

CORPORATE GOVERNANCE IN TIMES OF ‘CORPORATE GRIEF’

The present pandemic has caused major disruptions in the economy, with companies around the globe being under immense pressure to deal with collapsing markets; and has threatened the very survival of previously well-performing enterprises. Such unprecedented times raise some pertinent questions with respect to the role that Corporate Governance now plays in supporting an organization’s effective response to the current crisis. In pursuance of the same, Bombay Chamber of Commerce and Industry organized a webinar on ‘*Corporate Governance in Challenging Times*’ on December 18, 2020 with Mr. Suhas Tuljapurkar, Managing Partner of Legasis Partners and Founder-Director of Legasis Services Pvt. Ltd. being the key speaker.

During the course of the webinar, various issues related to corporate governance were highlighted against the backdrop of the pandemic, such as survival of the corporate, the need for a robust corporate governance regime for rebuilding and recovery, the role of independent directors, stakeholder engagement to name a few. The events preceding and succeeding the present pandemic can be viewed as *Pre-Coronial Era*, the *Coronial Era* and *Post-Coronial Era*.

The Black Elephant:

The 2020 pandemic has been identified as an event that has redefined all relationships – be it business, family or social. It has once again taught the businesses that while the unplanned catastrophic events will strike them, preparing for such events is only just one function relating to risk. Adam Sweidan has called Covid-19 ‘**The black elephant in the room**’¹. In the context of the crisis, the combined effect of the looming economic recession and some of the jurisdictions demonstrating social infest can be identified as the aforesaid ‘*Black Elephant*’. While the pandemic could not have been contemplated by anyone, it does raise a pertinent question as to whether the boards or business leaders have now learned to plan for the catastrophic events. It was observed that the Boards could have done better in mitigating risks arising from the unidentified catastrophic events.

¹ The environmentalist, Adam Sweidan, explained this idea to Thomas L. Friedman thus: “[It is] a cross between a ‘black swan’ — a rare, low-probability, unanticipated event with enormous ramifications — and ‘the elephant in the room’: a problem that is widely visible to everyone, yet that no one wants to address, even though we absolutely know that one day it will have vast, black-swan-like consequences.” <https://corpgov.law.harvard.edu/2020/09/19/how-can-boards-prepare-for-unplanned-catastrophic-events/>

Pre-Coronial Era:

In the pre-coronial era, the country witnessed a series of corporate governance failures. Every catastrophe in the domain of corporate governance and business in India had an element of failures of boards and corporate governance norms. Therefore, it was the failure of corporate governance that took the conversation forward in the Indian context, in the pre-coronial era with the 'consequential approach' of prosecution being the norm to set right the aforesaid failures of corporate governance. Instances such as that of Jaiprakash Industries where the personal assets of the independent directors were frozen at the interim level can be looked at as relevant examples. Such failures in corporate governance lead to more stringent regulations, for example, mandatory Resignation Disclosures of the Independent Directors to reevaluate the cause of the independent director's resignation. While this approach was adopted before the coronial era, the same needed to change in order for the corporate governance regime to grow in India.

Coronial Era:

The present pandemic required one to revisit the three decade old concept of VUCA world². VUCA stands for **Volatility, Uncertainty, Complexity and Ambiguity**, and the principles therein help an organization and its leadership to anticipate the future and to strengthen cooperation in organizations with modern solutions. In the beginning of the pandemic, the very survival of the corporate entities became difficult, with discussions revolving around lack of Business Continuity Plans and Risk Management at an enterprise level, with questions being raised with regard to the Boards' efficiency to oversee risks. It was observed that these concepts remained a board room paper discussion, rather than being implemented as programs. Therefore, in the initial days of the lockdown, companies struggled to put their risk and risk mitigation programs into effect. During the lockdown, a radical shift was seen in the independent directors' erstwhile approach of '*We v. Them*' to '*All of us together*'.

Furthermore, it was observed that while the stock exchange was functioning normally, the pressure of QSQT (*Quarter Se Quarter Tak*) was completely gone since the corporate social responsibility activities of the companies gained precedence over the profits made them. The responsibility of the companies towards migrant workers and the affected patients of Covid19 became a paramount factor while determining whether to trade or not. Since a good governance policy involves looking at the 'stakeholders' rather than 'shareholders', a radical shift occurred in the Boards' approach towards the health and compassion of employees, migrant workers and other victims of the pandemic. Discussions on good governance as subject of 5 Star conferences moved to digital platforms, which evolved from concepts like 'Work from Home'.

² Available on: <https://www.vuca-world.org/> (Last Visited: December 18, 2020)

Post-Coronial Era:

In what is now being called the Post-Coronial Era, a shift from VUCA World to VUCA Prime is being anticipated since the discussion has now moved from ‘corporate survival’ to ‘corporate purpose’. The corporate governance policies now revolve around risk and resilience. Board room discussions on good corporate governance and ‘*sustainability of the business and the Ecosystem*’ have now taken center-stage. Transitioning products and services from ‘Linear Economy’ to ‘Circular Economy’ has become imperative given the immense business and economic sense of such a transition. This shift will divert most of the businesses in the new world.

‘Digital Explosion’ is yet another element that will play a pivotal role in the systems of businesses post COVID-19. Given the unprecedented nature of the pandemic, businesses were forced to operate in the ‘Work from Home’ model, which is not covered under the existing legislations. The only legislative parameters which were in place for Work from Home was for ‘Bidi Workers’, and for those availing maternity benefits under the existing legislations. The aforesaid digital explosion and forced adoption of information technology has given way to large cyber security risks, a problem that most companies today are grappling with.

Board Considerations in 2021:

The use of ‘Re’ has been revisited during the pandemic, with concepts such as *Reimagine, Rethink, Reinvent, Recalibrate, Redesign, Reengineer, Restructure, Revive, Repair, Rebuild, Reset, Restore* redefining corporate governance and its relevancy. It has become imperative for companies and organizations to focus on ‘*resilient recovery*’ in the post-coronial era. In the new era, some important considerations for the Board will include communication between the Board and Management in terms of risk management will gain traction, along with fiduciary duties of directors, role of committees, succession planning, ESG and sustainability and role of independent directors. As per the OECD Report published on December 01, 2020, global GDP is predicted to return to pre-pandemic level in 2021. In light of such predictions, the question arises whether organizations are geared for such rapid growth.