



ASSESSING THE DRAFTING EFFICACY OF SECTION 149(1) OF THE COMPANIES ACT, 2013: A CRITICAL ANALYSIS OF ITS APPROACH TO GENDER REPRESENTATION METRICS ON CORPORATE BOARDS

Komal Nanda ¹, Dr. Neelesh Sharma ², CA Mohammad Maroof Beg ³

RESEARCH ARTICLE



Author Details: ¹ Ph.D. Candidate, Faculty of Law, Rabindranath Tagore University, Bhopal, India; ² Dean Faculty of Law, Rabindranath Tagore University, Bhopal, India; & ³ MBA Candidate, Faculty of Business Economics and Law, Auckland University of Technology, Auckland, New Zealand

Abstract

This article critically examines the drafting of Section 149(1) of the Companies Act, 2013, read in conjunction with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, to assess its efficacy in promoting gender diversity on corporate boards in India. Using doctrinal analysis, this study reveals strengths and then assesses the limitations in the provisions' drafting that may hinder the achievement of substantive gender equality in corporate governance.

Keywords: *Gender Diversity, Corporate Boards, Section 149(1), Companies Act 2013, Women Directors, India, Doctrinal Analysis*

Corresponding Author: Komal Nanda

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Introduction

Women's under-representation in corporate leadership has long been a problem worldwide, and India is no different. To address this issue, the Indian government enacted Section 149(1) of the Companies Act, 2013, which requires that women be appointed to company boards (Companies Act, 2013). This legislative intervention aimed to encourage diversity and rectify the gender disparity in corporate governance.

The importance of gender diversity on corporate boards has been increasingly recognized worldwide. Diverse boards have been linked to greater financial performance, better corporate governance, and better decision-making, according to research (Adams & Ferreira, 2009). In this context, India's legislative effort to increase female representation on boards through Section 149(1) represents a significant step towards aligning with global best practices.

Rationale for the Study

This study is motivated by several key factors. Firstly, the global trend of raising the presence of women on corporate boards is particularly relevant in the Indian context, as India strives to establish itself as a global economic power. Addressing gender diversity in corporate leadership is essential for enhancing competitiveness and reputation (Haldar et al., 2015). Secondly, there are corporate governance implications, with research suggesting that gender-balanced boards can help compensate for weak governance structures, as women directors may improve oversight and monitoring (Balasubramanian & Mohanty). This study aims to assess whether current legislation effectively promotes improved governance. Thirdly, both efficiency-related and sociological reasons underpin the global trend towards gender diversity (Haldar et al., 2015), and this study seeks to understand how these considerations are reflected in India's legislative framework, particularly in Section 149(1). Finally, the study adopts a path dependence approach to corporate governance, recognizing that while global trends matter, solutions should be tailored to each country's unique societal and cultural context (Balasubramanian & Mohanty). The analysis will assess whether Section 149(1) adequately reflects India's specific norms while striving for gender diversity.

Research Methodology

This study employs doctrinal analysis as its primary research methodology, which entails a methodical analysis of judicial rulings, legal norms, concepts, and principles to establish the nature and parameters of the law (Hutchinson & Duncan, 2012). This approach is particularly suitable for analyzing Section 149(1) as it allows for a rigorous examination of the legal text, its interpretation, and its potential implications. The doctrinal methodology involves several steps, including identifying relevant legal sources such as statutes, case law, and secondary literature; interpreting and analyzing these sources to ascertain the law's present status; and synthesizing the findings to identify any inconsistencies, gaps, or areas for potential reform (Hutchinson & Duncan, 2012). This approach is perfect for the study since it allows for a thorough examination of Section 149(1) in the context of Indian corporation law and worldwide trends in corporate boards and global trends. By critically examining the language, structure, and implications of the provision, the study will assess its effectiveness in achieving the intended objectives of gender diversity and improved corporate governance.

Legislative Framework

Section 149(1) of the Companies Act, 2013, lays the foundation for the composition of a company's board of directors, specifying the minimum and maximum number of directors according to the kind of business. It emphasizes the structural requirements for a diverse and functional leadership body, with a provision for companies to appoint more than fifteen directors through a special resolution. Notably, the provision also acknowledges the importance of gender diversity on corporate boards, mandating that some business categories are required to have at least one female director.

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, further outlines the categories of businesses that are required to have a minimum of one female director. The rule specifically applies to all listed companies and to public companies that either have a paid-up share capital of ₹100 crore or more or a turnover of ₹300 crore or more. This provision underscores the Indian government's commitment to improving gender diversity in corporate leadership roles. The rule also addresses practical issues, such as ensuring that any vacancy of a woman director is filled within three months, thereby promoting continuity and accountability. Furthermore, it mandates that businesses formed under the Companies Act adhere to this regulation within six months after being incorporated. The emphasis on gender inclusivity within corporate governance structures reflects broader efforts to foster equal representation and ensure that women play an integral role in decision-making processes in the top echelons of the company.

Bare Act: Section 149(1) of The Companies Act, 2013

“149. Company to have Board of Directors. — (1) Every company shall have a Board of Directors consisting of individuals as directors and shall have—

- a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and
- b) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution:

Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.” (The Companies Act Section 149, 2013).

Bare Act: Rule 3 of The Companies (Appointment and Qualification of Directors) Rules, 2014

“3. Woman director on the Board. — The following class of companies shall appoint at least one woman director-

- a) every listed company;
- b) every other public company having –
 - i. paid-up share capital of one hundred crore rupees or more; or
 - ii. turnover of three hundred crore rupees or more:

Provided that a company, which has been incorporated under the Act and is covered under provisions of second proviso to subsection (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation:

Provided further that any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Explanation.— For the purposes of this rule, it is hereby clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.” (Companies (Appointment and Qualification of Directors) Rules, 2014).

Analysis and Discussion

Strengths of the Provisions

The drafting of Section 149(1) of the Companies Act, 2013 and Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 exhibits several strengths.

Clarity and Specificity

Both provisions clearly define the scope and requirements for appointing women directors. Section 149(1) stipulates that at least one female director is required for some businesses, while Rule 3 elaborates on the criteria for these companies, such as listed companies and large public companies with a specified paid-up share capital or turnover. This clarity ensures that companies can easily identify whether they are subject to the requirement.

Mandatory Nature

The use of "shall" in both provisions establish the mandatory nature of the appointment of a woman director, leaving little room for ambiguity or non-compliance. This helps in reinforcing the legal obligation for companies to adhere to the rule.

Broad Coverage

The provisions cover a broad spectrum of companies, including listed companies and large public companies with substantial paid-up share capital or turnover. This broad applicability increases the likelihood of achieving significant gender diversity at the top levels of India's corporate sector.

Practical Compliance Timeline

Rule 3 specifies that companies must comply within six months of incorporation or meeting the prescribed criteria. This provides a reasonable timeframe for companies to take necessary actions, ensuring prompt implementation of the provision.

Provisions for Vacancy

The inclusion of a requirement for filling any intermittent vacancy of a woman director within a specified period (next Board meeting or three months) ensures that the composition of the board remains compliant even during transitional periods.

Clear Explanation

Rule 3's explanation that the paid-up share capital or turnover should be assessed based on the latest audited financial statements provides clarity on how companies should calculate compliance. This eliminates potential confusion over how to determine the applicability of the provision.

These strengths contribute to the effectiveness and enforceability of the provisions, helping to ensure that gender diversity on corporate boards becomes a reality in India.

Limitations in Drafting

The combined drafting of Section 149(1) of the Companies Act, 2013, and Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, while clear and structured, presents several limitations.

Limited Scope of Gender Diversity

Both provisions require only one-woman director, which, while a step forward, does not fully encourage gender parity on business boards. The focus on a single woman director in companies may not lead to significant shifts in organizational culture or a more inclusive representation of women at senior decision-making levels.

Lack of Sufficient Penalties or Enforcement Mechanisms

While Section 172 of the Companies Act, 2013 provides penalties for non-compliance with the requirements of Section 149(1), including the failure to appoint a woman director, the penalties outlined may be considered insufficient in ensuring strict adherence to the provision. Section 172 imposes a fine ranging from ₹50,000 to ₹5,00,000, with an additional fine of ₹1,000 per day for continued non-compliance (The Companies Act Section 172, 2013). However, these penalties might not be a strong deterrent for larger companies that can easily absorb such fines. Moreover, the lack of more substantial or progressive penalties, such as director disqualification or more significant financial sanctions, could reduce the overall effectiveness of the provision in promoting gender diversity and corporate accountability. Therefore, a more robust penalty framework may be required to ensure that corporations prioritize compliance and are held accountable for not adhering to the mandates for gender diversity on boards.

Limited to Certain Types of Companies

While the provision applies to listed companies and large public companies with significant paid-up share capital or turnover, it does not extend to smaller companies or private entities. As a result, smaller firms are excluded from this gender diversity mandate, which could result in slower overall progress toward gender equality in corporate governance.

Overemphasis on Financial Metrics

Rule 3 relies on financial metrics such as turnover and the paid-up share capital to determine which companies must appoint a woman director (Companies (Appointment and Qualification of Directors) Rules, 2014). While this provides clear criteria, it might inadvertently exclude smaller companies with considerable influence or those with lower financial metrics but an equal need for gender diversity on their boards.

Vacancy Management

Rule 3 requires that any sporadic opening for a female director be filled within three months or at the next Board meeting (Companies (Appointment and Qualification of Directors) Rules, 2014). While this provision aims to maintain compliance, the timeline might not be sufficient for some companies, especially those that may face difficulty in finding suitable candidates or those operating in sectors with limited access to female talent.

No Clear Definition of "Prescribed" Companies

Section 149(1) uses the term "such class or classes of companies as may be prescribed," but this reference is broad and not explicitly defined in the provision itself. (The Companies Act Section 149, 2013). While Rule 3 addresses the specifics, the lack of clarity in Section 149(1) could lead to ambiguity, potentially leaving room for varying interpretations regarding which companies are obligated to appoint a woman director.

Insufficient Focus on Qualitative Diversity

The provisions emphasize the numeric presence of women on boards but do not address the broader issue of qualitative diversity in decision-making processes. While the presence of a woman director is a significant step, without addressing the broader cultural and organizational changes necessary to integrate gender diversity, the provisions may not lead to meaningful change.

These limitations highlight areas where the provisions could be enhanced to better address gender equity in corporate governance and promote more substantial and lasting modifications to the makeup and operations of Indian boards.

Critical Evaluation of Section 149(1) and Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014

Table 1: The strengths and limitations of the drafting of Section 149(1) of the Companies Act, 2013, and Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014:

Aspect	Section 149(1) of the Companies Act, 2013	Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014
Summary of Content	Section 149(1) requires that specified companies appoint at least one-woman director.	Rule 3 provides further clarity on the companies mandate to appoint a woman director, including listed companies and large public companies with certain financial thresholds.
Mandatory Requirement	"Shall" makes it compulsory for specified companies to appoint at least one-woman director.	Strongly mandates that companies meeting the criteria (listed companies, and public companies with large paid-up capital or turnover) must appoint a woman director.
Strengths	- Broad applicability to public companies and listed companies.	- Clear and specific criteria for companies required to comply. - Provides a timeline for compliance (six months).
Clarity in Language	The language is clear but could provide more specific guidance on penalties for non-compliance.	Clearer in specifying which companies are required to comply and the actions to take in case of intermittent vacancies.
Penalties	Penalties for non-compliance are mentioned under Section 172 but are seen as insufficient.	Does not mention penalties directly but refers to compliance timelines.
Compliance Timeline	No direct timeline is provided, though the broader act includes	Provides a six-month compliance timeline after incorporation or fulfillment of conditions.

	compliance periods for other provisions.	
Gender Diversity Promotion	Section 149(1) attempts to improve gender diversity in corporate governance.	Rule 3 strengthens this by defining specific types of companies that must comply and further clarifies the necessary actions for ensuring diversity.
Weaknesses/Limitations	<ul style="list-style-type: none"> - Penalties for non-compliance are seen as insufficient. - Does not provide detailed guidance on how compliance is to be enforced. 	<ul style="list-style-type: none"> - No direct penalties are mentioned in Rule 3. - While it provides clarity, it lacks a comprehensive framework for monitoring or enforcement.
Enforcement Mechanism	Enforcement can be weak due to low penalties.	Lack of clear enforcement mechanisms for compliance.
Effectiveness	Limited by insufficient penalties and vague enforcement.	More effective in terms of specifying the companies that need to comply, but the lack of clear enforcement makes it less impactful.

Impact of the Legislation

The implementation of Section 149(1) has resulted in a significant rise in the representation of women on corporate boards in India, with a study by Balasubramanian and Mohanty showing an increase from 5.5% to 12.5% in women on boards of NSE-listed companies between 2014 and 2015. However, progress has been slow and uneven across different sectors. Research by Halder et al. (2015) reveals that industries such as healthcare and consumer goods have seen better compliance and representation, while sectors like energy and industrials have lagged behind, indicating that sector-specific factors may influence the effectiveness of the provision. When compared to global standards, India's approach seems modest. Countries like Norway and France have implemented more stringent quotas, with mandates requiring 40% female representation on boards, while India's requirement of at least one woman director falls short of these more ambitious targets, potentially limiting its impact on achieving substantial gender diversity.

Recommendations for Improvement

While Section 149(1) of the Companies Act, 2013 and Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 marks a significant step toward improving corporate governance and promoting gender diversity in India, several limitations need to be addressed. The provision is a positive starting point but needs further refinement to ensure meaningful gender representation, enforceable accountability, and comprehensive diversity within corporate boards. Regulatory authorities must implement stronger monitoring and provide clear guidance on the qualifications and roles of directors to maximize the impact of these provisions. Moreover, it would make sense to broaden the definition of diversity to encompass more aspects to improve corporate governance in India.

Section 149(1) of the Companies Act, 2013, read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, marks a significant step is an effort to encourage gender diversity on business boards in India. However, this doctrinal analysis reveals that while the provision has led to increased representation of women on boards, its current drafting leaves room for improvement.

The strengths of the provision, including its mandatory nature and broad applicability to listed and large public companies, have contributed to an increase in women's representation. However, limitations such as the minimum threshold of one-woman director, limited scope, lack of qualitative criteria, and absence of specific penalties may hinder the achievement of substantive gender diversity and meaningful participation of women in corporate governance.

To enhance the effectiveness of Section 149(1), policymakers should consider increasing the minimum requirement, expanding its scope, specifying qualitative criteria for appointments, introducing greater penalties for non-compliance, and promoting pipeline development for future women directors. Additionally, a regular review mechanism would allow for ongoing assessment and improvement of the provision's impact.

Conclusion

As India continues to evolve as a global economic player, ensuring gender diversity in corporate leadership is crucial for social and for improved corporate governance and economic performance. By addressing the identified limitations in the drafting of Section 149(1), India can move closer to achieving meaningful gender representation on corporate boards, aligning with global best practices while considering its unique socio-economic context.

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