

Mandate for Women on Boards: Is it Enough?

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Abstract: The Companies Act, 2013, mandates the appointment of at least one woman on the board of directors of a company. While it does not mention whether she should be an independent director or not, the legislation creates a reservation based on sex. The paper examines whether and why such a mandate is needed for companies to be gender diverse. It highlights certain problems with the current legislation and provide rectifying measures for the same.

Keywords: Women, corporate boards, companies act, discrimination, glass ceiling.

INTRODUCTION

The society we live in creates an invisible boundary around individuals. This boundary is the expectations and responsibilities that are presumed of them. As long as we are within that boundary, we are socially desirable and acceptable. This boundary is however different for men, women, and others. While defining the social roles they must undertake, society also confines individuals on what they must not do. Hence, will cooking, cleaning, nurturing, housekeeping, all are predominantly assumed to be a woman's job, all remunerated out-of-the-house activities are assumed to be a man's duty. This creates a sexual division of labor in the society. From the time of hunters and gatherers, we see that work is divided among individuals depending on whether they are male or female. This indicates an assumed set of abilities for both the sexes—of what they can and cannot do—without looking into individual merits. Women, comparatively *less capable, weak, and fragile*, are bound to the workings of the home (*the inside*), while men, being the tougher sex, are sent out to fight wild animals and bring money and food to the table. Such a social division also creates a boundary within the working sector as well. Men transgressing this boundary to do household chores are looked down upon as being less manly and women working outside their homes are labelled careless, that is *if* they are allowed to transgress their boundary in the first place.

Even though today's world is increasingly accepting and encouraging women in the workforce, the inherent biases created by this sexual division of labor is manifested in many ways. Women continue to occupy the lowest rungs of employment areas available in the market. While most school teachers are women, men dominate the high paying education sector in

universities. Cooking, supposed to be a 'woman's job', is overtaken by men when it comes to being a professional chef at restaurants. The first person we see whenever we enter a company's headquarters, the receptionist, is often a woman. But rarely do we see women sitting at the main chair of a boardroom table. It is always a man who comes to our mind when we hear the word 'boss' or 'director' of a company. The lack of gender diversity in corporate boards is an issue of great importance to both the feminist and the corporate worlds. The issue can be looked at either from a sociological point of view or a corporate one. This paper will focus on the latter, in an Indian context.

The Companies Act 2013 (hereinafter referred to as the 'Act'), is the governing law of the corporate world in India. Even though it mandates having at least one woman director on the board, it is not solving the issue of gender diversity in companies. This paper looks at why there is a need for a law to enable women to get a seat at the boards and whether the question of merit of individuals is somewhere lost when it comes to giving representation to specific genders. While drawing a comparison from the United Kingdom, the paper also suggests some rectifying measures for improving gender diversity in company boards across India.

MANDATE OF THE LAW

The Companies Act 2013 mentions that, "such class or classes of companies as may be prescribed, shall have at least one woman director."¹ While this proviso seems to be a step forward towards gender equality, it is in no way levelling the playing field for women. This takes us to the question- why is there even a need for the law to mandatorily tell companies that you should hire women directors? To answer this question would be to look at the sociological point of view that we

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¹S.149 (1).

talked about earlier. Research conducted by the Harvard Kennedy School lists some challenges which firms face while employing women. These may range from maternity leaves to higher costs of their accommodation to the lack of labor regulations for women. Another reason might be the less proportion of women who are capable enough for such a position. In India, female higher education is not given as importance as males, again because of the sexual division of labor- 'why would you need formal education for sitting and taking care of the home?'. As a result, a large proportion of females, who could have otherwise left a mark, fail to even qualify for directorial positions.

Even though companies are free to decide on the criteria for hiring directors, most abide by a standardized test of prior executive level and board experience. "Thus, the fact that women also comprise a small number of top C-suite executives in public corporations tends to obstruct their ability to access directorships."²The Federation of Indian Chambers of Commerce and Industry (FICCI) has explicitly been against such a reservation for women on board. It takes the position that to be a director requires a certain level of expertise, knowledge, and qualifications and that gender should not be a criteria for procuring positions as important as one on the board. This is clearly indicative of the fact that women, somehow, lack the essentials of being a director and even though men do and will continue to dominate directorial positions, a formal reservation based on gender is not the right way to go.

POSSIBLE ISSUES WITH THE LEGISLATION

The Act of 2013 does not fix a maximum cap on the number of directors that a company can have. Even after the prescribed maximum limit of 15 directors, the company can appoint more directors after passing a special resolution. Now, companies with as much as 100 directors or as low as 15, should have at least (and in some cases, only) 1 woman director, who makes up the minority group within the board. They usually then face tokenism as they are the sole representatives of their group. 'They are first seen as being a female-embodiment of the sex role stereotype, and only later as individuals. This makes it difficult for the women directors to be heard and get their ideas across the dominant group of men.' Research shows that this is not however the case when there is more than one

woman on the board. It is argued that, "without a critical mass of three or more directors from the same group, the rest of the board will marginalize and scrutinize the minority director's views."³ Thus it is only when there will be 3 or more women on board that an effective change can be expected in the gender diversity quotient. It is only women who can argue for more women on directorial positions and this can be achieved only when there are enough critical mass of women to tackle the tokenism. Research also suggests that, "appointment of three or more female directors leads to significant increase in firm performance compared to the appointment of one or two females on corporate boards."

Many scholars have also argued against the imposition of a mandatory quota for women directors. "Because hiring a male director or investing in a male CEO is standard practice, to hire or invest in a woman is to stray from the norm-an inherently risky move." The first objection that many have is the absence of any material evidence that shows a direct correlation between the number of women directors and profits of a company. Even if such a correlation exists, the ratio of benefits to costs cannot be justified. Many times, companies hire women directors just to fulfill the mandatory requirements and show gender diversity on paper. This is problematic in many senses— hiring an incapable employee just for their gender gives importance to representation over merit. This can seriously hamper the company's functioning and value. When Norwegian firms mandated 40% quota for women directors, they suffered negatively, however, "...the negative impact was due to the age and inexperience of the new directors as opposed to their gender." "Quotas force firms either to pad their boards with token non-executive directors, or to allocate real power on the basis of sex rather than merit. Neither is good for corporate governance"

COMPARATIVE ANALYSIS WITH THE UNITED KINGDOM

The incorporation and management of Companies in the United Kingdom is governed by the UK Companies Act of 2006. While this Act, similar to that of India's, mentions certain conditions for the composition of the Board of Directors (Section 154-159), one cannot ignore the absence of any quota for women candidates for a seat on the Boards. This is not

²*Id.*

³*Supra note 3, 562.*

to say that the English corporate world does not promote diversity and equality. Certain governmental guidelines, like the Corporate Governance Code and the Hampton Alexander Review do set more diverse targets and give recommendations for companies to be more inclusive in their structure.

Despite all that, the problem of underrepresentation of women on corporate boards is faced equally by one of the most developed nations, the U.K. This has resulted in many recommendations from the government in the form of the UK Combined Corporate Governance Code and the Lord Davis Report in 2011. "The UK has adopted a voluntary approach as opposed to the quota based approach" of increasing female participation in corporate boards. "The rationale behind the voluntary approach is to allow a fundamental change in culture of the board internally and by organisations themselves rather than imposing the change from outside which may result in just increasing the number of females in the boardroom."⁴

"UK FTSE 100 companies with more women on their boards adopted the governance recommendations from the Higgs Review (2003) earlier than those without. In particular they focused on: better succession planning and the use of external search consultants; new director induction and training; audit and balance of the whole board's skills, knowledge and experience; and regular reviews of board performance." "In 2017, the UK government published the Hampton Alexander report which recommends FTSE100 companies to have 33% females in FTSE100 leadership teams by 2020." Thus, the UK government, on seeing better compliance i.e., better corporate governance from women, recommended to have more female board directors.

"A non-academic study conducted by an asset management firm in the UK looked at those companies with a threshold of at least 20% female representation across FTSE-listed boards. They found that operational and share price performance was significantly higher at one and three year averages for those companies with women making up over 20% of board members than those with lower female representation."

In the UK, "when companies were sorted by market capitalisation, 80 per cent of the top 20 FTSE 100 companies had women directors, compared to only 40 per cent of the bottom 20."

As opposed to the UK, India has introduced a quota of having at least one woman director on the boards of companies. However, "With regard to the compliance with the quota, the road map that was set at the enactment of the Act was altered from time to time; the first compliance date set was October 2014. This deadline was later extended and further regulations of all listed companies under Clause 49 of the Listing Agreement of the Securities Exchange Board of India require all listed companies to appoint at least one woman director on the board by April 1, 2015." A study conducted by Jayati Sarkar and Ekta Selarka in 2015 shows that 'most of the boards have one woman director...27 per cent of boards in their data have only one woman director...one woman director is more of a norm in India given that only 7 per cent of firms have two directors on their boards and only one per cent have more than two women directors on their boards.'⁵ "In terms of leadership positions, only 4 per cent of firms have female occupied CEO positions and about 2 per cent have female chairs, 28 per cent of the firms have male directors occupying both CEO and Chairperson positions which is much higher than the incidence of just 1 per cent of firms having female directors in a dual role."⁶

It is also argued that in India, "the effect of women director on firm performance depends significantly on the extent of operational and strategic control exerted by the promoter."⁷ The study also puts forth that women in India "have to overcome more obstacles and bear higher costs when they choose a high profile career path" as opposed to developed countries like the UK.

We can see that even though both the countries have benefited from having more women on board, the pace at which both are excelling is highly different. While UK is more receptive to the idea and recommendations of having more female directors, Indians still hesitate to let women choose high profile career paths.

However, current statistics show that the number of female executive directors at FTSE companies in the UK were at a low of 75 in 2021, even though it is the best they have recorded since 2011.

"India also has progressed in appointing women on company boards; from 6 per cent in 2014 to 14 per

⁴*Id.*

⁵*Id.* 24.

⁶*Id.* 25.

⁷*Id.* 35.

cent five years ago. Women now account for 17.6 per cent of directorships of the Nifty-500 companies. Although the number of women directorships is increasing, the pace of new appointments has faltered with just an aggregate 1 per cent increase over the last three years. Based on these current rates, India will take till 2058 to achieve 30 per cent gender diversity on boards. At the end of March this year, the Nifty-500 companies had 4,694 directorships, out of which 827 or 17.6 per cent were held by women.”

RECTIFYING MEASURES

By now, we have established that even though having more women on corporate boards benefits the company, the Indian legislation is not sufficient to combat the issue of gender diversity and women empowerment. In my opinion, to achieve this, a more proportionate system should be put in place. Instead of mandating the concrete number of women directors, the law should mandate the proportion of directors which should be women. This is to tackle the problem of tokenism as both a small company with only 5 directors and in a large company with 150 directors, can have one woman director and be done with the mandate of the law. With the proportionate method, number of women directors would be enough so as to actually be listened to on an equal footing as their male counterparts.

“To increase female representation at board level, other countries including Germany, Norway, Spain, France, Iceland, Italy, Belgium, Finland, and Kenya have introduced a legislative quota requiring firms to appoint between 30 and 40% of women into corporate boards. However, research evidence indicates that the gender quota has led to large number of inexperienced women being appointed to the boards, thereby damaging firm financial performance”

To avoid this, one could vouch for the voluntary system of appointments as used by the UK. However, that also comes with its baggage. A mix of the two systems could be employed as a better way of ensuring gender diversity as well as avoiding tokenism on corporate boards. One could also recommend expanding the criteria for appointment of directors by the companies. By increasing the ambit of who can be an effective director, one could expect more individuals, including women, to be eligible enough to be considered for the post. “In fact, exemplar companies with high gender diversity have integrated practices such as expanding criteria beyond the C-suite and prior board experience.”

Another measure that the Act should include pertains to the perception value. The legislation should include a clause with regards to hiring of prospective candidates depending on their perceived value to the company. Hiring should be made on merit and nobody should be disadvantaged because of their sex. This should also include transgendered and non-binaries who often find it difficult to find standard jobs itself. By having more diversity in the company, the perceived value of the company also increases to its clients.

CONCLUSION

In conclusion, we can say that it is pertinent to look for factors which are hindering women from climbing up the corporate ladder and there is an urgent need to rectify these factors. Having stringent laws will not always mean better implementation, it could also have an opposite effect of deterrence from law. The comparison between the UK and Indian legislation is an appropriate example of the impact of having quotas mandated by laws. While one requires companies to reserve seats for Women directors, the other does not. Even then, the issue of underrepresentation of women on corporate Boards continue to grow in both nations. Today, in India, many companies do not abide by the mandated law and still continue to have zero women as their directors. Imposing strict restrictions to hire women may also adversely affect the psyche of the existing male directors and in turn increase tokenism. Thus, the way out of this vicious cycle would be to give some extent of discretion to the companies while also bettering measures of education for women so that in the next 10 years, no such law is needed to ensure gender diversity.

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