

Independent Directors – Sentinels of Stakeholders

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The concept of 'Independent Directors' has assumed greater significance today with the onset of 'Corporate Governance'. In the era of dynamism, the concepts and perceptions change as frequently as the seasons change. The composition of Board of companies in which 'public interest' is involved is a subject matter of considerable debate and discussion. A greater emphasis is being laid on transparency in governance and management. The way the Board functions affects the entire corporate culture; the impact and effect of which is also discernable on the economy.

The supporters of the concept of independent directors see a light through the tunnel in the era of good governance. The family or promoter controlled Boards in which public at large is the stakeholder are presumed to be tilted towards protection of their own interests though this may not be entirely true. There are many examples of promoter-controlled companies creating wealth for its stakeholders. The question, however, remains, whether these companies could have done better had there been independent directors. There are no straight answers to this moot question.

The presumption that forms the basis to have independent directors on the Board is that a Board with independent directors functions in a more transparent and effective manner. Prior to examining this issue, it is relevant to touch upon the meaning of 'independence.' Independence here does not mean sovereignty, autonomy, freedom or liberty. The adjective 'independent' is more relevant than the noun 'independence'. Simply put, a person who is not dependent is

'independent'. This definition of 'independent' is music to the ears of the law framers. Its practical utility is, however, zilch.

The independent directors are the custodians of stakeholders; guardians of their interest in a company. The corporate culture revolves on basic concept of divorce of ownership and governance. The independent directors like policemen in civil dress ought to notice the aberration, pinpoint it at the earliest opportunity, probe further to gather information and make the management take remedial steps immediately or else blow the whistle to send out early warnings. With the authority to obtain information and probe further, comes the responsibility – of being reasonable and logical. Whistle blowing by an independent director has serious consequences and must be done with extreme caution and prudence. Those backing promoter controlled Boards contend that it is the promoter who has high stakes in the company and he knows best about business. Advocates of such a theory, however, overlook the fact that the company has the stakeholders whose interest needs to be looked after. A corporate citizen has Social Responsibility besides manufacturing profits and building wealth. A train needs a driver to command and run but it also needs a guard to indicate when to start and when to stop.

The core issue today is, however, not whether the concept of independent directors is acceptable or not but the vital issue is the degree of independence that is acceptable. Can an independent director, with all the qualifications and disqualifications, be still really called an independent director in true sense? The promoter controlled or remote controlled companies elect their independent directors on the basis of brute majority of the promoters/persons acting in concert. The independent director acting sincerely as watchdog of the stakeholders may find himself eased out of the Board at the time of next retirement by rotation. The promoters desire independent directors to be friendly and support key decisions already taken by them, in the so-called Board meetings. In present corporate scenario, no independent director can get himself

independently elected without the crutches provided by the promoters. The solution lies within. Remove the crutches and remove the power of crutches provider. Simply stated, let the independent directors be elected at the shareholders meeting by shareholders other than promoters, their relatives and persons acting in concert. Identifying the promoters, their relatives and persons acting in concert is not a difficult task. Onus lies on law framers to incorporate such safeguards to provide corporate guardians of highest quality to watch the interest of stakeholders.

Should the keepers of interest of stakeholders have business intellect and wisdom? The answer is straightforward. A big No. The independent directors are not there to do business but to keep a vigil to ensure that the activities in the company are fair, truthful, transparent and reasonable. The interest of minority, creditors, lenders, public, customers, government etc is being protected through adoption of fair business practices, commonly known as good governance practices. The independent director need not be an expert; his conscience though must be transparent and clear. Independent directors must have independent thinking, insight and prudence. No prior experience of Boards is essential for an unshackled person with the freedom of thought will bring fresh ideas and views. The persons with ability to think laterally straightaway qualify to be independent directors. Finding such an independent director is no mean task in itself. The concept of independent director is in the process of evolution and by the time the concept ripens, the availability of independent directors shall be by hordes.

The independent directors having assumed greater significance and importance ought to bear in mind their responsibilities. The discharge of these responsibilities must be done with prudence and discretion. Any failure in rightful discharge of responsibility, if proved, must bring some punitive action. There cannot be any unfettered freedom; the independent directors enjoy freedom to question, freedom to ask, freedom to check and freedom to blow the whistle –

these freedoms demand that the independent director must be subject to certain punitive action in case of failure to discharge responsibility reasonably. The independent director not attending the meetings of the Board should be held responsible in case any decision taken in any such meeting severely affects the interest of the stakeholders.

The question of remuneration of independent directors poses another challenge for the law makers and advocates of this concept. Whether the independent directors be remunerated or not and if yes, to what extent? The first question is easier to answer. There is consensus amongst the corporate gurus, promoters and law makers that independent directors cannot be expected to take on the responsibility of corporate watchman unless suitably compensated. Developing criteria for payment of remuneration to independent directors, which does not affect their independence, is certainly a momentous task. There is a view that independent directors should only be paid sitting fee for the meetings attended by them. The task of an independent director is not restricted to meetings only; it extends beyond and compensation in the form of sitting fee only seems to be inadequate. Undoubtedly, independent directors are rendering service but can they be equated with daily wage earners. Determining the compensation amount of independent directors, as stated earlier, is an arduous task. Their compensation should, however, commensurate with the responsibilities they are shouldering. Should the independent directors be remunerated out of the funds of the company? The question seems to be odious but is not extraneous. One view is that the independent director squanders his independence the moment he is dependent on the company for compensation. This logic is not without reason. But does an auditor, who gets his remuneration from the company, no longer remains independent. The answer once again lies within; the independence does not depend on who compensates – what is required is independence of thinking – but who is in a position to determine criteria for remuneration. Any discretion to corporates would severely undermine the independence of the independent directors. Another suggestion has been floated

that the remuneration should be paid out of Investor Protection & Education Fund created under section 205C of the Act. The proposition is, to say the least, outrageous. Any form of Government control is neither desirable nor feasible. Let the corporate world be trusted and it is only a matter of time before they realize the benefits associated with this concept. The image, the goodwill and the reputation of any corporate on account of excellence in corporate governance would yield benefits in many ways and once that realization sets in, a day will come when the independent directors would rule the roost.

The independent directors have a task cut out for them and they can excel only if they enhance their skills. The continuous skill enhancement programmes must be made mandatory under the law for the independent directors. The obvious requirement is quality and not quantity. The process of being trained as an independent director is a continuous process and bulk of experience is gained 'on the job'. The saying - *'wisdom comes from experience and experience comes from foolishness'* is appropriate for independent directors also. Skill enhancement though is indispensable.

Every effort should be directed towards retaining independence of directors and moral keepers should decline the position of independent directors should they feel otherwise. The law makers and the government have to continuously monitor the practical utility of the provisions relating to independent directors and ought not hesitate to amend or modify the provisions if contrary is observed. The law relating to corporate governance, of which the concept of independent directors is a part, should be dynamic and must change with the change in corporate culture, time and situation. The concept of independent directors cannot be imposed through laws only; its acceptability has to come from within and the government and chambers of commerce must champion this noble cause to ensure acceptability of this concept, not as a façade, but as a reality. The evolution of this concept is on and let it flow like holy river Ganga, changing its course innumerable times but not stopping to flow.