

Women Directors: Does the Legislation Placate the Nexus with the Objective of the Amendment

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ABSTRACT:

The 2013 Amendment to the Companies Act, 2013 brought with it a lot of landmark changes to the legislation. However, the most appreciated yet the most criticized amendment remains the change made to Section 149 of the Act which now lays down for a mandatory appointment of a woman director to the board of directors for certain companies. This was done to ensure the dual objectives of better governance in corporate law and social empowerment of woman, to help with the barriers of immovability in the hierarchy due to lack of social awareness. The mandate set by this amendment has however “*compelled*” certain companies with heavy internal issues and other such capable companies to abrogate them and atory provisions of the law and appoint someone from their own kit handkin or relations to the board as a woman director so as to continue to hold a firm grip on the functioning of the company while there still sits some lady acting as a nominal head, ensuring “*compliance*” with the law .There arises a need therefore to check whether the legislation in itself is foolproof to meet with the objectives set forth by the law and if not then what can be done otherwise in order to ensure the same. The question also arises as to whether appointment of an ‘independent woman director’ instead of a “woman director” would resolve the challenging issue cropping up with the amendment.

I. MEANING OF A DIRECTOR AND WOMEN DIRECTORS:

The Companies Act, 2013 does not really define who a ‘*director*’ is in its full capacity and has under section 2(34) has given a very brief and unfulfilling definition of a director to mean that a director is a person who is appointed by the Board of the company¹. It is only after reading the various provisions of the Companies Act that one can truly understand what the roles and responsibilities of a director is, to delineate the term correctly in the first place.

Section 149 of the Companies Act, 2013 provides for the appointment of a director² and the only compulsory qualification applicable in uniformity if the existence of a DIN (Director Identification Number) as prescribed under section 153 of the said Act.³ A director is primarily the agent of the company and is responsible to oversee and carry out its transactions and operations.⁴ Every director has different attributes towards a company, depending upon the functions she/he carries on with respect to that of the Company.

¹ Section 2(34), Companies Act, 2013.

² Section 149, Companies Act, 2013.

³ Section 153, Companies Act, 2013.

⁴ Sarathi Leasing Finance Ltd v. B Narayana Shetty, (2006) 131 Comp Cas 798; Ferguson v. Wilson, (1866) 2 Ch App 77; Elkington & Co. v. Hurter, (1892) 2 Ch 452; Kuriakose v. PKV Group Industries, (2002) 111 Comp Cas 826.

A director may also be a promoter of the company⁵; in some regards can also be the employee or officer of the company⁶ if she/her is carrying on some labor on behalf of the company like in the case of *Lee v. Lee's Air Farming Ltd.*⁷ and in some regards is the trustee⁸ of the various properties and assets of the company. The Entire board of directors' collective act on behalf of the company and are the body which is responsible for the main function of decision making in a company. A director has managerial duties but not vice versa.⁹

The 2013 amendment to the Companies Act, 2013 pioneered a lot of landmark changes in the governance of Companies in the Indian scenario and effected a form of corporate revolution within such a broad yet limited sphere, may it be by defining the role of independent directors or defining the role of nominee directors.

However, the most landmark change that was brought to the Act was the way in which the government provided for the empowerment of women via amendment to the section 149(1) of Companies Act, 2013 which laid down for appointment of one women director on the board for every listed and every other public company having paid up share capital of one hundred crore rupees or more or a turnover of three hundred crore rupees or more. A new company is required to make the appointment within a period of 6 months while an already existing company is given a period of one year to make the appointment. An intermittent vacancy on the board shall be filled up at the earliest but not later than the next board meeting or three months from the time of such vacancy, whichever is later. The paid up share capital or the turnover of the latest audited financial statements shall be taken into consideration.

The main objective of appointing a women director directly flowed from the mandates of the Indian Constitution which has laid down for Right to Equality and Equality of Opportunity under Article 14 and 15 and, right to practice profession under Article 19 and following the guidelines laid down under Directive Principles of State Policy under Part IV. Article 39(a), 39(d) and 42 of the Constitution of India, specifically deal with providing equal work opportunity to women at work place along with other form of important leverages like equal pay and maternity reliefs.

The professional immovability of women who form such an important part of the social ladder was rightly taken into cognizance by the Indian lawmaking authority and was rightly attempted to be remedied by the legislation. However, there seems to be certain legislative lapses to make the laws full proof and

⁵Floating Services v. MV San FranscecoDipalola, (2004) 52 SCL 762.

⁶Lee Behrens and Co., Re, (1932) 2 Comp. Cas. 588.

⁷Lee v. Lee's Air Farming Ltd., (1961) AC 12.

⁸RamaswamyIyer v. Brahmayya and Co., (1966) 1 Comp. LJ 107 (Md.); Percival v. Wright, (1902) 2 Ch 421.

⁹DeenDayalu v. Sri B.P. Reddy, (1984) 2 Comp. LJ 396.

fully capable. This however does not completely render the amendment invalid but does help us enhance the need for reform or change for holistic development.

II. RESEARCH QUESTION IN HAND

The legislation which provides for appointment of women directors is a very abstract provision according to me for the legislation does not lay down any provision as to what the qualifications for such women directors should be.

Two rudimentary objectives behind making such a provision in the first case is to:

- a) Ensure empowerment of women in the corporate sector by giving them an opportunity to participate in management processes.
- b) Ensuring the holistic development of the Companies in such a process by neutralizing and equalizing the environment in which people belonging to all the genders, work to promise a better output by developing a healthy work atmosphere for all, ensuring a variance of perspective.

The issue however arises when the very obvious lacuna, very simply shadows the very rudiments of this amendment. The provision does not provide for any *qualifications* for women who are supposed to be appointed as such directors and because this has been set up as a mandate, it becomes obligatory on behalf of the board to make an appointment and as a result, in order to bend the law, women who belong to the family of the board or those related to the Company itself can be made to sit on the board as nominal heads; serving no real purpose of empowerment or equalizing the work environment or development of the company itself, rendering the effort of the whole amendment to have a zero or no impact.

In order to deal with this issue; there should be three steps:

- a) Understanding as to why there was a need to make such a special provision for the women which we have discussed via discussing the mandates of the Constitution and other laws.
- b) How does participation of women directors effect a change in the field of corporate governance and functioning of the board?
- c) How can the same provision be abrogated by the hands of companies who want to appoint their own kith and kin to do away with the mandatory conditions and studying whether the appointment of Independent women directors help resolving the issue of such unsolicited abrogation of law.

So the hypothesis or the research question or the issue in this case shall be: **“Is there a need to appoint ‘women’ director or is there a need to appoint an ‘independent women’ director in order to achieve**

the objective set forth by the Amendment made to Section 149(1) by the Companies Act, 2013 Amendment.”

III. LITERATURE REVIEW AND CRITICISM OF APPOINTMENT OF ‘WOMEN DIRECTORS’

The discourse of the female sex when it comes to such professional appointments is the ability of people to underestimate their professional capacities and override the compulsion of their appointment by making a token head sit on the board just for the sake of it. Yes, women in India do make up for about 50% of the total working population, however only 4% of these women make up for top executives of the nation.¹⁰

a) Challenging Boardroom Homogeneity: Corporate law, Governance a diversity¹¹:

This was a private study conducted by York University, where they discovered seven consequences of heterogeneity on board and groups which included quality monitoring and critical approach towards situations and issue guidance. So the objectives of having such women on board even in the international jurisprudence is to satisfy the two objectives given above and therefore the purpose and objective with which women hold such position, shall be mindful of the responsibilities of their chair and that placing of a nominal head on board would not fulfill the issue.

b) The Indian Companies Act, 2013- A boon or bane to sustainable development¹²:

The data explained by the author also talks about how on one hand the status accrued to the women is beneficial in nature but also talks about the ground reality that it is not completely black and white. The FICCI (Federation of Indian Chambers of Commerce and Industry), stretching upon the need to have directors who are “*experts, knowledgeable and qualified*” and were of the opinion that the mandate of the government via the Companies Act, 2013 is not definitive enough to ensure the same. *There is a need to ensure not only social but socio-economic development in the sphere of corporate governance.*

c) PHD Chamber, survey on gender diversity, 2011¹³:

The fact that more than a convenient change in the laws, elaborate efforts are needed to make a change in the mindsets breeding the need of such a change in the first place. Out of 66 board members that the body investigated, one-fourth of the board members were of the opinion that the women are incapable of holding such key position in the Company. The atmosphere shall be made conducive for the change first

¹⁰ H.L. Kaila, Women Work and Family, Rawat Publications (1st edition, 2005).

¹¹ Aaron A. Dhir, Cambridge University Press: Challenging Boardroom Homogeneity: Corporate law, Governance a diversity, Osgoode hall law School of York University, (2015).

¹² Volume 19, C.S. Mala Upadhyay, IOSR Journal of Business and Management: The Indian Companies Act 2013 – a boon or bane to Sustainable Development, (Issue 7, July, 2017).

¹³ PHD Chamber, *India's survey on gender diversity*, http://phdcci.in/file/thematic_pdf/Direct%20Selling-2011.pdf (2011).

or else there will be an obvious resort to abrogation or “twisting” of the law.

d) Women Empowerment: Women Directors on Corporate Boards¹⁴:

The data used in the research shows very clearly that one fourth of the women appointed in such key positions are actually related to one of the promoters of the Companies and there are some companies who have not yet complied with the requirements of this act but no apparent actions seems to have been taken on behalf of the tribunals. The paper also stretched upon the need and quality of ‘expertise’ of women who sit on the board.

e) Kotak Committee on corporate governance¹⁵:

The Uday Kotak Committee on corporate governance was of the opinion that instead of appointing mere women director on the board, according to the mandates of the amendment, there shall be an appointment of an ‘independent woman director’ and looking at the statistics conducted, also laid down for amendment in the qualifications that is required for such an appointment.

What we need to deliberate first is the need for such an appointment and whether the laws which are made in the favor of such appointment is enough to achieve objective envisioned.

The numerous amount of atrocities faced by the women at the hands of the dominant sex in each and every filed of progress is difficult to be ignored at any cost and any step which is taken in order to counter the oddities of this practice shall always be hailed. The amendment as mentioned before is made taking into cognizance the mandates of the Constitution of India to set up an egalitarian society to ensure holistic growth. It is women who make the optimistic goals seem to be realistic.

It is women who always project better attendance, and are more committed to better performance.¹⁶ They are always notably engaged and active towards what is expected.¹⁷ Subprime lending by the company is usually toned deaf with greater participation of women on the board of directors.¹⁸ There is a positive influence on sustainability¹⁹ and informativeness in large firms²⁰.

¹⁴ Volume XLVII (1), Manisha Dave, Indian Journal of Accounting: Women Empowerment: women directors on corporate boards, ISSN-0972-1479 (2015).

¹⁵ SEBI, Kotak Committee on Corporate Governance, https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html(October, 2017).

¹⁶ 94, Adams, Renee B. and Daniel Ferreira, Journal of Financial Economics: Women in the boardroom and their impact on governance and performance (2009).

¹⁷ Balsubramanian, N, Corporate governance and stewardship: Emerging role and responsibilities of corporate boards and directors, Tata-McGraw-Hill (2010).

¹⁸ Muller-Kahle, Maureen I. and Krista B. Lewellyn, Did board configuration matter? The case of US subprime lenders, Corporate Governance, and International Review, Social Science Research Network (2011).

¹⁹ Volume 17, Galbreath, Jeremy, Journal of Management and Organization: Are there gender-related influences on corporate sustainability? A study of women on board of directors, (Issue 1 January 2011).

Firms with strong profits prefer appointing female director for the sake of performance improvement.²¹ ChandaKocchar who heads ICICI Bank and KiranMazumdar Shaw, director of Biocon Limited have shown a very positive change in the work environment and outputs of their company since the appointment and involvement of such female directors.

The issue arises primarily when the above given literature is read and maximum opinion gets formed that most of the compulsory appointments that take place in this case is just for the sake of appointment and most of the women who fill the said vacancy are somehow or the other related to that of the promoters of the Company or any other members of the board.²²

A Survey conducted in January 2018, showed that out of the 1,667 companies which had complied with the 2013 amendment, 425 companies had appointed women directors who were from the promoter group or family while 60 companies had no women directors. Nearly 25% of the companies listed on NSE would have to appoint “*independent*” directors if the recommendations of the Uday Kotak Committee reports are enforced.²³

The female director who is supposed to be appointed shall be a woman of experience and this experience is not as easy to gather especially when there are no stringent laws to regulate the work conditions and egalitarianism of opportunity for women at the basic ground level of employment except for the maybe very late imposed *Vishaka guidelines*²⁴; therefore, fitting the requirement by the efforts of less experienced person, keeping the quality of being a ‘woman’ aside for once is basically comprising on the needs and economy of the company in itself. A list of companies has appointed their own family members and other convenient appointees to fill the vacuum in positions for example:

Sr. No.	Women Director Appointed	Compay’sName
1.	Nita Ambani	Reliance Industries Ltd.
2.	Aarti Kothari	Kothari Products Ltd.

²⁰ Volume 51, Gul, Ferdinand A, Bin Srinidhi and Anthony C., Journal of Accounting and Economics: Does board gender diversity improve the informativeness of stock prices? (Issue 3, 2011).

²¹ Volume 89, Dobbin, Frank & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?* North Carolina Law Review (2011).

²² R.J. Burke, *Women in corporate management: Women on Corporate Boards of Director: A needed resource*, Kulwer academic publishers (1997).

²³ Data from Prime Database, Gender diversity on board improves but more grounds need to be covered, //economictimes.indiatimes.com/articleshow/62988324.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cps t (2018).

²⁴ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

3.	Mina Kothari	Kothari Petroleum Ltd.
4.	SunandaSinghania	JK Tyres and Industries Ltd.
5.	SushilaSinghania	JK Cement Ltd.
6.	RituMallya	Mangalore Chemicals and Fertilizers Ltd.
7.	Vasavdatta Bajaj	Bajaj Corp. Ltd.
8.	BinaModi	Godfrey Phillips India Ltd.
9.	GauriKirloskar	Kirloskar Oil Engine Ltd.
10.	Lakshmi Venu	TVS Motors Co. Ltd.

Therefore, there arises a need to ensure that the appointment which is made is 'independent' of the other personal factors favoring the appointment of such women and the same shall be ensured to meet the objectives of empowerment by reposing a faith in the credibility of merits and holistic development of the company and the industry in general.

IV. INTERNATIONAL ASPECT OF APPOINTMENT OF WOMEN DIRECTORS

Norway is one of the best examples to highlight the current Indian situations. In the year 2003, they established a 40% quota for the appointment of women directors on the board since women held less than seven percent of seats on the board of directors. Norway has a gender quota requirement for corporate board appointment in all public limited liability companies. This however did not go down well in a practical aspect for in the year 2010, a study conducted by the University of Michigan suggested that the impact of such quota system was adverse on the growth of such companies for a lot of nominal and unexperienced women were appointed to the board to fill the jobs, without any experienced background.

Israel just like India has a law for one women director to be appointed to the board however the country managed to show a stark improvement in the governance of their corporate sector for the female directors raised to 42% by the end of 2012.²⁵

Italy has introduced a legislation according to which public listed companies and state owned companies need to have at least 33% of each gender on the board, and if not, the same may lead to dissolution of the

²⁵ Israel Ministry of Foreign Affairs, Ensuring equal rights for women in Israel, <https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Ensuring-equal-rights-for-women-in-Israel.aspx> (2013).

board. This has led to a stark increase in the number of women on the board, even during the transitional period.²⁶

It can be very easily noticed that developed countries like the **USA** for example does not have a specific law for the appointment of women at such prestigious post because of their streamlined consciousness of women empowerment and faith in their capability of them holding positions of power.²⁷ Rather, female Representation in the Fortune 500 boards has been inching up for they now hold about 20 percent of board seats.²⁸

By the end of 2016, countries like **France** by 40% and **Germany** by 30% and **Malaysia** by 30% have fully phased in their scheme for reservation for women directors, however studies have shown that such reservations are less effective in assuring long term female board reservation.²⁹ In fact, France now has 29.7% of woman directors in the company.³⁰ This quota system is however unpopular in the commonwealth countries like the **Australia** and **New Zealand**.

In the **United Kingdom**, there was an appeal to encourage companies to appoint gender equal workforce via voluntary appointments and allowed companies to set their goals and work towards the same. Lord Davies paper advises for FTSE companies to have up to 33% board representation of such women which would roughly add to about 350 women directors by the end of 2020.³¹

V. MEASURES/REMEDIES TO DEAL WITH THE LACUNA IN LEGISLATION

It is not that the objective with which the Act was brought into force in the first place in itself is invalid or unattainable and therefore the same can be very well met with the help of certain possible amendments that can be made to the 2013 legislation to ensure efficient meeting with the objectives of the Act. The most rudimental amendment that can be made, to answer the research question, is amending the legislation to Section 149(1) of the Companies Act, 2013 and making the provision for the compulsory appointment of '**Independent Women Directors**'.

Independent directors have certain characteristics about them which when applied to the appointment of

²⁶ Corporate Women Directors International, 2014 CWDI Report- Women Board Directors of Fortune Global 200 –2004-2014, (Jul. 2014), <https://enterprisingwomen.com/the-connector/2014-cwdireport-women-board-directors-of-fortune-global-200-2004-2014.html>.

²⁷ , Volume 17, TerjesenSiri, Sealy Ruth and Singh Val, Corporate Governance: An International Review: Women Directors on Corporate Boards: A review and research agenda, (Issue 3, 320-337, 2009).

²⁸ Global center for corporate governance, Deloitte, Women in the boardroom: a global perspective, 5th ed., https://www2.deloitte.com/content/dam/Deloitte/za/Documents/technology-media-telecommunications/za_Wome_in_the_boardroom_a_global_perspective_fifth_edition.pdf (2016).

²⁹ Linda-Eling Lee, MSCI Report: Women in the boardroom: a global perspective, Appendix III (2015).

³⁰ Press Release, Khaitan& Co & Biz Divas, Women on Boards: A Policy, Process and Implementation Roadmap, (Aug. 07, 2014) http://www.bizdivas.in/wpcontent/uploads/2014/09/women_on_boardV3-PRINT.pdf.

³¹ Lord Davies, Women on boards: Davies Report, <https://www.gov.uk/government/publications/women-on-boards-5-year-summary-davies-review> (2015).

such compulsory female directors, all the demerits of personal bias while making appointments will be eliminated, ensuring smooth functioning in the hands of capable administration.³² Section 149(6) of the Act talks about appointment of an independent director who is a person who has:

a) A person who has relevant exposure, expertise and integrity of position.

b) Who is not related to the promoters or directors in the company in any manner for example as laid down from sub-section (c) to sub-section (f).

Such a person, like an independent director can be selected from the data of willing volunteers with enough qualifications as the company rules may define with the amendment. The board of directors are believed to be “*strengthened by the appointment of independent directors*”.³³ The liability imposed on such directors is high enough to ensure compliance with the provisions of the Act³⁴ and the role of the authorities while imposing liability is of one which employs high due diligence.³⁵ This liability arises simply in abrogation of liability, making it very much legitimate in nature.³⁶

This makes the task of appointing a women independent director to the board a serious task and according to the mandates of the Act requires the person holding the position to have certain kind of expertise or knowledge in the field of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company’s business. Surely, the term “other disciplines” mentioned above can be manipulated by the company to achieve its ulterior ambitions, however, there will come in place a system of checks and balances to hold the management liable in case any form of such abrogation is deemed to be happening in the first place. The requirement of such a director shall also be made a part of the Articles of Association of a company so that the whole exercise is taken seriously and the objective of the same shall be elaborated to achieve the goals of realizing awareness and concern.

VI. CONCLUSION

In conclusion, it is important to have a holistic roundabout view of the discussion so as to comprehensively go about the topic. We first talked about the Amendment brought about the Companies Act in the year 2013 and how it introduced the compulsory appointment of women directors to the board of directors.

³² Volume 37, Zen Burgess and Phyllis Tharenou, Journal of Business Ethics: Women Board Directors: Characteristics of a few, (Issue 1, 2002).

³³ Central Government v. Sterling Holiday Resorts (India) Ltd. and Ors., (2006) 21 SCL 372 CLB.

³⁴ Srikanta Wodiyar v. Enforcement Officer, Mysore, (1993) SCR 3 508.

³⁵ M/s. Pepsi food Pvt. Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749.

³⁶ K.K. Ahuja v. V.K. Vora and Anr., (2009) 10 SCC 48.

The objective behind the same can be very much understood and appreciated looking at the statistics as to how well do a company perform with relation to otherwise when women are allowed to hold key managerial positions.

However in order to ensure maximum applicability and functionality of the Act, the researcher suggests amending the said Act to include appointment of 'independent women directors' and not just 'women directors' so as to ensure that the goals set forth via this amendment is completely achieved and the same is not abrogated for the sake of complying with it by appointing women who are related to the board or the promoters or person of key interest, thus serving as a mere nominal head and not contributing anything to the fields of either women empowerment as endured by the laws of this nation or egalitarianism in corporate governance.

An addition of one word to the body of the legislation can bring about a massive wave of change and for that there requires a need for change in the minds of the legislators in the first place and a realization of the seriousness of its goals and objectives in the hearts of the corporate governance body of the country on the other hand.