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GENDER PARITY IN BOARDROOMS

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Abstract

Gone are the days when corporations were solely invested in multiplying wealth and scaling the ladder of profits. With the onset of a globalised world and interconnected economies, the configuration of corporations has evolved from money-minting engines to responsible entities focused on attaining wealth through ethical practises of effective corporate governance. An essential component of realising the goal of effective corporate governance is gender diversity and equal representation of the genders in the management of companies. For the longest time, business, as an economical practise was thought to be a vice, meant only for men. However, with reformative waves of gender inclusivity, women entrepreneurs and leaders have made their mark on the corporate world. Therefore, envisioning this progressive move, the Companies Act also mandated the inclusion of women directors on the board of the company to ensure the diversity of gender and of opinions. This research article critically analyses these provisions and justifies the rationale for such inclusive legislations. It aims to answer the research question by analysing statistics, committee reports and international trends. Further, the author attempts to draw out the flaws in the legislation and gives pragmatic suggestions for improving the prevailing law.

Research Question

Whether the existing company law legislation on women directors' tackles gender parity issues or is rusted legislation?

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Introduction

'Diversity is the engine of invention. It generates creativity that enriches the world.'

- ***Justin Trudeau***

The gender balance scale has been tipped in favour of men since roles were determined by society. With passing years these roles became ingrained in our system and working women were looked down upon in the society. The makers of the Constitution acknowledge these patriarchal notions which might pose a threat to the development and growth of the Indian society and stressed on equity over equality. The Constitution of India was amended various times to uplift women throughintroducing various articles such as reserved seats for women in village panchayats. *As per provisions contained in Article 243 D of the Constitution, 1/3rd of the Seats of Panchayati Raj Institutions and 1/3rd offices of the Chairperson at all level of Panchayati Raj Institutions covered by Part IX of the Constitution are reserved for women.*[1] Working on the same principles of empowerment and removal of inequalities the legislature amended the Company Law Act in 2013 and laid down provisions which made it mandatory for companies to have women directors as part of its board of directors.

As per Section 149(1)[2] of the Company's Act, 2013 every company which fulfils the given criteria shall appoint one women director on the board of directors.The criteria for the compulsory appointment is given under Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 and covers;*(i) every listed company;(ii) every other public company having (a) paid-up share capital of one hundred crore rupees or more or (b) turnover of three hundred crore rupees or more.*[3]

The law is also stringent upon the imposition of this provision. If Clause 49(II)(A)(1) of Listing Agreement of SEBI, which deals with the compulsory appointment of women directors, is not complied with within one year of the Act coming into force the penaltywill range from Rs 50,000 to Rs. 5,00,000 depending on the circumstances of each case.

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[1]Press Information Bureau,Ministry of Panchyati Raj,Government of India, Women Reservation in Panchayat, 2011.
[2]The Companies Act, 2013, Section 149(1).
[3] Companies (Appointment and Qualification of Directors) Rules, 2014, Rule 3.

The lawmakers introduced the amendment after observing the Glass ceiling effect[4]which provides evidence for male supremacy in highest management positions. This effect was observed after conducting various studies and it was concluded that gender bias becomes stronger while going up the managerial ladder.

The main motivation behind the appointment of women onthe board of directors is corporate governance[5].The role of any Board of directors is of a human limb of the company while taking decisions. These decisions are not a result of individual opinion but the confluence of various opinions which stem out of interactive discussions. Hence there is a need for diverse identities on any board of a company.The other reason behind having women directors can be found in Vishakha guidelines[6] which stress upon fosteringa safe working environment for women. This is only possible when women feel represented in top management positions.

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[4]David A. Cotter, Joan M.Hermsen, Seth Ovadia& Reeve Vanneman, The Glass Ceiling Effect, The University of North Carolina,2019.

[5] Janis Sarra, The Gender Implications of Corporate Governance Change, University of British Columbia Press 2002.

[6]Vishaka and Others v State of Rajasthan, (1997) AIR 1997 SC 3011 (India).

Theories of Corporate Governance

The corporate structure of India is in its nascent stage which entails that companies cannot be relied upon to function in an independent manner. The laws are put in constant pressure exerted by various global forces to develop and evolve with time. According to the ***Convergence theory of Corporate Governance***[7], the government sets statutory requirements to regulate the functioning of the company. Indian corporate market is an example of this concept where the government decides policies.

Whereas in countries like the US and UK the market decides policies, the government's role is of a mere regulator. Thus,gender diversity norms are not mandated by the government but are followed by the companies due to prevailing market demand. This type of model is classified under the ***Path dependence Theory of Corporate Governance***[8].

Historical Background and Committee Reports

The origin of providing reservation or quota to women on board of directorscan be traced back to Norway. Norway introduced a 40% reservation in every company's board of directors[9]in the year 2003, giving afive-year transition period for the companies to comply. Globally many countries followed this trend due to the success rate of the model like Italy, France, Malaysia and Spain.In 2010,a committee[10]was appointed in the United Kingdom to address the issue of lack of gender diversity in the board of directors. After this report,the government proposed to mandate a 25% representation of women on the Board of listed companies. To achieve this figure a transition period was allotted till 2025.

[7] Allen, W.T., Our Schizophrenic Conception of the Business Corporation, New York University Press, 1992.
[8] The Female FTSE Report, Center for Developing Women Business Leaders, Cranfield School of Management,2004, http://www.som.cranfield.ac.uk/som/research/centres/cdwbl/downloads/FT2004FinalReport.pdf.
[9] Norwegian Equality and Anti- Discrimination Act ,2018.
[10]Lord Davies of Abersoch, Women on Boards, UK Government, 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf

The two cases that changed the outlook of states legislatures in the US on fixing women quota are United States v Virginia [11](1996) and Craig v Boren (1976)[12]. The Supreme Court held that any law which discriminates on the basis of gender should have '*persuasive justification'*.A similar requirement has been laid down in the Indian Constitution under Article 15[13], the law made by the legislature can be justified on the principle of equity over equality. This forms a persuasive justification in the eyes of law.

One of the first committees to deliberate upon and recommend the mandate of women directors on the board was the Expert Committee headed by JJ Irani[14] in 2004. The recent amendment can be traced to the Uday Kotak Committee in 2017 when the legislature realized that instead of fulfilling the motive of gender diversity, the companies started appointing female family members to trick the law enforcement. *This committee (2017)has recommended that half of the board of listed entity should constitute of independent directors and at least one should be a woman independent director. 637 companies out of 1,670 companies listed on the National Stock Exchange (NSE), has to appoint a woman independent director as recommended by the Committee.*[15]

The committee reports serve as primary evidence for recent trends of appointment of directors. When the concept of companies was not evolved, homogeneity in the board was appreciated as it meant people who think alike were in a better position to take decisions. Whereas, recently it has shifted to heterogeneity for the representation of all classes.

India has ratified the CEDAW and needs to have laws in compliance with this treaty. Under'*Article 11 of the United Nations Convention on Elimination of all Forms of Discrimination against Women (CEDAW), states that 'men and women have the same rights to employment opportunities', 'promotion' and 'equal treatment in respect of work for equal*

[11]United States v Virginia, 518 U.S. 515 (1996).
[12]Craig v Boren,1976, 429 US 190 (1976).
[13] INDIA CONST. art. 15.
[14] Report of Expert Committee on Company Law, (Jan 15 2020, 21:28) http://reports.mca.gov.in/Reports/23-Irani%20committee%20report%20of%20the%20expert%20committee%20on%20Company%20law,2005.pdf.
[15] Report of Committee on Corporate Governance, (Jan 15 2020, 21:35) https://www.sebi.gov.in/reports/ reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html

value'.[16] This can be achieved by way of quota and reservation. This leads to gender parity and equality in the board rooms.

Issues and Analysis

The move towards gender inclusivity in corporations has been much appreciated in recent years. However, the legislative provision does not do much for women representation other than creating noise and promote a narrative. Having one women director fails to equate to gender inclusivity due to which there is a need for change in the law. The issues which are present in the law and need to be addressed are as follows:

1) After the law which mandated quota was passed, a trend has been observed in various studies relating to the apprehension of appointing women directors[17].The share price of the company appointing woman director was seen to drop considerably in the stock market. There are mainly two conclusions from the behavior displayed by prospective or current shareholders. Firstly, people do not trust the abilities of women working in high managerial positions. Secondly,the market assumes that the company is straying away from profitable motives to more social caused based issues.

2) The amendment in the Act did not give sufficient time for the appointment of women directors[18]. The transition period was one year and, in the cases, where vacancy is created for the post of women director three months periods is given. When we compare these time frames to international laws it is approximately 1/10 of the 10-year period given by the Norwegian government. This often leads to chaos and appointment of women directors who are not qualified for holding such a position. This situation then leads to defeating the purpose of the legislation which was to give women voice and representation (trophy director effect[19]).

[16] Branson, D., An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors, U. of Pittsburgh Legal Studies Research, 2012.
[17] S. Karen, E. Catherine, G. Cathy, Increasing Women's Participation on Corporate Boards in the USA, Journal of Business and Economics, 2014.
[18] M/S. Soumag Electronics Limited v Deputy Registrar of Companies, Crl.M.P.Nos.647 & 648 of 2016
[19] Dhir, Aaron. A, Challenging Boardroom Homogeneity, Cambridge University Press, 2015.

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3) There is not enough number of women who are qualified or skilled for these high managerial positions. The reasons are many but lack of training programs and career prospects coupled with societal pressures are the foremost ones. The report[20] released by McKinsey & Company ranked India lowest in women representation in the board of directors ranking globally.

4)As soon as the 2013 legislation came into effect many companies started complying with the mandate by way of appointing women family members as directors. These women were unaware and secondly did not have the capacity or capability to counter the decisions of other board members. This is another drawback in the legislation where it fails to address malicious appointment.

5) It is not only important to pass laws in order to support a social cause but what is more important is to amend existing flawed structures in the law for effective implementation. The structures of corporations do not have sufficient facilities for women like maternity benefits and safe working conditions. The lack of these facilities does not fostera healthy working environment thus fails to achieve gender parity.

6) The punishment for non-compliance to the above-mentioned clause is not enough to have a deterrence effect even though it includes both fine and imprisonment. There should be an amendment made to existing clauses increasing the penalty for non-compliance.

7) One women director cannot be enough to equal the male majority on the board. This mandate of appointing one women directorreleased by the government sounds more like formalityrather than an effective step in this area. It also leads to the situation of oppression and rule of the majority comes into play as the opinion of one female director cannot sway the majority male counterparts.

[20] McKinsey & Company, Women Matter 2013 - Gender Diversity in Top Management: Moving Corporate Culture, Moving Boundaries, Nov., 2013, http://www.mckinsey.com/~/media/mckinsey/dotcom/homepage/2012_March_Women_Matter/PDF/WomenMatter%202013%20Report.

STATISTICS

Exhibit 1: Gender Diversity in NIFTY 500 as on 31 March 2017[21]

The above exhibit represents gender diversity report by NIFTY in 2017. This clearly is a representation of 13 women per 100 men which entails the patriarchal structure of the Indian society. This gap in genders is still prevalent even after the mandatory requirement passed by the law which not only represents the failure of the goal of legislation but also a need for change.*Studies have found that an active board of directors and an independent board of directors are two characteristics of good governance that are closely related to strong organizational performance.*[22]

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[21]Gender Diversity in NIFTY 500, 2017https://www.nseindia.com/products/content/equities/indices /nifty_500.htm

[22] Millstein and Mac Avoy, The Conference Board of Canada, 1997 ,cahttp://www.europeanpwn.net/file s/women_on_boards_canada.pdf.

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Exhibit 2: Regulatory thresholds for gender diversity on corporate boards[23]

Country	Requirement Type	Threshold	Introduced in	Due Date[1]
Belgium	Mandatory	33%	2011	2017
Denmark	Comply or explain	40%	2013	-
France	Mandatory	40%	2010	2016
Germany	Mandatory	30%	2015	2016
Italy	Mandatory	33%	2011	2015
Malaysia	Mandatory	30%	2011	2016
Netherlands	Comply or explain	30%	2013	2016
Norway	Mandatory	40%	2003	2008
Spain	Comply or explain	40%	2007	2015
UAE	Mandatory	At least one-woman director	2012	-
India	Mandatory	At least one-woman director	2013	2015

This exhibit 2 represents the position of Indian law inthe international arena. Most of the developed nations have raised the requirement up to 40% of the entire board which eventually has resulted in gender parity. The table shows the redundant nature of Indian laws and the unwillingness on the part of Indian policymakers to repair the existing structure.

Conclusion and Suggestions

The rust infested laws are eating away the pillars of empowerment. There is no doubt about the fact that the existing laws need change. I agree with the policymakers to fix women quota in the board of directors rather relying on corporations to act themselves. The issue is not about the method adopted but fixing the loopholes which are withholding this amendment for becoming effective.

- The first solution is to increase the representation of women from one to be proportionate with the size of the company. The government should fix slabs based on the number of employees and turnover of the company.
- The time period of filling the vacancy of women director should be increased to 6 months so that someone qualified and experienced women can be appointed.

[23]Corporate India Women on Board, Prime Database Group Report ,May 2017, http://www.primedatabasegroup .com/primegroup_logo/Women%20Directors%20In%20India.pdf.

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- Out of the mandated number of women directors by law, 50% should be independent women directors. This will ensure that the company appoint women who do not share any relationship with the company thus giving an individual opinion.

- Government and private companies should start training programs for their existing female staff in order to promote them to managerial positions. This way a woman will feel motivated and contribute more tothe growth of the company.

- The result of not following the provisions laid down by the Act should result in deterrent provisions like delisting the companies or imposing a ban. The quantum of punishment and fine should be increased in proportion to the turnover of the company.

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