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Evaluation of the Role of Women Directors in Companies

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ABSTRACT

This paper analyses the provisions of the Companies Act dealing with which make it mandatory for companies to have at least one-woman director have been analysed and their development has been discussed. The advantages of having women directors have also been discussed in great detail. In light of these provisions, the situation in other countries is also presented for comparison. It is also inferred from various comparative studies that countries all over the world face inadequate women representation on company boards, and many of these countries have also enacted various provisions to tackle the same. The paper also discusses the drawbacks of these provisions and how they are misused by some of the biggest companies in the Country. Such misuse also defeats the entire purpose of enacting such provisions. In order to tackle the problems of inadequate representation of women and misuse of the provisions enacted to improve the situation, possible solutions and remedies have been suggested.

I. INTRODUCTION

The Companies Act, 2013[2] was enacted on 29th August 2013, replacing an almost six-decade old legislation regulating and governing the incorporation, registration and administration of companies. There are many requirements for the smooth functioning of the company, one such statutory requirement being that of appointing a Board of Directors (hereinafter, BoD). The BoD consists of various directors who are appointed during the Annual General Meetings (AGM).Section 2 (34)[3] of the Act defines a director to mean a director appointed by the Board of a company. Directors act as the agents of the Company when they act on behalf of the company. This is required since the company cannot act in its own person.[4]However, in certain situation, though the company is regarded as the principle, it cannot direct the Board in decision making. When it comes to the properties and the assets of the company, they are regarded as

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[2] Companies Act, 2013 (Act No. 18 of 2013).
[3] S. 2(34) of Companies Act, 2013 (Act No. 18 of 2013)
[4] *Vineet Kumar Mathur v. Union of India,* (1996) 20 CLA 213 (SC).

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their trustees.[5] Trustees are the people in whom the legal ownership of the assets is vested which he administers and governs for benefit of another. Directors are regarded as the trustees based upon a relationship of trust. This fiduciary capacity enjoins upon them the duty to act with utmost good faith, care and skill while representing the company or making any decision concerning it.[6] A director is elected by the shareholders and once elected, his rights and duties cannot be interfered with and so the question of a director being an employee often arises. An employee is generally the servant of the company and they enjoy only those powers which are vested in them by the employer, who also has authority to interfere in his work. Thus, the director is usually considered to be the representative of the shareholders and not their employee[7] but that does not stop him from entering into a special contract for employment in the company[8] The directors thus play different roles depending upon the facts and circumstances under which they are supposed to act. The directors as the Board act on behalf of the company whenever required (as mentioned in the Company Law legislation). Nevertheless their legal position is extremely difficult to be determined.[9]

Section 149 states that every company shall have a BoD and at least one of them should be a women director. Every listed company and every other public company having a paid-up share capital of 100 crore rupees or more or turnover of 300 crore rupees or more should have at least one-woman director.[10] Women comprise a minority of most BoDs. Some BoDs are completely male dominated. Though various alternatives for increasing the number of females have been initiated and debated, identifiable barriers still exist to the participation of women.

In this article, the research will put light on the history, jurisprudence, need and misuse of the statutory provision which provides for at least one-woman director in the company.

II. FEMINIST JURISPRUDENCE IN GLOBAL CORPORATE

Feminist jurisprudence is a philosophy of law which concentrate on equality of sexes in the political, economic and social field. Feminists strongly believe that the history, since it was written from a male point of view does not provide for women to play an important role in the economic or social development of herself, family and the country as a whole. Most of the researches conducted before focus on the number of females appointed to a position of a

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[5] *Ramaswamy Iyer v. Brahmayya & Co.* (1966) 1 Comp. LJ 107 (Mad).
[6] *Dale & Carrington Investment (P.) Ltd v. P.K. Prathapan* (2004) 54 SCL 601 (SC).
[7] *Lee Behrens & Co., Re* (1932) 2 Comp. Cas. 588.
[8] *RR Kothandaraman v. CIT* (1957).
[9] GK Kapoor & Sanjay Dhamija, Company Law and Practice 418-422 (21st ed. 2016).
[10] Rule 3 of Companies (Appointment and Qualifications of Directors) Rules, 2014.

director and their representation at various higher designations in the corporate world. However,only a few focuses on why there are few women in the concerned arena. It has been noted that the path to achieving a higher executive responsibility of public companies is through inside director positions, where the representation of women is abysmal, proving to be disadvantageous.[11]Today, increase in diversity is not only the requirement for the social benefitand advancement of the country but also for its economic growth. This diversity is a need of the hour for almost every profession or calling, be it the legal practice, medicine, academic etc.This requirement, along with the fact that woman would are proven to be more sensitive and adverse to the kind of risks that led to the global financial meltdown of 2008, seeks for greaterpresence of women in the corporate arena.[12] Taking the example of the economic downfall in 2008, women, if given the power, would have been able to avert many such debacles.[13]

Recently, various studies and researches have propagated that there are various benefits to thecorporations from an increase in women directors:

Firstly, they provide for an ideal role model in the to the women in middle and lower ranks ofthe corporation. Inspiration and hard work arising from it are the major catalysts to increasing the number of women in the corporate world. In mid-2011, female CEOs accounted for only 2.6% of the CEOs of *Fortune 500* companies.[14]Secondly, boardroom diversity helps in avoiding “group thinking” which was the reason for the downfall of prosperous companies likeEnron. Groupthink is a phenomenon where the decisions are affected as the group pressures leads to deterioration of mental efficiency and moral judgement. The presence of women will aid in bringing about new perspectives and view points on corporate boards, leading to better assessment and management of risks.[15]The dangers that stem from homogenous boards are thesimilar thinking mindsets of all the people on Board. The “groupthink” as it is termed would not be an issue if the Boards of the major companies firstly, have diversity with respect to gender which would enable more view points

[11]Judith Warner, *The Women’s Leadership Gap*, THE AMERICAN PROGRESS, http://cdn.americanprogress.org/wp-content/uploads/2014/O3/WomenLeadership.pdf.
[12] Leonie Lamont, *Time Male Bosses Walked the Talk on Equality*, SYDNEY MORNING HERALD (Oct. 15, 2011), http://www.smh.com.aulbusiness/time-male-bosses-walked-the-talk-on-equality-20111014-llp2x. html
[13] “"[Women] consider more elements of risk and plan accordingly, whereas men will look at the more finite set of risks that are more likely to occur. And that parallels in the boardroom. Laura Mortkowitz, Survey: *Big Gender Differences in Board Room*, CRAIN's N.Y. Bus. (Oct. 14, 2010, 2:12 PM), http://www.crainsnewyork.com/article/20101014/FREE/I 01019924.”
[14] Just the Facts, IN WOMEN WE TRUST, http://www.inwomenwetrust.com/resources/just-the-facts (last visited June 22, 2012).”
[15] “Douglas M Branson, *Initiatives to Place Women on Corporate Boards of Directors-A Global Snapshot*, 37 J Corp. L. 793, 795 (2011-2012)

and different perspectives on all matters on whichdecision is to be taken. Thirdly, women account for 70% of the global consumers. The presenceof a women in the Board will only help to sway purchasers and increase the economic and marketing power of the corporation. Further, there are additional laws and international treaties which provide for equal rights of employment opportunities.[16]

III. Comparative statistics

The statistics indicating the presence of women on corporate boards vary from region to region. In Norway, after the enforcement of the quota law in 2003 which mandated 40% of the directors of public companies to be women directors, the representation of women went from 6.8% to 40.3%.[17]In America, the proportion of women in the corporate arena stands at 16.1% but has however been stagnant since 2004. Portugal has the fewest females on corporate boards of publicly held corporations, accounting for just 0.62%.[18]The past two years have seen significant change-to between 13% and 14%.32 France, which adopted a quota law early in 2011, is thought to be responsible for half or more of the EU increase with the percentage of women directors increasing from 12% to 24% in 14 months.[19]

IV. Women directors in India

The provision for the appointment of woman director was introduced in the Act of 2013[20] in order to mitigate gender discrimination in the corporate world. The requirements of paid-up share capital and turnover should be calculated and considered according to the last date of the latest audited financial statements.[21] The appointment of such woman director needs to be made within 6 months from the date of incorporation of the company and the intermittent vacancy ofa woman director needs to be filled as soon as possible, not later than the immediate next Boardmeeting or three months from the date of such vacancy, whichever is earlier. However, the companies, due to interpretation have been allowed to appoint woman directors within 1

[16]United Nations Convention on Elimination of All Forms of Discrimination against Women art. 11 (l)(b), Dec. 19, 1979, 1249 U.N.T.S. 13

[17] S. Boards, WALL ST. J., Dec. 10, 2007, at B-1. 27. IRENE NATIVIDAD, THERE is No DENYING THE EFFECTIVENESS OF QUOTAS: WHY EUROPE WILL SURPASS THE U.S. IN CHANGING THE FACE OF THE CORPORATE BOARD, DIRECTORS & BOARDS 23 (2010), available at www.globewomen.org/summit/2010/New _Folder/Natividad%20Article.pdf;

[18]EUROPEAN PROFESSIONAL WOMEN'S NETWORK, EPWN BOARD WOMEN CORPORATE MONITOR 2010 3 (4th ed. 2010) [hereinafter EPWN BOARD MONITOR], available at www.europeanpwn.net/files /europeanpwn boardmonitor2010.pdf; cf NATIVIDAD, supra note 27, at 24 (stating that Portugal's percentage of female directors is 3%).

[19] Douglas M Branson, *Initiatives to Place Women on Corporate Boards of Directors-A Global Snapshot*, 37 J Corp. L. 793, 798 (2011-2012).

[20] Companies Act, 2013 (Act No. 18 of 2013).

[21] Rule 3 of Companies (Appointment and Qualifications of Directors) Rules, 2014.

yearfrom the period of its incorporation.[22]

Today, out of the 1,112 directorships in India of the 100 companies listed on Bombay Stock Exchange (BSE), only 59 are held by women. Out of these women directors, around 50 per cent are independent directors, making India rank 38th in the world in terms women representation on Company Boards. Globally, around 9.8 per cent of directors in 2011 were women, with 58.3 per cent of companies having a female on the board.

The requirement of having at least one-woman director in the BoD can be fulfilled by appointing a woman as any of the directors, vis, executive or non-executive director or permanent or rotational director which will make them liable to perform the duties as mentioned in S. 166.[23] They must act according to the Articles of Association (AoA), which, if not done will lead to the act being *ultravires.* These directors must also act in good faith in order to promote the object of increasing wealth of the shareholders, promoters and the company as a whole. A director cannot have direct/indirect interest in the transactions performed by the company; neither should a director try to achieve an undue gain or advantage through the functioning of the company. If the provisions of this section are violated, the director is liable to pay a minimum fine of Rs. one lakh rupees which can extend to Rs. five lakh rupees. The roles and duties of women directors is same as that of other directors in Board.

Requirements For Women Directors

Since the MCA 21 program, which is an eGovernance initiative by the Government of India, E-filling of most of the documents has become mandatory. Every (women) director is thus required to attain a Digital Signature Certificate (DSC) as stated under the provisions of the "Information Technology Act"[24]. She also needs to apply for a DIN according to "Section 153 of the Companies Act, 2013 read with Rule 9(1) of the Companies (Appointment and Qualifications of Directors) Rules, 2014." Further, she is required to fill form DIR -8 in terms of the prior mentioned rules in order to intimate that she is not disqualified under Section 164 (2)[25] from becoming a director.

Before the provision for mandatory directors was introduced, some companies already had women on their boards who played a significant part in the financial global growth of their companies. Chanda Kochhar, the Managing Director and Chief Executive Officer of ICICI

[22]ICSI, *Appointment and Qualification of* Directors, ICSI (Jan. 13, 2016, 10:00 am), https://www.icsi.edu/portals/0/APPOINTMENT%20AND%20QUALIFICATIONS.pdf.
[23] S. 166 of Companies Act, 2013 (Act No. 18 of 2013).
[24] The Information Technology Act, 2000 (Act No. 21 of 2000).
[25] S. 164 (2), Companies Act 2013 (Act No. 18 of 2013).

Bank is known for the structuring of retail banking in India. She played an instrumental role inthe establishment of ICICI Bank in the 1990s. Under her supervision and participation, the bank has won numerous accolades including the "Best Retail Bank in India", "Excellence in Retail Banking Award" etc. Indra Krishnamurthy Nooyi is the current Chairperson and Chief Executive Officer of PepsiCo, which is the second largest food and beverage network in the world. Under her guidance, the company's global strategy has been restructured. She took the lead in the acquisition of Tropicana in 1998 and the merger with quaker oats Company which brought Gatorade to PepsiCo.

V. MISUSE OF THE PROVISION

India's market regulator had made it mandatory to appoint at least one women director by April 1, 2013. This women director could be appointed as an independent director, non-executive orexecutive director; there were no restrictions with respect to the same. Instead of appointing women who bring about diversity of opinion, a different perspective and expertise to the role, promoters and BoDs of some of the companies have been appointing family members as the director, defeating the main purpose behind the objective. Many famed companies incorporated by families have appointed their family members – either their wives, daughters or step-mother a directors.[26] Some examples are – Vijay Mallya's step mother, was appointed as director for his company, Reliance Industries, which is India's largest conglomerate appointed the wife ofthe chairman, Mukesh Ambani, Nita Ambani as the director and the Raymond group's non-executive directorship is served by Nawaz Modi Singhania, who is the wife of the chairman ofthe Company, Gautam Singhania.

Additionally, there is short supply of women with proven leadership skills. There are women who have been offered directorship but turned it down due to this reason. Women like Ramni Nirula, the former CEO of ICICI bank, Indira Parikh, former Indian Institute of Management professor and Renu Sud Karnad, Managing Director of HDFC are currently serving as the independent directors on the Board of almost seven companies.

Moreover, another way in which this provision is being misused by the companies is by appointing a women director and then appointing a male alternate director on her part to participate in the Board meetings. A multinational company BASF India, in August 2015 had appointed Germany-based Andrea Frenzel as a non-executive director just in order to comply with the legislation and on the same day appointed N J Baliga as an alternate director on her

[26]Anirvan Ghosh, *Mandatory Rules to Appoint more Women Directors not Working in* India, THE HUFFINGTON POST (July 15, 2016, 8:25 am), http://www.huffingtonpost.in/2015/03/30/mandatory-rules-to-appoint-more-women-directors-not-working-in-i/

behalf. The company in the first place could not find a suitable Indian candidate for directorship, then appointed a foreigner to the Board and expeditiously appointed an alternate director who was a male. Appointing a male as an alternative director for a women director cannot be deemed to be compliance with the law requiring at least one women director on the Board.

VI. Suggestions and Recommendations

In a society where the women are brainwashed to believe that they are inferior to men, such mindsets just cannot allow any voluntary appointment of women directors to the Board. Even today, women are struggling to live as equal citizens. This archaic practice of patriarchy has caused a lot of hurdles for women to be treated equally and with respect. Women in various countries face this issue too, however, changes have been brought about by quota legislations and mandatory compliance with various rules. The Norwegian Government has imposed the quota law in 2003, The Australian Government has asked companies to report on gender ratios while even countries which are a part of the European Union are looking forward towards introducing legislation which enables at least 40% of occupation of corporate board by women and Malaysia has set a target of 30% women in boardroom within the next five years. The steptaken by the Legislature through the Companies Act, 2003 is indeed a progressive step, especially when the misuse of this provision as stated above is worked around. Leaving it to the companies to voluntary change the gender ratio on the Board of Directors has not worked out so far and no society can allow women to be completely excluded from corporate activities which have a great effect on the nation as a whole.

The Union's recommendation for women directors to be mandated on corporate board in the companies Bill was a progressive step. Companies have not shown any intention to voluntarily change the gender ratio in boardrooms. No society can allow women to be kept out of corporate decision-making in today's times. It has been proven time and time again that women are more empathetic, sensitive and compassionate. Thus, good corporate governance calls for greater women representation.

Improving gender ratios in company boardrooms is subject to two kinds of arguments; ethical or economical. Ethical arguments present the lack of representation of women on the Boards due to the immoral practice of gender discrimination while on the other hand, the economic sides supported by the businesses which state that if the company does not appoint an able candidate, it is likely to suffer losses in the future.

Under the Indian Companies Act, the provision for appointment of women was made in 2013 in order to encourage gender diversity in the country. However, there are some loopholes and flaws in the same. The provision for the appointment is made mandatory only for listed and other public companies satisfying the criteria of having a paid up share capital of over 100 crore rupees and turnover of 300 crore rupees or more. The private companies are doing as well as the public companies and also play important role in the economic market. Important decisions are made by them which affect the organization, community and the country. The significant decisions about executive compensation, mergers and acquisitions are all taken by the CEOs of the company who are appointed by the Board of Directors; and a good corporate decision can be taken only when the directors, who are the members of the Board have the ability to hear and consider different opinions and perspectives. A diverse board is better positioned to thrive in today's globally competitive world.

Further, the Companies Act provides for the same roles and duties for women directors. While, this practice is gender neutral, in the opinion of the researcher, provisions need to be added in the act, supporting the labor laws and providing for benefits for women on maternity leaves. Provisions relating to working from home, maternity leave and the like should be added in the Act for better compliance.

Under Section 135[27], companies are mandatorily to comply and ensure Corporate Social Responsibility (CSR) on their part by investing 2% of the profit of the company during the previous financial year. Though this CSR is to be executed monetarily, the ethical and the moralobjective behind this concept can be executed by ensuring social and gender equality in the employment, promotion and appointment of women directors in a company.

The Indian Companies Act has incorporated a provision relating to women which has also proved to be successful, the researcher is of an opinion that a provision dealing with directors belonging to the third gender should also be introduced to result in an inclusive society.

VII. Conclusion

Equal representation on the boards of directors of companies is critical to sustaining a certain level of performance, even improving it. A diverse composition of the board increases the size of the candidate pool and helps expand perspectives at the top. While most companies recognize the importance of appointing directors from different age groups and having different educational background, but the need for having women directors is not paid any heed to. According to the studies mentioned herein, companies with women directors deal more

[27] S. 135, Companies Act, 2013 (Act No. 18 of 2013).

effectively with risk management and also tend to focus on long-term priorities. In today's modern times and developing corporate arenas, it was high time for the legislature to encourage gender diversity in order to promise equal rights with respect to employment opportunity, wages and promotion.

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