a mixed or combined (or dual, akin to the concept referred in chapter I) case of boardroom gender diversity. Hence, both social justice and business rationales seem to have inspired the strategising of the quota. Coming to the last part of chapter III, this thesis finally investigates the outcomes of the quota five years since its enactment (although the renewed timelines for the reformed "one independent woman director" are currently ongoing).

An extensive review of India's 100 top and medium-sized listed (Nifty 50 and Nifty mid-cap 50) companies reveals a not-so-appealing status. Although not representing the whole of the industry, the review is indicative and offers a useful insight into the progress made so far. Notably, it includes several vital statistics and interpretations originally and extensively created by the author (based on the data procured from secondary sources) for the purposes of this thesis.

With women occupying less than 14% of total director positions (even less, 11%, at aggregate country level), and a large number of defaulting companies, gender

[1695] Discussed in section III.4 in this chapter III above.
[1696] A Kamalnath & A Masselot (n 1141) 179-203, 193.
[1697] Analysed in section III.3 in chapter III of this thesis.

imbalance is still prevalent in boardrooms. With a quota that does not adhere to either demographic equality or a critical mass of 30% (or at least three) women, the results are far from what can be considered as representing functional or forward-looking diversity. This becomes clearer from a purposive assessment of the statistics and directors' profiles. These include, first, poor female representation in executive directorships (six out of 157, and 11 out of 136 in Nifty 50 and Nifty mid-cap 50 companies, illustrated in figures 22 and 23 respectively); second, functional segregation of female directors in board committees linked to monitoring rather than core business or productivity (illustrated in figure 24), which can only be expected to intensify with the announced "one independent woman" quota – in its nomenclature itself, it increases the risk of stereotyping women as occupying part-time "outsider" roles rather than "whole time" directorship; third, few chair positions (only 24 of more than 300); and fourth, niche and not-so-diverse attributes in terms of age, background, qualifications and competencies, and close connectivity which characterise existing female directorships.[1698]

In addition, instances of companies with more than one female director – i.e., in exceeding what the quota requires (as illustrated in figures 15 and 16), are rare. Finally, weak or boiler-plate contents of diversity policies which although not mandatorily required by law to be disclosed, nonetheless must be devised by companies (based on a review of annual reports of top-notch companies),[1699] indicate towards results that are "tick-box" and superficial. Considering that there has not been any organic or systemic progress, over and beyond the compliance that the quota imposed, it can be said that no significant industry momentum has been created in this regard. To put it simply, the "one woman director" quota has not been able to generate the desired results, or achieve the rationales it was strategized for. [1700]

Hence, one must ask – *what went wrong from a regulatory standpoint?*

[1698] Discussed in section III.5F in chapter III of this thesis.
[1699] Analysed in section III.5G in chapter III of this thesis.
[1700] Summarised in section III.6 in chapter III of this thesis.

Regulatory Mismatch

While the "one woman director" quota has been a good starting point as such (considering that India is first among its developing peers to initiate efforts on boardroom gender diversity), the momentum is still missing. The outcomes from the review of boards of Nifty 50 and Nifty mid-cap 50 companies, and the more recent industry aggregates,[1701] reveal that, although compliances with the letter of law can still be found (although not fully achieved), systemic progress or the spirit of diversity is still far-fetched.

Despite this, not much interest can be seen at the regulatory front to revisit the quota, in terms of mapping it out against the rationales for which it was imposed at the outset, or its outcomes. Moreover, no follow-ups or audits were done by the regulator in the five years since the enactment of the quota to review its progress in real terms. The reform that requires such "one woman director" to be an "independent" one also seems to be a sporadic reaction to media allegations against proxy appointments.[1702]

Hence, five years since its enactment, it is worthwhile to revisit the quota to understand if it was strategized the right way at the outset. Accordingly, the underlying rationale for which the quota was purportedly imposed, is compared with India's choice of policy approach. This mapping reveals that, while the rationale (as established in chapter III) is a mix of both – social justice and business reasons, the policy approach adopted is one of strict hard law, i.e., binding and mandatory quota with sanctions. To recall from chapter II, the general theory and the formulae to an optimum strategy require that, where the predominance is of the social justice rationale, the policy approach is hard law; and likewise, where the rationale is motivated by business reasons, the approach would be soft law. As a corollary, the strategy in case of former would be mandatory, binding quotas backed by sanctions, as against industry led voluntary measures for the latter. In case where neither of the two override the other, and the rationale is a combination or mix of both, the optimum approach would be one that lies mid-way between the hard law and soft law (or a mix of strategies, combining

[1701] 'Gender diversity: Top NSE-listed companies in violation of SEBI's directive' (n 1134).
[1702] See section III.5F(C) in chapter III of this thesis for a discussion as regards the implications of the reformed quota.

both mandatory and voluntary measures). Hence, when mapped against this general theory propounded, and the formulae for an optimum strategy, an outright mismatch between the quota (which is a purely hard law approach and strategy) and the rationale (which is a mix of both, social justice and business) emerges, referred as a "regulatory mismatch".[1703]

This was perhaps because, instead of engaging in regulatory innovation and integrative regulation, which was needed in the context of corporate boardrooms, India instead clung to its traditional legacy of the quota. In doing so, the regulator, however, failed to take cognisance of the lessons it should have learnt from its experience of political quotas. First, previous impositions of quotas made in exclusively political and social domains could not have worked for the dual case of boardroom gender diversity or the complex dynamics underlying these. Second, past experiences of controversies surrounding the quota as a strategy show that many remain deferred and not enacted even after decades of debate. Third, the structure of the quota does not suffice, as "one woman director" cannot reasonably be expected to bring about either equal rights or any value addition to boardrooms. Finally, the regulator ought to have examined whether India offers adequate socio-economic conditions to facilitate the mobility of women up the corporate ladder – necessary for any such strategy to succeed. As a consequence of an arguably impulsive strategy, India now stands at a juncture where its *why* no longer matches its *how*.

To rectify this, a mix of strategies that would cumulate up to a mid-way policy approach between hard law and soft law, on similar lines as what was proposed as a broad-level potential optimum strategy for boardroom gender diversity,[1704] is recommended, but with adaptions to suit what would be ideal for India.

To work best for India from a practical standpoint, it is important that the re-strategising or rectification of the regulatory mismatch happens in a way that factors and mitigates the severe candidature crisis peculiar to the Indian context. Notably, the crisis is a consequence of India's strikingly low female labour force participation, low

[1703] Explained in section IV.2 in chapter IV of this thesis.
[1704] See section II.7C (B) in chapter II of this thesis.

female literacy rates, and a vicious cycle (of gender segregation, stereotyping, mid-level filtration, severe leakage in the pipeline, and a "double" glass ceiling) with deep and staunch patriarchal roots.[1705]

Roadmap for India

Finally, with the two-fold objectives (i.e., (a) to rectify the regulatory mismatch, and (b) doing that in a way that factors the candidature crisis), the chapter proposes a roadmap specific and focused on the Indian context.

Firstly,to rectify the regulatory mismatch, this thesis proposes a mix of strategies so as to attain a balance between hard law and soft law in India's policy approach. It seeks to do so through two distinct strategies, one for the non-executive directorships, and the other for the executive constituent (conforming to the broad-level proposal made in chapter II). This would reconcile the incongruence between India's current strategy and policy approach vis-à-vis its mixed rationale.

Non-executive Directors

Not entirely rejecting what has already been enforced (as that would neither be a wise nor viable regulatory move), this thesis takes a pragmatic stance to retaining the quota but with significant modifications. These include replacing "one woman director" with progressive thresholds that adhere to critical mass, clearer sanctions and an implementation that is planned in two phases (further divided across companies based on their market capitalisation), as discussed in section IV.4A(B). To explain, the quota for female non-executive directorship is set out on an incremental basis depending upon board size – i.e., boards of less than ten directors with five non-executive directors must have at least one female non-executive director; boards of less than 15 directors with eight non-executive directors must have two female non-executive directors, and boards with 15 or more directors with eight or more non-executive directors must have three female non-executive directors. All of these must be attained by the end of the first phase, which is fixed at 2019 for the top 300, 2020 for the top 500, 2022 for the top 1000, and 2025 for all listed companies. In the second or final phase (i.e., by the end of 2028), the quota would increase to two, three and 30% of

[1705] Explained in section IV.3 in chapter IV of this thesis.

non-executive directorships, for the outlined board sizes respectively. The proposal for the modified quota is illustrated here:

Board Size	Total Non-executive Directors (at least 50% of board size)	Number of Female Non-executive Directors (first phase)	Number of Female Non-executive Directors (second phase)
Six or more, but less than ten[1706]	Three to five	ONE	TWO
Ten or more, but less than 15	Five to seven	TWO	THREE
Fifteen or more	Eight or more	THREE	30% of non-executive Directors

Similarly, sanctions would apply incrementally – i.e., starting with warnings published on public forums, then fines and monetary penalties (crafted in a manner that outweighs the cost of compliance, for instance, fixing it as a percentage of the company's turnover or profits such that it is equally onerous and deterrent for small and big companies alike), followed by suspension of fees and benefits accruing to existing directors and/or nullifying appointments that are made in violation of the quota, and, finally, restrictions on or suspension of trading.

While this provides enough leverage to the regulator to measure compliance, identify deficits and missing links and rectify gaps as a parallel process, it also enables more mindful big companies to lead by example and inspire smaller ones to comply, while also learning lessons from experiences on their way to compliance.

As regards the candidature, considering that the quota would be confined to only the non-executive constituent, the pressure that an over-arching quota applicable to the whole of the board might exert stands automatically reduced or mitigated. The stress reduces further because of deferred and phased-out timelines, as the number of companies competing for candidates at the same time is lower. This also allows for

[1706] As per the SEBI's announcement pursuant to the Kotak Committee, the board size of public companies must have a minimum of six directors in the top 1000 listed entities by 1 April 2019, and in the top 2000 listed entities by 1 April 2020- 'SEBI Board Meeting' (n 60) 1.

time to build upon the available candidature, which is, at present, not adequate for an over-arching and immediate quota. Through such spacing out of thresholds and corresponding deadlines, India will have more time to be ready for each stage of the modified quota.

Moreover, for directors with a significantly peripheral role to play and limited levels of involvement, interventions and condensed liabilities, the skill-set required is comparatively more generalised and broad-based.[1707] Not necessarily in the same company or sector, an understanding of how organisations and operations are run is sufficient to be (or to be capable of being) a leader, even if not to be able to entrepreneurially run a company. A search for non-executive directors should therefore ideally look beyond to academics, researchers, accountants, lawyers, professionals, entrepreneurs, public servants and not-for-profit areas to meet the immediate demand of the modified quota.[1708]

To ensure that India is able to utilise its existing candidature, and further develop and strengthen it in a manner so as to continually align with the quota, the recommended strategy must go beyond this. Accordingly, more proactive roles are assigned to search firms and nomination committees[1709] to enable extensive searches of what is available beyond what the CEO and/or the board seeks. This starts with, first, a more diverse composition of committees and firms, including their recruiting panels. At least one woman, whether a member or chairperson, must therefore be mandatorily involved. Second, to reduce board influence, shareholders' approval of the constitution of such committees and the engagement of firms is recommended. Third, as well as a ceiling for the maximum number of nomination committees of which it is possible to be a part, it is advised that search firms and directors within the nomination committee must be engaged on a rotational basis. Fourth, they must proactively draw up internal guidelines as regards the fairness of their recruitment procedures. In this regard, the SEBI may draw a voluntary code, coupled with disclosure obligations.

[1707] Discussed in section IV.4A(A) in chapter IV of this thesis.
[1708] M Huse (n 879) 95
[1709] Explained in section IV.4A(C) in chapter IV of this thesis.

Further, given the need for a consolidated and comprehensive database of female directors, which is largely missing in India, search firms are in a more resourceful position to construct one.[1710] If centralised, published and administered by the SEBI (or suitable delegates), this can be a strong point of reference for future appointments. While what is suggested can help increase the objectivity and outreach of searches for what is available, it is important that the candidature is further developed and built upon to cater to the gradually increasing demands for female directors. In this regard, this thesis recommends professionalising of non-executive directorship (for both genders), in the form of certification and courses structured under an "Academy of Corporate Directors".[1711] While search firms can come together and enter into a MoU that would define the relevant scope and charter, the institution must be formed under the aegis of the SEBI to avoid apprehensions as regards its authenticity and credibility.

Through all of these, the dominant myopia to restrict the search for non-executive directors to only current or previous executive positions within the sector can be done away with for a broadened outlook. This would not only expand the candidature, but, through reduced prior connections with management and with wider perspectives, can also enrich the quality of such directorship.

Executive Directors

Considering that how this constituent operates and its internal dynamism can hardly be gauged from outside, externally imposed "one size" rules or a rigid quota would not work for this constituent. This is particularly the case as hands-on involvement, technical competencies and company-specific expertise are far more important for executive directorship, much of which needs to be adjudged and decided on a business-specific or need basis. Thus, where a trade-off between strict and precise legalization vis-à-vis business judgment and private autonomy has to be struck,[1712] and where hard law cannot reach, softer measures should step in. Instead of leaving this out of the regulatory radar, a strategy that would involve minimalist regulatory intervention – i.e., at least a 30% target on a conform-or-explain basis – is recommended. Although

[1710] Suggested in section IV.4A(D) in chapter IV of this thesis.
[1711] Explained in section IV.4A(E) in chapter IV of this thesis.
[1712] KW Abbott & D Snidal (n 617) 421–456, 455.

voluntary, and with no sanctions to apply, this would nonetheless offer a focal point[1713] for industry momentum and formative expectations. Some strength might be added to its enforcement by way of disclosure obligations requiring companies to report their conformity or non-conformity, as the case may be. The SEBI could consider issuing a note as regards what all such disclosures should contain, and which might include the suggestions made in this thesis.[1714] Once again, this target is structured along timelines that are divided across companies based on their market capitalisation. While reducing the stress over candidature and allowing for the time needed to further build upon the pipeline, this would also enable the regulator to retain its focus and attention on each stage separately, and hopefully ensure a more thorough and qualitative review of the disclosures made. Having said this, caution must be exercised to retain the target on a conform-or-explain basis, and not escalate to a comply-or-explain strategy.

While this will help the industry realise that female directorship is not only about monitoring or peripheral non-executive roles, which might in turn take away the stigma often associated with a quota, this avoids excessive regulation of what cannot be externally and comprehensively done. With layered regulatory oversight, although companies would be regularly reminded of standards that they are expected to attain, and any irresponsible omissions met with market reprimands, they would not succumb to any pressure to comply. Rather, they would be able to construct their own logic and reasons for attaining and adapting to such targets.

In terms of candidature, with tasks directly and intimately linked to the core business or strategic decision-making, these directors must have more proximate awareness, knowledge and expertise of the company. Thus, they are preferably sourced from amidst those with first-hand exposure to business-specific nuances – i.e., key managerial, line and staff positions within the organisation or across competing businesses or the pipeline. Set amidst staunch patriarchal values, which trigger a vicious cycle of gender segregation, lingering pay gaps, mid-career attrition and male hegemonic boards resembling parochial chambers, resulting in "double" ceilings,[1715]

[1713] AT Guzman & TL Meyer, 'International Soft Law' (2010) 2(1) The Journal of Legal Analysis 171-225, 176.
[1714] Provided in section IV.4B(B) in chapter IV of this thesis.
[1715] Demonstrated in figure 32 of this thesis.

the fiercely leaking pipeline in India comes as no surprise. A severe drain of female candidature in the passage of their transition from junior to middle levels, and then again from middle to senior levels, explains why Indian women are few in number in corporate leadership, and fewer in executive directorships.

To seal the leakage and develop it further, a top-down approach alone (seeking women in top positions) would not help. Simply increasing the numbers at board level would not redress the glass ceiling resulting from stereotypical temperaments, gender segregation, pay disparity and mid-level attritions, all of which would continue to erode the pipeline. What transpires down translates upwards, meaning that it is essential to mainstream diversity reforms into each sub-system, or "genetically" within the company.

For in-house capacity building intimately linked to the executive pipeline, the SEBI should issue guidance that would offer a direction or a broad framework upon which companies might then formulate their own tailor-made practices. Such guidance is critically needed as most Indian companies have not yet been able to conceive formal diversity policies or plans on their own, or, even where they have done so, such policies are no more than boiler-plates without any functional significance. To fill this gap, where the industry still seems clueless, as does the regulator, a model policy or a "ready reckoner for in-house diversity" is proposed.[1716] This includes provisions pertaining to, *inter alia*, gender-neutral recruitment and progression criteria, more definite work profiles and fixation of liabilities, work–life conditions, diversity as an extensive criterion for board/committee/individual director evaluation, and diversity of due diligence and audit. Although by no means exhaustive, this would nonetheless offer a direction in which the regulator and companies can act. As well as being an instrument of self-reflection, a diversity policy devised on these lines can help in cultivating a more extensive range of candidature within the organisation. A diversity policy modelled on the lines of the proposed "ready reckoner" if well-designed, efficiently implemented, and routinely enforced, can significantly contribute to attaining inclusive corporate governance.[1717]

[1716] Detailed in section IV.4B(C) in chapter IV of this thesis, and a snapshot is provided in Annexure A.
[1717] J Eijsbouts (n 805) 181-205, 205.

To administer all of these, a board committee dedicated to diversity, alongside a diversity department/wing, could be established. Headed by a chief diversity officer (CDO), this would ensure that diversity becomes an over-arching mission mainstreamed across all areas, functions and domains, gaining undivided and full-time attention and emphasis, as opposed to being sidelined, as currently appears to happen. Where this is not so viable, an alternate option could involve engaging diversity consultants for a fee, who would have specialised expertise in services linked to diversity. Although not commonly prevalent yet, such services may be a potential area to develop in future.

Last, but perhaps foremost and most vitally needed, setting the right tone from the top is needed. Only if and when the CEO/managing director, C-suite officers or functional heads and chairperson value diversity and highlight its significance, expressed in terms of advantages to business with evidence of financial indicators, can a strong message permeate down the corporate hierarchy into all relationships within and outside the company. A few suggestions as regards how this might effectively happen are set out.

Outside Boardrooms – to the Industry

To make diversity happen within the company and inside boardrooms, stimuli are needed from both the regulator and the market/industry. This owes particularly to the signalling and salutary effects of diversity, which are intimately linked to how the industry perceives such diversity.[1718] This thesis therefore recommends greater activism of, *inter alia*, institutional investors and industry agencies,[1719] who are "beholders of the beauty of diversity". While examples at global level where institutional investors have been instrumental in reforming boardrooms are many, this is not the case for India, where such interventions have been few, occasional and selective. However, given the significance of these in the context of dual cases of diversity (which cannot be comprehensively regulated), particularly for India's mixed rationale, it is time that the industry becomes more proactive and engaging. This is

[1718] Refer to the discussions on boardroom gender diversity as a concept in chapter I of this thesis.
[1719] Detailed in section IV.4C in chapter IV of this thesis.

especially needed for the target applicable to the executive constituent, as the strength of such a strategy lies predominantly in "naming and shaming" by market forces.[1720]

While a stewardship code might be of some help, and is also being contemplated in India, the contents of this, as applicable to insurers and pension funds, reveal that they go no further than enumerating diversity as one of the parameters that should be overseen by investors. This is once again inconsequential if not backed by adequate incentives and means for investors to follow this. To this end, a combination of regulatory and contractual measures is suggested, which starts with such a code, reasoning clearly and explicitly why investors should be interested in diversity, and why it has become their responsibility. Next, diversity can be spelt out as an explicit investment criterion, along with the requirement for disclosure as regards the diversity component of investee companies. In this regard, the SEBI may consider "recommending" boardroom gender diversity as a criterion in the investment rules. Likewise, specifically for foreign investments, the Reserve Bank of India may consider issuing guidelines with reporting requirements for diversity. Further, if replicated in contractual covenants (such as in investment/shareholders' agreements), in terms of conditions precedent, veto powers or "say-on-diversity", "tag along" and "drag along", and more extensive termination or exit rights, it can act as a pressure tactic to trigger action.

In addition, institutional investors might connect directly by requiring separate meetings (in addition to general meetings) with the management, boards or CDOs, as necessary. In particular, for diverse recruitment, they may offer sponsorship of an advance deposit of INR 100,000 for new candidates for directorship in accordance with section 160 of the Act of 2013. They can also make use of the stakeholder relationship committee and redressal of investors' grievances, set out as one of the criteria for evaluating the board when they seek to effect diversity. A coalition of investor groups and proxy advisors might also help in making such advocacy more impactful, constructive and synergic. While this relates to investee companies, diversity within the institution of the institutional investor can also be set as an eligibility condition for licensing with the regulator. This can help in affirming

[1720] L Thwaites (n 470) 137–168, 158.

diversity as a strategic concern for them as much as for the investee companies in which they invest.

Notably, for such investor activism to work, transparency is quintessential. While investors have to rely a great deal upon the annual reports and disclosures made by companies, greater levels of their activism and interests can enhance the regularity and quality of such disclosures. Thus, transparency and diversity can be mutually re-enforcing.

Finally, to generate and maintain momentum (which is currently not so strong) in the industry, a colour-coded diversity rating is recommended.[1721] With rankings of companies based on their diversity scores, this can form the basis of industry-sponsored awards. Needless to state, this would require the industry to engage in collation, comparison and publication of extensive data and keeping of records at sector, industry and national level. If consolidated and centralised (instead of fragmented as is currently the case), this can help track the country's progress on a regular basis.

All of this must, however, be preceded by diversity reforms within the leadership and organisational set-up of the regulator itself – i.e., the SEBI and stock exchanges – so that they lead not only with words, but pave the way by setting an example for the industry to follow.

All in all…

Towards a vision that ought to transform "patriarchy" to "participation" in boardrooms, there has to be a change from the current "tick-box" quota to what can bring real ideological reform. For this, externally imposed compliance alone does not suffice. Rather, companies should be allowed to adjust their "own optimum" such that diversity evolves as an institutionalised business norm (rather than a forced regulated exception).

Accordingly, the recommended roadmap starts with organically inventing (and not transplanting or replicating law from elsewhere) a potential optimum legal strategy for

[1721] Illustrated in figure 34 of this thesis.

India. Through a combination of a mandatory quota for non-executive directors and a conform-or-explain basis target for executive directors, the strategy attains the much sought-after balance between hard law and soft law policy approaches. This is much needed in view of the mixed social justice and business rationale underlying why India seeks such diversity (which coincides with the dual case upon which boardroom gender diversity conceptually stands). While fixing regulatory deviance, this is also expected to find greater harmony within India's governance set-up, lying between a rule-based and principle-based arrangement.

This harmony between soft and hard policy approaches as suggested more generally in chapter 2, and more specifically for India in chapter 4, is expected to serve the unique demands of boardroom gender diversity- which although not a compulsory business norm yet, has nonetheless triggered the awareness that "something must be done".[1722] In addition, a strategy that does not make an immediate jump start, but is progressive and incremental, would be better aligned with India's candidature, which is currently deficient. While creating greater demand for female directors through a quota, target and industry activism, the strategy interweaves with measures to strengthen the supply of candidates through better utilising what is available and developing future candidature for the non-executive and executive constituents. As opposed to the current regulatory temperament to set out rules while being oblivious to how the industry would cope with it, the recommendations made will ensure that India is ready for each stage of the regulation, as and when the deadline approaches. This way, diversity will grow gradually, but steadily and symmetrically.

Hinting at institutionalising diversity not as an end but as a way of life for companies to breathe, what must be strived for is a work environment where differences are not oppressed, rather recognised, acknowledged, accommodated, utilised and allowed to surface. Accordingly, an all-inclusive roadmap involving industry and market players, as well as the regulator, with their roles interwoven with the strategy, is recommended:

[1722] C Chinkin (n 1492) chapter 1, 41.

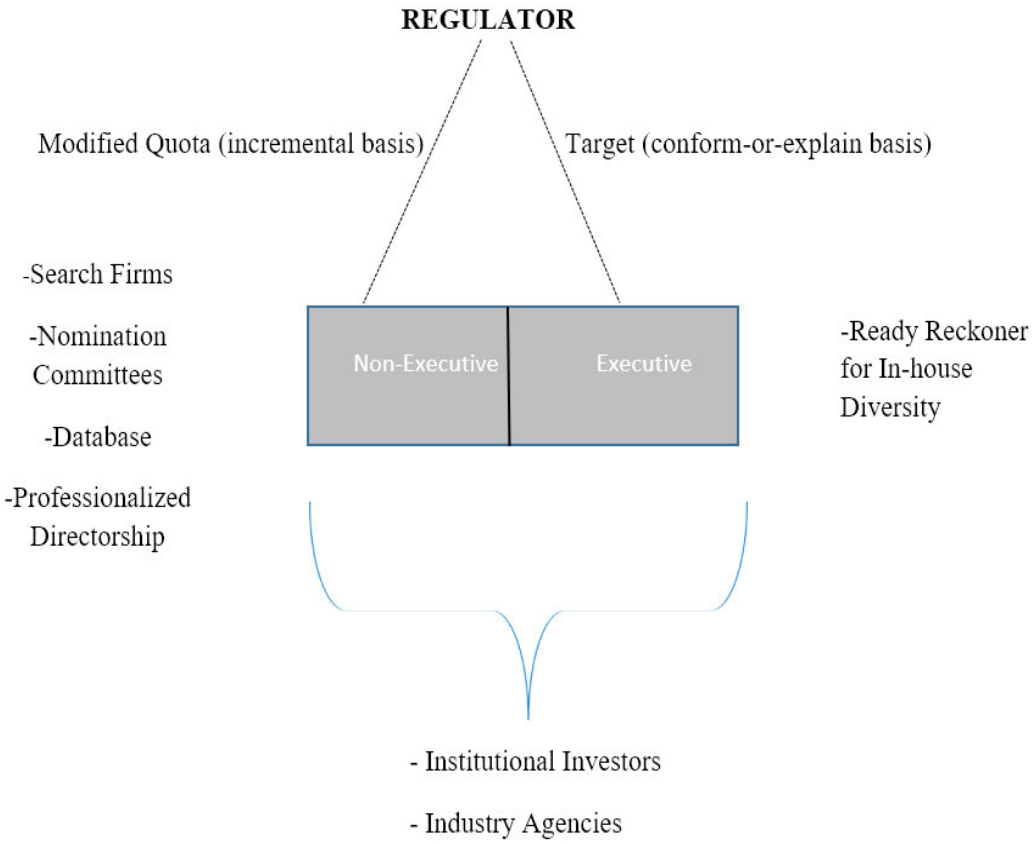

Figure 36: Roadmap for India

As a sum of *dejure* (regulation – quota plus target) and *defacto* (candidature and industry practice) diversity, a recommended roadmap like this would help in bridging the gap that lies between the scholarship and practice of India's boardroom gender diversity, for a win–win situation for all.

What remains to be done…

Outside the scope of this thesis, which addresses boardroom gender diversity from a corporate governance, particularly a regulatory, standpoint, and even more focused on the national context of India, there remain several potential topics that could be separately taken up for research in future.

For instance, within corporate governance, the real effects of gender diversity on India's board and corporate performances are yet to be mapped out. While a few industry reviews exist that measure this against financial denominators such as return on equity, the results are premature. This is because India is still at a transitional stage insofar as regulation of female directorship is concerned, and these reviews are mostly

clustered around the same time as the "one woman director" quota was enforced or subsequent reforms were announced. Effects cannot be instantaneous or magical. To allow for the regulations to stabilise, the industry to adapt, and directors (both male and female) to adjust, reviews must be spaced out across a wider time span so that the real effects are visible and can be captured. Only then can a strong belief in business advantages prominently emerge for a business norm to evolve. Alongside financial denominators, this may be further supplemented with interactions with CEOs, functional heads and female directors, so that more intangible benefits (not patently visible in financial reports) are not missed out. Having said this, given the difficulty in penetrating the opaque doors of India's corporate set-up, this would not be easy to pursue. In addition, reviews of family-owned as against dispersed ownership, state-owned public sector versus private sector, listed versus unlisted, and public companies versus private companies, may be undertaken, potentially offering a comparative overview of such diversity. Research may further transgress national borders to compare India with its developing peers.

Some others include, *inter alia*, reforms within equality and anti-discrimination laws and institutional set-up. Currently governed by over-arching fundamental rights in the COI, complaints can be enforced only against the state (and not private persons). Moreover, given the overlap and duplication of enforcing agencies (as discussed in chapter III), an all-encompassing equality and anti-discrimination legislation, catering to specificities of India's society and culture, will soon be needed. With effects that might spill over into the corporate domain, including boardrooms, the question of whether the pending bill of 2016 would suffice, and align with company reforms already undertaken, warrants stand-alone research in itself.

Further, for a holistic understanding of such diversity, it needs to be examined from a cultural perspective, which is rather tight for India. The implications of one over the other, and the amalgamation of the two, has become a critical area of study. Likewise, given India's strong and rigid advocacy of corporate social responsibility (requiring companies to make a mandatory provision for it) on one hand, and the social limb of gender diversity on the other, it would be interesting to note how the latter can be, if at all, included within the obligations pertaining to the former. *Can the two be merged?*

Lastly, mainstreaming diversity into every policy-making and welfare measure, as well as state provisions in relation to, for example, education and training, taxes, pensions, grants of subsidies, allocating government contracts/tenders, collective bargaining/trade unions, more economic entitlements to women, facilitating female entrepreneurship, female-focused incubators for start-ups and credit financing, state-sponsored maternity (which remains an onus upon employers), and compulsory paternal leave, need further thoughts and enhancements, such that they might offer optimum precincts, outside company regulation, for diversity to sustain itself.

Reiterating once again, starting from here, diversity is yet to unfold…

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Training

The author has attended the unconscious bias training that was organized for, and by the University of Edinburgh on 6 June 2017.