

Achieving gender balance in the boardroom: is it time for legislative action in the UK?

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In the UK and across the globe, women struggle to get a place on the boards of large public companies and still take home less pay than their male counterparts. At a time of financial crisis and corporate governance failures, this lack of equality is considered especially problematic because the talents of half the workforce are not being utilised fully. This paper explores the possibility of introducing legislative gender quotas for company boardrooms in the UK. Such laws have been passed in Norway and Spain with dramatic results. Other countries, such as France and the Netherlands, look set to follow the examples of Norway and Spain. Has that time arrived in the UK?

INTRODUCTION

Recent research commissioned by the Government Equalities Office shows that 60% of people think there are not enough women directors in big businesses.¹ Eighty per cent of the survey participants think a balanced senior management team will be better at understanding their customers. Sixty-one per cent believe businesses are losing out on talent by having fewer women in senior roles, and 78% disagree that, because men have more experience in senior management than women, men are better at running companies.

In the UK and across the globe, women struggle to get a place on the boards of large public companies and still take home less pay than their male counterparts.² This lack of equality is considered especially problematic because the talents of half the workforce are not being utilised fully.³ Following the financial crisis, the Commission

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1. H Coombs, E Gray and D Edmiston *Representation of Women and Men in Business and Government – Public Attitudes and Perceptions* (IPSOS MORI, March 2010), available at Government Equalities Office website http://www.equalities.gov.uk/pdf/100311_Report_representation_FINAL.pdf.

2. *Financial Services Inquiry, Sex Discrimination and Gender Pay Gap Report of the Equality and Human Rights Commission* (September 2009), available at http://www.equalityhumanrights.com/uploaded_files/financial_services_inquiry_report.pdf.

3. See, eg, B Masters 'Female staff work to their strengths' *Financial Times* 13 May 2009; R Sutherland 'This mess was made by men. Now let the women have their say' *The Observer* 1 February 2009.

for Equality and Human Rights published a report on sex discrimination and the gender pay gap in financial services,⁴ highlighting the continuing discrimination against women in the financial services sector. The Treasury Committee has also reported concern at how women are treated in the City.⁵

On International Women's Day, 5 March, the then Prime Minister, Gordon Brown, told leading female executives at a Downing Street breakfast that 'serious action' may be needed to tackle the issue of boardroom diversity. Some countries have already taken more dramatic action.⁶ Norway and Spain have pioneered a new wave of action across Europe with the introduction of legislative quotas for company boardrooms. The Netherlands⁷ and France⁸ have more recently voted in favour of similar legislation, and other countries, such as Finland, have introduced, or are considering the insertion of, gender-based recruitment requirements in their corporate governance codes. Has the time arrived for the UK to follow these examples? The Fawcett Society sees quotas as a potential solution.⁹

This paper explores the possibilities for legal reform in the UK. The first part provides an outline of the statistical evidence that reveals the existence of a glass ceiling. The paper continues with an explanation for the glass ceiling and then it outlines the cases made for improving women's opportunities in large companies. The paper then explores the possible solutions, considering also the examples of Norway and Spain, where early indications point to a successful outcome following the introduction of legislative quotas.¹⁰ The potential for quotas in the UK is explored. The discussion has relevance beyond white women on corporate boards. Some of the suggestions might be extended to cover ethnic and disabled groups, as well as to cover public sector workplaces.

IS THERE A GLASS CEILING? THE STATISTICAL EVIDENCE

The most recent labour market statistics available from the Office for National Statistics show that during the period November 2009–January 2010, there were 19.858 million men of working age, 15.352 million of whom were in employment and there

4. See above n 2.

5. House of Commons Treasury Select Committee *Women in the City* Tenth Report of Session 2009–2010, HC 482, 22 March 2010, incorporating HC 967 i–ii of Session 2008–9, available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/482/482.pdf>.

6. 'Absence of women from top boards is unacceptable, says Gordon Brown' *The Guardian* 8 March 2010.

7. See DutchNews.nl 'Female boardroom quota backed by MPs', where Dutch MPs have supported plans to make at least 30% of top company executives female – the plan will require these proportions in both the management and supervisory boards of companies with more than 250 employees (26 October 2009), available at <http://www.dutchnews.nl/news/archives/print/019348.php>

8. European Professional Women's Network *French National Assembly Votes For Women on Boards* (EPWN), available at http://www.europeanwn.net/index.php?article_id=868.

9. R Lewis and K Rake OBE *Breaking the Mould for Women Leaders: Could Boardroom Quotas Hold the Key? – A Fawcett Society Think Piece for the Gender Equality Forum* (Fawcett Society, London, October 2008), available at <http://www.fawcettsociety.org.uk>.

10. See below.

were 18.149 million women of working age, 13.510 million of whom were in employment.¹¹ Women make up 46.8% of the workforce.

In the UK, an annual FTSE Female 100 Index Report is published and this shows that over the past 10 years the pattern is as follows:

Female FTSE	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Female-held directorships	69 5.8%	75 6.4%	84 7.2%	101 8.6%	110 9.7%	121 10.5%	117 10.3%	123 11%	131 11.7%	131 12.2%
Executive directorships	11 2.0%	10 2.0%	15 3.0%	17 3.7%	17 4.1%	14 3.4%	15 3.8%	13 3.6%	17 4.8%	17 5.2%
Female non-executive directors	60 9.1%	65 9.6%	69 10%	84 11.8%	93 13.6%	107 14.5%	102 13.7%	110 14.5%	114 14.9%	114 15.2%
Women Holding FTSE directorships	60	68	75	88	96	99	97	100	113	113
Companies with female executive directorships	10	8	12	13	13	11	13	11	16	15
Companies with at least one female director	58	57	61	68	69	78	77	76	78	75
Companies with multiple female directors	12	15	17	22	29	30	29	35	39	37
Companies with no female directors	42	43	39	32	31	22	23	24	22	25

Source: FTSE Female Reports 2000–2009.

The table shows that women currently make up 12.2% of total directorships on FTSE 100 boards and women constituted only 14.7% of all new director appointments during 2009. In addition, women hold 7.6% of FTSE 250 board positions. Twenty-five FTSE 100 companies still have exclusively male boardrooms. The table highlights a slow rate of progress for women accessing the boardroom,¹² although it is notable that, within the decade, the percentages, whilst remaining small, have actually doubled. That change might be the result of changes in corporate governance.¹³

The table reveals a tokenistic recruitment of women in company boardrooms. Seventy-five FTSE 100 companies appear to have only one female director, many

11. See Office for National Statistics 'Labour Market Statistics' *Statistical Bulletin* March 2010, available at <http://www.statistics.gov.uk/pdfdir/lmsuk0310.pdf>. Note that of the men in employment, 13.465 million are employed full time and 1.887 million are employed part time and of the women, 7.691 million are employed full time and 5.819 are employed part time.

12. The Female FTSE Index Reports highlight the rate of progress; see the website available at <http://www.som.cranfield.ac.uk/som/p1087/Research/Research-Centres/Centre-for-Women-Business-Leaders>; see also The Equal Opportunities Commission Report, *Sex and Power: Who Runs Britain?* (2007), noting that it would take another 60 years to achieve parity on the current rates of change. The European Professional Women's Network describes progress as 'glacially slow': See Third Biannual BoardWomen Monitor 2008, available at http://www.europeanpwn.net/files/presentation_bwm_2008.pdf.

13. See further below discussing principles A.4 and A.4.6 of the Combined Code on Corporate Governance.

fewer have more than one. The table does not show obviously how many women hold multiple directorships, although the fact that there are 113 women holding 131 female positions indicates that there are approximately 18 multiple positions held. Multiple directorships mean that still fewer women are reaching the top ranks.

Experian published a more upbeat Female Directors Report in December 2007¹⁴ and this revealed that women in the UK make up 28% of directorships but only 12% of directors within businesses of more than 250 employees are female and 11% of directors within organisations with a turnover of more than £22.8 million are female. Experian revealed that younger women find it easier to enter the boardroom. Middle-aged women by contrast are the most under-represented in the boardroom. The number of female directors peaks at the 40–44 age band but men in the same age band outnumber women by 3.3 to 1. By the age of 50–54, men outnumber women in the boardroom by nearly 4 to 1.

By comparison with the private sector, the last *Sex and Power Report* published by the Equality and Human Rights Commission in 2008 showed that women's representation in senior roles in the public and voluntary sectors was somewhat higher at 23.9% and in politics it was 26.6%, although still these figures are variable. Thus, for example, in the senior levels of the judiciary from the high court and above, women held only 9.6% of positions, whilst 19.3% of Members of Parliament were women during 2007/8.¹⁵ Following the recent 2010 election, the number of women MPs moved up to 139 – 21%.¹⁶

In the USA and in Western Europe, the figures are generally similar to – and sometimes worse than – those revealed in the UK. In Canada, Catalyst reports that in 2009 women's representation as corporate officers was 14% of the Financial Post 500;¹⁷ in the USA, women hold 15.2% of the board seats in the Fortune 500.¹⁸ The European Professional Women's Network describes Portugal as a 'laggard', where women hold only 2.1% of directorships.¹⁹ In Australia also, women held only 8.3% of board positions in 2008.²⁰ Much of the data available are not easily comparable across countries, sectors or time. More longitudinal data are required to be able to make useful comparisons.²¹ In summary, the fact that half the workforce is comprised of

14. Experian *Experian Female Directors Report 2007, The Changing Face of Britain's Boardrooms* (December 2007), available at <http://www.prweb.com/prfiles/2007/12/11/285158/THECHANGINGFACEOFBRITAINSBOARDROOMS.pdf>

15. See Equality and Human Rights Commission *Sex and Power Report 2008*, available at <http://www.equalityhumanrights.com/advice-and-guidance/here-for-everyone-here-for-business/working-better/sex-and-power/>

16. With 21% women, the UK parliament compares badly with the German Bundestag, 33%, the Dutch parliament, 42%, and the world's most equal parliaments, Rwanda, 56%, and Sweden, 46%; see R Booth 'Parliament's 2010 Intake Shows Swing towards Private Sector' *The Guardian* 10 May 2010.

17. L Jenner, L Mulligan-Ferry and R Soares, *2009 Catalyst Census: Financial Post 500 Women Board Directors*, available at http://www.catalyst.org/file/341/2009_fp500_core_report_final_021910.pdf. This figure is down from 16.9 % in 2008.

18. Catalyst *US Women in Business* (June 2009), available at <http://www.catalyst.org/publication/132/us-women-in-business>

19. Third Biannual BoardWomen Monitor 2008, above n 12.

20. See Egon Zehnder International *Gender in the Boardroom* (Australian Government, Equal Opportunity for Women in the Workplace Agency, 2008).

21. D Branson *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* (New York: NYU Press, 2007). See also LM Martin et al, who comment on

women but only around 14% of directors in the largest companies are women indicates that a glass ceiling exists, preventing women from progressing to the top of their careers. The House of Commons Trade and Industry Committee in its report, *Jobs for the Girls: The Effect of Occupational Segregation on the Gender Pay Gap*,²² highlighted its concern with the continuing gender pay gap partly caused by occupational segregation. In a follow up report 2 years later,²³ this problem was connected in part to the lack of representation of women on company boards.

WHAT HAS GIVEN RISE TO THIS GLASS CEILING?

Numerous reasons for the existence of the glass ceiling have been presented in the literature. Individual and organisational factors lead to women's underrepresentation in the boardroom.²⁴ Sturm sees the glass ceiling as a 'by-product of ongoing interactions shaped by the structures of day to day decision-making and workplace relationships'.²⁵ Sturm goes on to suggest that 'the glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns'.²⁶ Examples include stereotypes and perceptions; structural arrangements and informal and subjective decision-making processes at board level; lack of mentoring and networking for women; family responsibilities and work-life balance issues; and becoming one's own boss. Only the last of these suggests a positive reason for women not entering boardrooms.

Stereotyping

According to O'Connor, 'gender stereotypes act to pull men and women in the direction of conventional behaviour'.²⁷ Despite dramatic changes in these gender roles during the last generation, the reality is that perceptions about gender roles are slow to change. Oakley observes that, even though men may deal with women as professionals, their private life perceptions of women, based on their relationships with mothers, wives and daughters, spill over into the workplace, making it harder for women to be taken seriously as professionals and thus hindering their opportunities

the difficulty of finding information and data on gender diversity. This is because there are currently no requirements for companies to report on these issues and so the self-reporting is sparse: LM Martin et al 'Boards of directors and gender diversity in UK companies' (2008) *Gender in Management: An International Journal* 194. On lack of information and reporting problems see below.

22. Sixteenth Report of Session 2004–05, HC 300-1, 7 April 2005.

23. House of Commons: Business Enterprise and Regulatory Reform Committee Report *Jobs for the Girls Two Years On*, Second Report of Session 2007–08, HC 291.

24. AJ Hillman, C Shropshire and AA Cannella Jr 'Organizational predictors of women on corporate boards' (2007) 50 *Academy of Management Journal* 941.

25. S Sturm 'Second generation employment discrimination: a structural approach' (2001) 101 *Columbia Law Review* 458 at 469.

26. Ibid.

27. MA O'Connor, 'Women executives in gladiatorial corporate cultures: the behavioral dynamics of gender, ego, and power' (2006) 65 *Maryland Law Review* 465 at 478.

for success and then promotion.²⁸ Women are still largely regarded as the primary carers within the family, whilst men go out in the world of work.²⁹

These stereotypes frequently result in ‘a high degree of segregation’ in the workplace, leading to an ‘evaluation bias’ against women based on social role theory and expectation states theory.³⁰ Social role theory means that in the organisational setting, leaders occupy roles defined in terms of hierarchy and the organisational leader is also bound by roles related to gender derived from consensual societal beliefs about the attributes of women and men. Similarly, expectation states theory implies that the lower status of women causes negatively biased evaluations to be made. More favourable traits are associated with men rather than with women.³¹ These stereotyped placements lead to organisational structures that perpetuate the inequalities arising from the biased evaluations.

Structural barriers and informal and subjective decision-making processes

Structural barriers entail job ladder patterns and personnel systems that allow arbitrary and subjective decision making by managers. Patterns of segregation throughout the company reveal a ‘visible trace of bias’. Bielby states that ‘in medium to large scale organizations, pay and advancement prospects usually are closely tied to job titles and job ladders’ and such patterns are generated through an organisation’s policy and practice for hiring, job assignment, training, pay and promotion.³² Bielby describes personnel systems as having ‘arbitrary and subjective’ decision-making criteria and such systems are ‘highly vulnerable to bias due to the influence of stereotypes as for example when individual managers have a great deal of discretion with little in the way of written guidelines or effective oversight’.³³

The Higgs Review on the role and effectiveness of non-executive directors confirms these observations by noting in the UK:³⁴

‘a self-perpetuating tendency in the appointments process that militates against wider representation in the boardroom. Previous PLC board experience is often seen to be the main, and sometimes only, competence demanded of potential candidates. Too often due consideration is not given to candidates with a broader mix of skills and experience.’

28. JG Oakley ‘Gender-based barriers to senior management positions: understanding the scarcity of female CEOs’ (2000) 27 *Journal of Business Ethics* 321 at 328.

29. Catalyst Inc *Women ‘Take Care’, Men ‘Take Charge’: Stereotyping of U.S. Business Leaders Exposed* (New York: Catalyst, 2005). M O’Connor cites a survey of chief financial officers in American corporations which found that 80% were men with stay-at-home wives; see MA O’Connor ‘Corporate social responsibility for work/family balance’ (2005) 79 *St John’s Law Review* 1193 at 1214, citing A Crittenden *The Price of Motherhood: Why the Most Important Job in the World Is Still the Least Valued* (2001) pp 17–18.

30. B Weyer ‘Twenty years later: explaining the persistence of the glass ceiling for women leaders’ (2007) 22 *Women in Management Review* 482.

31. *Ibid.*

32. WT Bielby ‘Minimizing workplace racial and gender bias’ (2000) 29 *Contemporary Sociology* 120 at 123.

33. *Ibid.*

34. D Higgs *Review of the Role and Effectiveness of Non-Executive Directors* (London: DTI, 2003) para 10.18.

In this light, Higgs adds that ‘it has been suggested that search consultants have a tendency to identify candidates from a narrow pool. If that is so, nomination committees can and should insist that their consultants look beyond the usual suspects’ to find candidates who would make good board members.³⁵

Social fit

A major challenge is the fact that women are often considered not to fit the mould. Research evidence indicates that managers tend to see men in general (as opposed to women in general) as more similar to managers, such perceptions being based on stereotyped assumptions about women.³⁶ The Tyson Report suggests that non-executive directors (NEDs) are selected primarily on the basis of their experience as executives or senior managers, which continues the white middle-class male dominance.³⁷ Sheridan and Milgate suggest that ‘managers continue to make decisions on the basis of stereotypes, . . . men in powerful positions have a predilection for people in their own image and they have strongly sex-typed views of the job requirements’.³⁸

The pipeline argument

A typical explanation from chief executive officers (CEOs) for women’s failure to reach top level positions is that there are not enough women in the pipeline with the relevant experience so they are held back. In a US survey in 1998, it was reported that 82% of CEOs thought that women were impeded by a lack of significant general management or line experience, and 64% of CEOs thought that women had not been in the pipeline long enough.³⁹ Catalyst remarked that line experience is ‘widely considered essential for rising to the rank of CEO’.⁴⁰ This pipeline problem is exacerbated by the fact that career progression tends to be a sequence of jobs within and between organisation, rather than a steady climb up one organisational ladder. Yet, the pipeline argument does not stand up to scrutiny since, despite a dramatic expansion in the number of female managers to approximately 50%, the trajectory for achieving equal numbers at the top ranks is another 60 years, both in the UK and in the USA.⁴¹

35. Ibid, para 10.19.

36. See M Heilman et al ‘Has anything changed? Current characterizations of men, women, and managers’ (1989) 74 *Journal of Applied Psychology* 935.

37. L Tyson *The Tyson Report on the Recruitment and Development of Non-Executive Directors* (London Business School, June 2003) p 6.

38. A Sheridan and G Milgate ‘“She says, he says”: women’s and men’s views of the composition of boards’ (2003) 18 *Women in Management Review* 147.

39. B R Ragins, B Townsend, and M Mattis ‘Gender gap in the executive suite: CEOs and female executives report on breaking the glass ceiling’ (1998) 12 *Academy of Management Executive* 28.

40. Catalyst Inc *Census of Women Corporate Officers and Top Earners of the Fortune 500* (New York: Catalyst, 2002) p 2.

41. Equal Opportunities Commission *Sex and Power: Who runs Britain? 2007* (London: Equal Opportunities Commission, 2007); see also O’Connor, above n 27, citing M Steen ‘How soon will women gain more corporate directorships, and will it make a difference?’ *Fast Track* 25 August 2004, available at <http://www.infoworld.com/cgi-bin/displayStat.nl/?pageone/news/features/fastrack/99ft.bo>.

Lack of mentors or networking

Lack of suitable mentors for women progressing up the career ladder is widely seen as an obstacle.⁴² This is linked also to a lack of networking opportunities.⁴³ Without either networks or mentors, women are less likely to get assignments that will enhance their managerial experience.⁴⁴ The elite male network maintains its dominance and power. Individuals who are not part of the network are excluded from positions for which the network acts as a pathway.⁴⁵ The main benefits of mentors and networks are described by Schipani et al.⁴⁶ These include higher income, greater job satisfaction and promotions.⁴⁷ A mentor 'can buffer an individual from overt and covert forms of discrimination, lend legitimacy to a person or position, provide guidance and training in the political peroration of the organisation and provide inside information on job-related functions'.⁴⁸ Mentors may also 'provide reflected power by signalling that an individual has a powerful sponsor' and a mentor might 'increase self-confidence and facilitate achievement of career goals'.⁴⁹ Similarly, networking contributes to the social capital necessary for advancement to top management, since it gives encouragement that leads to training that leads to advancement.⁵⁰ Networking helps an individual to increase visibility and get known, to enhance industry knowledge and improves a person's ability to offer innovative recommendations in the workplace.⁵¹ Despite the benefits, there are also dangers in mentoring and networking in that they can increase segregation if they are not gender neutral. Women-only networks appear to broaden the gap between the sexes rather than level the playing field.⁵²

Corporations as masculine territory

Exclusion of women from the networks that give them a passage to the top ranks also reinforces the masculinity that surrounds those positions, as well as the masculinity that appears to characterise the corporate organisation. The 'gladiator' metaphor ascribed to the corporate culture presents the large company as a masculine and narcissistic organisation, where the more valued features include achievement, heroism, assertiveness and material success.⁵³ Women are frequently judged

42. Catalyst Inc *Women in US Corporate Leadership* (New York: Catalyst, 2003) p 7.

43. CM Janiak 'The "links" among golf, networking and women's professional advancement' (2003) 8 *Stanford Journal of Law, Business and Finance* 317 at 324.

44. LM Fairfax 'Clogs in the pipeline: the mixed data on women directors and continued barriers to their advancement' (2006) 65 *Maryland Law Review* 579 at 601.

45. V Singh and S Vinnicombe 'Why so few women directors in top UK boardrooms? Evidence and theoretical explanations' (2004) 12 *Corporate Governance* 479 at 485.

46. CA Schipani et al 'Pathways for women to obtain positions of organizational leadership: the significance of mentoring and networking' (2009) 16 *Duke Journal of Gender Law and Policy* 89. See also KE Kram, *Mentoring at Work: Developmental Relationships in Organizational Life* (Scott Foresman, 1985).

47. *Ibid.*, at 100.

48. *Ibid.*, at 100.

49. *Ibid.*, at 100.

50. *Ibid.*, at 102.

51. *Ibid.*, at 115.

52. *Ibid.*, at 135.

53. See AN Licht 'The mother of all path dependencies: towards a cross-cultural theory of corporate governance systems' (2001) 26 *Delaware Journal of Corporate Law* 147 at 170–180.

negatively if they do not show these traits but they are also judged negatively when they do.⁵⁴ In this world, men are assumed capable of a higher level assignment unless they have performed poorly, whilst women are not automatically presumed capable.⁵⁵ Catalyst emphasises that gender differences arise because corporate environments were designed by and for men, and presumably geared toward their behaviour and responsive to their needs.⁵⁶

Self-perceptions

There are dangers of further stereotyping in suggesting that women and men behave differently but research findings do identify differences. Research by Gilligan is widely cited as demonstrating existence of such differences.⁵⁷ Gilligan noted that, from an early age, girls are more concerned with maintaining relationships, whilst boys are concerned with personal autonomy and that this manifests itself in the workplace and at the negotiation of terms and conditions of employment stage when women are more likely to adopt a relational stance, while men talk in terms of justice and rights and personal autonomy. The relational emphasis adopted by women means that they do not make as many demands at the bargaining table, which puts them at a disadvantage in terms of hierarchical position. Additionally, O'Connor claims that women set low goals and safe targets in managing their careers. They do not so readily take actions to obtain raises and promotions.⁵⁸ Women are also more likely to follow formal career paths and are overtaken by men who simultaneously use informal networks to get on so that they get better pay and promotions, even when they are not rated as highly.⁵⁹ Women hold back because they doubt themselves, perhaps because they feel like imposters in a male-dominated cultural environment.

Family commitments

Stereotypes exist both within the workplace and the private domain of the home. The result is that, whilst women who go to work frequently employ cleaners and child-minders, still many find that they are required to do two or three jobs (going to work, household chores and child care) which, over a long term, they find difficult to sustain. Large and Saunders list the questions a woman must face as she moves up the career ladder: her self-image, the degree of flexibility of working conditions, the opportunity cost in going for a promotion, the amount of me time available⁶⁰, and all these questions become more difficult to answer when children are involved.

Although the workplace is gradually offering greater flexibility in order to accommodate these different roles through policies connected with the work-life balance

54. Catalyst Inc *The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Doomed if You Don't* (New York: Catalyst, 2007).

55. See Schipani et al, above n 46, at 107.

56. Catalyst Inc *Women in US Corporate Leadership* (New York: Catalyst, 2003) pp 16–19.

57. C Gilligan *In a Different Voice* (Boston: Harvard University Press, 1982).

58. O'Connor, above n 27.

59. *Ibid.*

60. M Large and MNK Saunders 'A decision-making model for analysing how the glass ceiling is maintained: unblocking equal promotion opportunities' (1995) 7 *The International Journal of Career Management* 21 at 22–23.

and family-friendly measures introduced in the UK during the last decade, such workplace flexibility is still a relatively new concept and does not necessarily resolve the difficulties the working mother often has to face. The long hours culture (which is still the norm in Western developed society, despite the existence of legislation such as the Working Time Regulations 1998⁶¹) exacerbates the difficulties faced by the woman and her family.⁶²

Weaknesses in the existing legislation

Existing legislation seeks largely to protect against discrimination but does not specifically focus on corporate boardrooms. The most directly relevant legislation includes the Sex Discrimination Act 1975, the Equal Pay Act 1970, and the Work and Families Act 2006.

Alice Belcher has considered the extent to which the anti-discrimination legislation could be used by a woman to challenge her lack of appointment to the board of directors.⁶³ If appointment to the board depends on decisions and recommendations of a nominations committee, an action might be taken if she feels that the nomination committee is applying discriminatory criteria. The Sex Discrimination Act 1986 covers applicants for positions and covers opportunities for promotion. Direct discrimination would require differential treatment that gives rise to a detriment. More likely is a claim for indirect discrimination. For example, previous board experience is normally required. In reality, this requirement is likely to have a disparate impact on women because they are less likely to be able to satisfy it. Belcher suggests that a company might be able to justify such a requirement under the *Bilka Kaufhaus*⁶⁴ test of proportionality: that the means are appropriate and necessary to meet the legitimate objective. In any event, the individualised nature of discrimination claims has meant that systemic problems are not necessarily tackled effectively by employers or by policy makers or regulators.⁶⁵ The result is that the legislation does not assist women effectively at the higher levels for which tribunal challenges are rare. Indeed, Belcher notes that a tribunal's jurisdiction could be blocked on the basis that board appointments are a matter for company law rather than for employment law, thereby requiring challenges to be made using company law procedures. Often senior women will not be represented or assisted by trade unions in challenging the system and the publicity at these levels makes such challenges unappealing, either for the companies concerned or for the women whose reputations will have a high profile. Thus, despite the existence of the Equal Pay Act 1970 and the Sex Discrimination Act 1975, the reality remains that women receive an overall average of 22.6% less pay than men,⁶⁶ and they face occupational segregation and glass ceilings.

61. The Working Time Regulations 1998, SI 1998/1833 as amended by the Working Time (Amendment) Regulations 2003, SI 2003/1684.

62. See O'Connor, above n 29.

63. A Belcher 'Board diversity: can sex discrimination law help?' (2005) 56 Northern Ireland Legal Quarterly 356.

64. Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

65. D Rosenblum 'Feminizing capital: the economic imperative for women's corporate leadership' (2010) 7 Berkeley Business Law Journal (forthcoming).

66. Government Equalities Office *Working towards Equality – Achieving Equality for Women and Men at Work Equal Opportunities Report* (October 2009) p 3.

The Work and Families Act 2006 has sought to alleviate some of the problems by including provisions designed to encourage men to be more involved in home commitments and for employers to allow them to do so. Thus, the extension of paternity leave and the right to ask for flexible working arrangements contribute towards making the workplace more compatible with home obligations and also to equalise the share of tasks in the home between men and women. However, this legislation does not go far enough to produce more meaningful equality at work or at home.⁶⁷

The fact remains that the anti-discrimination legislation has done little to change the masculine culture of companies at these levels and it has not assisted women in their fight against the glass-ceiling phenomenon.

REASONS FOR SEEKING A MORE BALANCED GENDER RATIO IN COMPANY BOARDROOMS

Campaigns have been launched in numerous jurisdictions for ending inequality in the boardroom. The European Commission,⁶⁸ governments and women's networks and associations have all indicated that the situation should change. Broadly, the arguments in favour of redressing the imbalance fall into two categories: the business efficacy case and the human rights, egalitarian case.

The business case

The business case is based upon claims that inclusion of women improves business performance. Evidence, although not necessarily conclusive,⁶⁹ is provided by various organisations of improved profits when women are represented at boardroom level.⁷⁰ A wider talent pool enables the business to benefit from a much larger number of the ablest people. Including women also puts the company more in touch with its customer base.⁷¹ A business may be better protected from claims of discrimination if it can show that it promotes women and appoints them at the highest levels.⁷² In addition, by recruiting women from senior management, the company helps to retain its employees and saves on costs of employee turnover.⁷³

Women score higher than men in many indices of top leadership, including those related to profitability.⁷⁴ Claims are made that women perform better than men on

67. See E Carracciolo di Torella 'New Labour, new dads: the impact of family friendly legislation on fathers' (2007) 36 *Industrial Law Journal* 318; G James 'The Work and Families Act 2006: legislation to improve choice and flexibility' (2007) 36 *Industrial Law Journal* 272.

68. See, eg, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *Equality Between Women and Men – 2009* SEC(2009) 165 COM/2009/0077 final.

69. See nn 78–80 and accompanying text.

70. See, eg, Catalyst Inc *The Bottom Line: Connecting Corporate Performance and Gender Diversity* (New York: Catalyst, 2004), available at <http://www.catalyst.org/>. Such evidence is not necessarily conclusive of a positive correlation between women on board and greater profits: see nn 80–82 and accompanying text below.

71. See Women to the Top *The Business Case for Gender Diversity*, available at http://www.women2top.net/uk/facts/tools/Business_Case_Gender_Equality.pdf.

72. Ibid.

73. Ibid.

74. Eg Catalyst, above n 70.

giving feedback, rewarding and motivating individuals and teams, and acting with integrity. Women also score higher than men on maintaining productivity, producing quality work, meeting project deadlines, generating new ideas and moving projects forward.

Women might also be considered as contributing to improvements in corporate governance. For example, because they are not part of the 'old boys club', they have the potential to bring greater independence to the decision-making processes. Women are less likely to be named in proxy statements for poor attendance at board meetings. The greater the fraction of women on the board, the better is the attendance behaviour of male directors. Available evidence suggests that they are more likely to insist on conflict of interest guidelines, to pay attention to audits, as well as risk oversight and risk control, and to conduct formal board evaluations.⁷⁵

'Group think' is perpetuated by tokenism and reinforces the structural and social features that impede women's progress.⁷⁶ The differences that women bring help a boardroom to avoid falling into the trap of 'group think', where the group is unable to critically assess its own decisions.⁷⁷ According to Polden, women and minority directors seem to ask different questions than white male directors, and bring different sets of experiences and concerns with them to the boardroom.⁷⁸ Tyson cites research by Milliken and Martins,⁷⁹ which suggested that groups that are more diverse in skill or knowledge-based dimensions have the potential to consider a greater range of perspectives and to generate more high-quality solutions to problems than less diverse groups. Diversity can send positive signals to customers, shareholders and employees, and can help create a better understanding of those groups. Examination of the backgrounds of those women who have succeeded indicates that, as well as their often outstanding career capital, they bring social capital to the network of directors, by interlocking directorships, by contacts from previous employment, by contacts through voluntary work and, for some titled women as wives of prominent males, by evidence of social relationships within powerful networks.

There are limitations and dangers in the business arguments. Tacheva and Huse, for example, suggest that diversity can have a negative impact on some aspects of the business, such as lack of a cohesive or focused business strategy, disagreements and

75. J Rosener 'Women on corporate boards makes good business sense' *Directorship*, May, 2003, available at <http://www.womensmedia.com/lead/87-women-on-corporate-boards-makes-good-business-sense.html>

76. See IL Janis *Victims of Groupthink* (Oxford: Houghton Mifflin, 1972) describing the symptoms of group think as a sense of invincibility, a belief in inherent morality of goals, collective rationalisation, the stereotyping of out groups, the appearance of unanimity, self-censorship, pressure on dissenters and self-appointed mind-guards. The preconditions for group think are a cohesive group, structural faults in decision making and situational context.

77. This requires a 'critical mass' to be established; see V W Kramer et al *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* Wellesley Ctrs for Women, Working Paper Series (Report No WCW 11, 2006).

78. DJ Polden 'Forty Years after Title VII: creating an atmosphere conducive to diversity in the corporate boardroom' Santa Clara University School of Law Legal Studies Research Paper Series No 06-08, University of Memphis School of Law, Vol 36(1), Fall 2005, available at SSRN <http://ssrn.com/abstract=931203>.

79. Tyson, above n 37, p 6, citing FJ Millikens and LL Martins 'Searching for common threads: understanding the multiple effects of diversity in organisational groups (1996) 21 *Academy of Management Review* 402.

slower processes.⁸⁰ Adams and Ferreira have recently found that the average effect of gender diversity on firm performance is in fact negative and can reduce firm value for well-governed firms.⁸¹ A recent report from the University of Michigan suggests that Norwegian firms have performed less well in terms of shareholder value since enactment of female quotas.⁸²

The effect of diversity has not been fully tested because diversity has not yet been solidly achieved, so much of the business case is therefore speculative.⁸³ Connected to this point is that the business case expects women to add value to the business but value is defined narrowly as improved profits. Some values, on the other hand, such as good employee morale, may not be clearly measurable by profits. The business case also inherently relies on stereotyped views of men and women's roles but these stereotypes will not always be accurate. If women are only appointed in a token fashion, they will have much less impact and could become socially and professionally isolated, so they are unlikely to be able to influence board effectiveness. Thus, the claims about women's impact on group think may be overstated, as Huse makes clear, since we do not know what goes on in board meetings or to what extent women question board decisions.⁸⁴ There is a further danger that, where profits are reduced, this will push women holding such positions over a 'glass cliff'⁸⁵ and will discourage any efforts to achieve gender diversity.

These weaknesses in the business case may justify a search for an alternative basis for raising women's opportunities and levels of representation. One alternative is the human rights case.

The human rights/egalitarian case

The established right to equal treatment within the Universal Declaration of Human Rights⁸⁶ and the European Convention for the Protection of Human Rights and

80. S Tacheva and M Huse *Women Directors and Board Task Performance: Mediating and Moderating Effects of Board Working Style* Draft of paper to be presented at the EURAM meeting 2006, available at http://209.85.229.132/search?q=cache:XRUU3HkRUGcJ:www.boeckler.de/pdf/v_2006_03_30_huse2_f5.pdf+Tacheva+and+Huse&cd=7&hl=en&ct=clnk&gl=uk.

81. RB Adams and D Ferreira 'Women in the boardroom and their impact on governance and performance' (2009) 94 *Journal of Financial Economics* 291; see also J Marinova, J Plantenga and C Remery *Gender Diversity and Firm Performance: Evidence from Dutch and Danish Boardrooms* Tjalling C Koopmans Research Institute, Discussion Paper Series (No 10-03, January 2010), available at http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_USE/REBO_USE_OZZ/10-03.pdf.

82. KR Ahern and AK Dittmar *The Changing of The Boards: The Value Effect of a Massive Exogenous Shock* Working Paper, University of Michigan (2009). See D Ferreira 'Board diversity' in R Anderson and HK Baker (eds) *Corporate Governance: A Synthesis of Theory, Research, and Practice*, (New York: John Wiley, 2010) ch 12.

83. It might also be the case that in these current times of financial recession firm performances will be reduced but not necessarily because of gender diversity. The figures might be difficult to interpret with any certainty under such conditions.

84. See, eg, M Huse (ed) *The Value Creating Board* (Oxford: Routledge, 2009) several chapters.

85. MK Ryan and SA Haslam, 'The glass cliff: evidence that women are over-represented in precarious leadership positions' (2005) 16 *British Journal of Management* 81.

86. See Art 2.

Fundamental Freedoms 1950,⁸⁷ as well as within EU law,⁸⁸ provides a basis upon which to seek equal opportunities for men and women, as well as for other groups in society. Steps might be taken to enable women to enjoy equal opportunities at senior career levels, as well as elsewhere in the workplace.

At the international level, gender equality and women's empowerment is given increasing emphasis. Gender equity is the third of the United Nations ten Millennium Development Goals. The UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) has also been ratified by 186 countries including the UK. The Convention calls for the equal or proportional participation of women in all spheres of life. The Convention provides in Art 3 that:

‘States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.’

In Art 11, the Convention provides that states shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. Article 11 highlights the same employment opportunities, and right to promotion, equal remuneration and equal treatment.

The egalitarian/human rights case seeks balanced representation in elite groups. If women form half the population and half the workforce those proportions should be evident at decision-making levels so that women's interests are effectively taken into account. The state's role has been diminished during the last couple of decades by privatisation and deregulation programmes. The result has been to increase corporate political power dramatically. That justifies further the need to ensure that women are represented. These arguments implore firms to increase the diversity of boards on the grounds that it achieves for society an outcome that is more equitable and, in some sense, fairer.⁸⁹

UNIFEM and the UN Global Compact recently launched the *Women's Empowerment Principles* that seek to encourage equality in the business environment. The first principle rests on the need to ‘affirm high-level support and direct top-level policies for gender equality and human rights’. The Principles are based on recognition of the principle of equality between men and women ‘as a universal international precept – a fundamental and inviolable human right’.⁹⁰ The driver for the introduction of these principles is the fact that women are so dramatically under-represented at top levels in companies around the world. The Principles seek to ‘assure sufficient participation of women – 30% or greater – in decision-making and governance at all levels and across all business areas’.

87. See Art 14.

88. See Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

89. S Brammer, A Millington and S Pavelin ‘Gender and ethnic diversity among UK corporate boards’ (2007) 15 *Corporate Governance: An International Review* 393 at 395.

90. United Nations Development Fund for Women and UN Global Compact, *Women's Empowerment Principles: Equality Means Business*, available at <http://www.unifem.org/attachments/stories/WomensEmpowermentPrinciples.pdf>.

The egalitarian case avoids stereotyping and emphasises inclusiveness regardless of similarities or differences between men and women or between other groupings. Character differences are irrelevant for how persons are to be treated. The egalitarian case thus aims at eradicating the negative impacts of gender-based job segregation such as pay inequality and unequal career trajectories. The emphasis is upon equality of opportunity for all. One criticism of the egalitarian case might be that it gives rise perhaps to a sense of entitlement that overlooks the necessity of a 'long, hard, unglamorous slog'.⁹¹ In this way, 'the route to the top is predicated on endeavour not entitlement'.⁹²

MEASURES TAKEN TO ERADICATE WORKPLACE INEQUALITIES

The UK's approach has been essentially voluntary 'with an emphasis on highlighting the importance of the issue, public identification of "good" and "bad" performers and arguing in favour of the business case for greater board diversity'.⁹³ Initiatives have come from a variety of sources including the government, corporate governance bodies, private industry organisations and campaign groups.

The UK government responded to the Enron scandal in the USA with a review of the role and effectiveness of non-executive directors. The Higgs Review revealed the inadequacy of the non-executive directors as corporate governance actors, suggesting that part of the problem arises because they are generally recruited from a narrow pool of applicants and in ways that fail to ensure that the best candidates are necessarily appointed. Higgs emphasised the need for an appointment process that is 'rigorous, fair and transparent and promotes meritocracy in the boardroom'.⁹⁴

Following Higgs, the Tyson Report⁹⁵ recommended use of private search agencies, use of talent from the public sector and use of processes similar to those in the public sector such as use of registers for those interested in serving as NEDs and use of appointments committees as well as advertising of positions in the media. Tyson also recommended that NEDs could be recruited from human resources management, an area in which more females tend to work.

The previous Combined Code on Corporate Governance included provision A.4, stating that there should be 'a formal, rigorous and transparent procedure for the appointment of new directors to the board' and the supporting principle A.4.6 added that annual reports should provide an explanation where a chairman or non-executive director has been appointed without use of an external search consultancy or open advertising.

Reporting and information gathering

The Cranfield Business School prepares an annual Female FTSE Index which reveals the proportions of women on company boards in the FTSE 100 companies and reveals

91. See, eg, A Hofman and T Hofman 'Why are senior women so rare in finance?' *Financial Times* 21 May 2010.

92. *Ibid.*

93. J Grosvold, S Brammer and B Rayton 'Board diversity in the United Kingdom and Norway: an exploratory analysis' (2007) 16 *Business Ethics: A European Review* 344 at 345.

94. Paragraph 10.12.

95. Above n 37.

their numbers in different sectors so that comparisons can be made. *Opportunity Now*, part of the Business in the Community Movement, publishes statistics gathered from various research bodies.

Although reporting and information gathering provide an important aspect of monitoring progress towards gender equality in the boardroom, their contribution towards improving the gender balance is limited. Kate Grosser and Jeremy Moon observe that, whilst reporting on gender and diversity policies and programmes is generally widespread, reporting on gender impacts and performance is low and idiosyncratic. For example, gender breakdowns are rare in human capital reporting. There are also significant instances of non-disclosure of gender information internally generated for other purposes. Martin et al also note that the lack of aggregated data causes difficulties in establishing the true figures.⁹⁶ Overall, Grosser and Moon reveal that reporting is 'patchy, unsystematic, not easily compared and rarely constituted a comprehensive coverage of gender workplace issues'.⁹⁷ These observations by the commentators were recently confirmed in research carried out for the Government Equalities Office. That research found that only 8% of firms with more than 250 employees publish diversity data. The collection of such data is patchy and incomplete. When asked in in-depth interviews about their reporting practices, employers expressed concerns about unclear definitions of diversity, negative employee responses to published data and possible discouragement of a wider range of applicants if figures were poor. Those firms that do publish such data highlight their corporate and social responsibility reputations and the positive effect it can have on recruitment.⁹⁸

Mentoring and networking programmes

Higgs suggested that chairmen and chief executives should consider implementing executive development programmes to train and develop suitable individuals for future director roles and he also stated that more should be done to develop the directors of the future.⁹⁹ The government has since endorsed the introduction of a mentoring programme launched by Praesta, an executive coaching organisation.¹⁰⁰ A number of women activists have also created networks and campaigns to improve their opportunities of successful recruitment, such as the Fawcett Society, which focuses on the continuing pay gap between men and women and seeks improved child care facilities and has more recently debated the possible benefits of legislative quotas.¹⁰¹

96. Martin et al, above n 21.

97. K Grosser and J Moon *Best Practice Reporting on Gender Equality in the UK: Data, Drivers and Reporting Choices* ICCSR Research Paper Series (No 35, 2006), ISSN 1479-5124, p14, available at <http://www.edf.org.uk/publications/KateGrosser.pdf>.

98. IFF Research *Research Report: Private Company Reporting of Workforce Diversity Data* (July 2009), available at GEO website <http://www.equalities.gov.uk>

99. Higgs, above n 34, para 10.14.

100. House of Commons: Business and Enterprise Committee *Jobs for the Girls: Two Years On: Government, Response to the Committee's Second Report of Session 2007-08* Fourth Special Report of Session 2007-08, HC 634, para 62; see Praesta, FTSE 100 Cross-Company Mentoring Programme, information available at http://www.praesta.co.uk/images/Praesta_FTSE-100-Mentoring-Programme_2009.pdf.

101. Lewis and Rake, above n 9.

Candidate lists

Although both Tyson and Higgs recommended candidate lists of non-commercial women who might act as NEDs, there is no evidence that such a step has been formalised.¹⁰²

Good practice advice

The government has published various best practice advice documents such as *Building Better Boards* published by the Department of Trade and Industry (DTI) in December 2004,¹⁰³ which is specifically concerned with improving corporate governance and stresses that boards are key to effective corporate governance.

The previous DTI's Women and Equality Unit published its own guidance on diversity: *Diversity Best Practice in the Corporate World: A Guide for Business*, providing tips for better and more diverse boards. Another document, *Brighter Boards for a Better Future: Diversity Best Practice*, makes clear that best practice is preferred over legislative requirements. The document provided top ten tips for companies, headhunters, women and top ten skills that companies look for. For women, the top ten tips include get networking, have the right skills, raise profile, learn how to sell yourself, be specific about what you have to offer, identify fertile ground, take on leadership positions, get board experience, believe in yourself and persevere. In a similar fashion, Branson also advises women to alter their communication and language, to add humour to their work, etc.¹⁰⁴ Such approaches suggest that women are required to fit into the culture. They arguably lay the blame on women for the inequalities rather than the systemic and structural inequalities that stand in women's way of progress.

The efforts so far have gained little by way of progress. The response shows a reluctance to take forceful legislative steps. The new Equality Act 2010 permits an employer to take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are equally qualified, and the clause does not allow employers to have a policy of automatically treating people who share a protected characteristic more favourably than those who do not.¹⁰⁵ This is unlikely to have much effect since candidates for appointment at boardroom level are unlikely to have equal qualifications.

A new provision in the revised Code on Corporate Governance states that 'the search for board candidates should be conducted and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender'.¹⁰⁶ This provision responds to the final recommendations made in the Walker Review in November 2009. Walker objected to 'parachuting' women into boardrooms as non-executive directors without executive board or senior executive experience

102. S Vinnicombe *Call for More Women in the Boardroom* (Cranfield, Spring 2009), available at http://www.som.cranfield.ac.uk/som/dinamic-content/news/documents/mf_women.pdf.

103. Available at Department for Business, Innovation and Skills, and at <http://www.berr.gov.uk/whatwedo/businesslaw/corp-governance/better-boards/page17362.html>.

104. Branson, above n 21.

105. Section 159.

106. New supporting principle B.2, see further the website available at <http://www.frc.org.uk/corporate/reviewCombined.cfm>.

elsewhere.¹⁰⁷ With respect, Walker fails to see that the nub of the problem is in fact that women are denied that executive or senior executive experience! The Government and Equalities Office also asked the Financial Reporting Council to include new reporting requirements on gender diversity in the revised Code so that firms must report on what they are doing to increase the number of women in senior management positions. This suggestion is not included in the final version of the Code.

These tame approaches are unlikely to have an effect so rapid and dramatic as have been observed elsewhere after the introduction of legislative quotas to combat women's under-representation in company boardrooms. It is to these experiences that I now turn.

LEGISLATIVE GENDER QUOTAS IN NORWAY AND IN SPAIN

Gender quotas may support both main strands of argument for extending female representation: the equality and social justice argument and the utilitarian argument of extending diversity. Whilst gender quotas have been established in a number of jurisdictions in the political sphere, they have not previously been a feature of the private commercial environment where actors have been left with considerable autonomy in how they appoint at higher levels. However, both Norway and Spain have recently altered the scenery by introducing gender quotas for the boards of public companies.

Within the literature, there are various views for and against the introduction of quotas. A key argument in favour is that other measures have failed to overcome a deeply embedded culture of inequality. Lisa Baldes argues that the appeal of gender quotas in the political arena is that they constitute a direct attempt to tackle 'the failure of more gradual efforts to change the masculine culture of politics'. Thus, quotas shift the responsibility for women's under-representation away from women who previously had to conform to male standards in order to be selected and towards political elites, who are now required to devise new principles and consider alternative spheres of political recruitment. The legal system can be utilised as a way of kick-starting attitudinal change or as the European Professional Women's Network (EPWN) expresses it, the compulsory nature of quotas will help create new reflexes.¹⁰⁸ Gender quotas also offer an external influence in the shaping of the new diversity model. Another justification for introducing gender quotas is offered by Medha Nanivadekar who regards quotas as 'a form of compensation for historical injustice suffered by identifiable groups and represent evidence of society's commitment to redress that injustice'.¹⁰⁹ Rosenblum suggests that, in the context of women's representation in boardrooms, legislative quotas would go some way to meet states' obligations under CEDAW, particularly Arts 3 and 11.¹¹⁰ More pragmatically, gender quotas might act as

107. D Walker *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities, Final Recommendations* (HM Treasury, 26 November 2009), available at http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf.

108. EPWN *Quotas: For or Against?*, available at http://www.europeanpwn.net/index.php?article_id=213; C Demailly *EuropeanPWN* (May 2005); L Baldez 'The pros and cons of gender quota laws: what happens when you kick men out and let women in?' (2006) 2(1) *Politics and Gender* 102.

109. 'Are quotas a good idea? the india experience with reserved seats for women' (2006) 2(1) *Politics and Gender* 119.

110. Rosenblum, above n 65.

a mechanism to achieve the critical mass considered necessary to end the negative influence of group think and to break the masculine culture that pervades corporate organisations. Konrad and others suggest that a board requires three women to change the culture effectively, whilst only one or two women may actually compound their outsiderness.¹¹¹

There are some potential disadvantages attached to quotas. Baldes notes that they may do no more than reinforce the status quo. In the political sphere, for example, quota requirements might strengthen highly centralised, undemocratic processes of candidate nomination. Their effectiveness is also limited in that they introduce new players to the political arena but make them play according to old rules, rather than bring about change to those old rules. Another problem noted by the EPWN is that quotas might depreciate the value of women, implying that their successes can be ascribed to quotas.¹¹² In this way, women are portrayed 'as a species that must be protected', with gender quotas promoting the 'victim' stereotype. Mona Lena Krook,¹¹³ for example, notes that opponents argue that quotas privilege groups over individuals, undermine equality of opportunities and ignore other more pressing social cleavages. People prefer to think that positions have been won based on merit rather than through quota requirements. These observations lead to women themselves being concerned with the potential stigma attached to gaining positions under a quota system.

Gender quotas alone are not likely to resolve the problem of the gender imbalance. Gender parity laws are only likely to succeed if they are accompanied by a deeper understanding of the factors limiting women's participation, such as the difficulty in balancing family and career.¹¹⁴ They need a supportive back up of supplementary measures aimed particularly at capacity building for women and attitudinal change on the part of both men and women.

Gender quota laws are also likely to vary and have different degrees of application. To make them succeed, a balance has to be made in making them acceptable and making them effective. In theory, equal opportunity would be 50%; in practice, quotas are set at different levels. There are also various methods for creating binding quotas. They can be implemented either by law or by offering incentives such as government contracts or reputational ratings. Such variations are made clear in the examples of Norway and Spain.

Norway's boardroom gender quota provisions

In Norway, the quotas for company boardrooms were introduced in the Law of Public Companies. During 2002, the coalition government Minister for Trade and Industry, Mr Ansgar Gabrielsen, who was a corporate leader from the Conservative Party, stated that he was 'sick and tired of male dominance in the corporate boards'¹¹⁵ and that he

111. AM Konrad, V Kramer and S Erkut 'The impact of three or more women on corporate boards' (2008) 37 *Organizational Dynamics* 145.

112. M Visser and A Gigante 'Quotas: pros and cons' in *Women on Boards – Moving Mountains* (Women@Work, No 8, EPWN, December 2007) p 86, available at http://www.europeanpwn.net/files/quotas_pros_and_cons.pdf.

113. ML Krook 'Gender quotas, norms and politics' (2006) 2 *Politics and Gender* 110.

114. MF Bagues and B Esteve-Volart *Can Gender Parity Break the Glass Ceiling? Evidence from a Repeated Randomized Experiment* FEDEA Working Paper (2007-15).

115. C Toomey 'Quotas for women on the board: do they work?' *Sunday Times* 8 June 2008.

might well consider enforcing gender quota legislation. With the Minister of Family and Children's Affairs, a woman from the Christian Democrat Party, a compromise agreement was reached in March 2002 giving to the corporate sector 3 years in which to reach a gender balance voluntarily, with the threat of legislation if they failed to achieve the balance. By June 2003, only 314 women had gained access to board positions, amounting to 6.4%. By July 2005, very few private companies appeared willing or able to appoint the necessary number of women. Only 13% of the companies concerned had met the requirements and only 16% of board members were women. By the end of December 2005, the figures were 18% and 18%. This situation contrasted with the gender balance in politics: where 64% of the Parliament comprised of men, the cabinet had 58% men. State-owned company boards, where gender quotas were enforced from January 2003, also showed that women had achieved a 45.7% portion of the boardroom positions.¹¹⁶

Since 1 January 2004, boards of all state-owned companies are obliged to have a minimum of 40% representation of each gender, and a law from January 2006 specifies similar requirements for the boards of all companies registered on the stock exchange.¹¹⁷ Specifically, if the board has two or three members, both sexes must be represented. For a board with four or five members, both sexes must be represented by at least two members. At least three members should represent each gender on boards of six to eight members. At least four representatives for each gender should appear on boards of nine members and, where there are more than nine members, each gender should be represented by 40% of the board members.¹¹⁸ These percentages apply for the shareholder representatives, indicating that the quotas are required for the supervisory board rather than for the management board. There must also be at least one man and woman participating as employee representatives unless there is less than 20% of either sex in the workforce. There are a number of complications within the provisions, in part because company boards typically include several board members elected by unions. If a company chooses, for example, three men and three women, but the employees then elect three men, the 40% requirement would fail.

Importantly, the law relies on existing enforcement provisions and these entail the threat that public companies falling short of the 40% target would face government refusal when they apply to have their boards registered and such unregistered boards would not be recognised legally.¹¹⁹ If a company does not have a board that fulfils the statutory requirements, it may be dissolved by order of the court. It is envisaged to be unlikely that a company would be so dissolved because, following warning letters, companies would be likely to comply. In any event, the state has the option to decide that a company should not be dissolved on grounds of substantial public interests and, in such circumstances, companies in breach of the statutory requirements would be liable to pay compulsory fines until they comply. Companies could, under the legislation, opt to go private as a way of avoiding the requirements, since the quota has not yet been extended to cover private companies. In reality, the quotas apply to approximately only 600 companies, whilst the vast majority – 160,000+ privately owned

116. Ministry of Children and Equality *Representation of Both Sexes on Company Boards*, available at <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864>

117. Ibid.

118. Ibid.

119. Ibid.

non-listed companies – remain free of the requirements. An analysis carried out by the Centre for Corporate Diversity shows that of the 57 companies that have reregistered in 2007, only 22 have changed their status from an ASA to an AS company, and 35 have changed from an AS to an ASA company.¹²⁰

Although there was an initial opposition to the legislation by the Conservative politicians and by the business sector in Norway, the results have been remarkably positive. The Centre for Corporate Diversity reviewed the composition of boards in all public restricted companies (ASA companies) in June 2007 when, for the first time, a majority of companies (55%) had reached the target set by the quota law. At March 2007, this included only 38% of the companies. The number of women elected by the shareholders increased from 24 % to 26.6 % in the same 3-month period. The number of companies with no women on their boards decreased each month, from 190 in March 2007 to 134 in June.

The law has been supported by efforts of the Norwegian Confederation of Enterprise. Before the quotas came into force, the Norwegian Confederation of Enterprise's programme, *Female Future*, sought to pave the way by introducing training and networking to increase the proportion of women in boards of directors and in management generally. Of the 600 women who have undergone the training, approximately half of these have found board positions. In addition, the Norwegian Confederation of Enterprise has created a list of board-ready women for the purposes of recruitment searches. The Professional Boards Forum also brings together women candidates with potential recruiters.¹²¹

By April 2008, it was clear that none of the public limited companies would be dissolved, although some were given a 4-week notice to comply with the rules in January 2008. The legislation appears in fact to have been very successful, with women holding 39% of board positions in public limited companies.¹²² Recent figures published by the Cranfield School of Management in its 2009 Female FTSE Index Report indicate that progress in Norway has been quite dramatic. According to the report, as a result of the law, all of the ASA companies now have women on their boards in 2009.¹²³ Whilst it is still early days and in the longer term conclusions may be less positive, at this point in time, the Norwegian experience is encouraging for women seeking a path towards breaking the glass ceiling. Not only has the number of women increased at the higher levels where the legislation applies but also other companies appear to have followed the example being set. Moreover, despite the possibility, the Cranfield School suggests that there is no evidence so far of companies relocating from Norway in order to avoid the quota system.¹²⁴ The positive results may have encouraged Norway in having recently stepped up its efforts to make its board-rooms more gender-neutral by introducing a new law requiring at least 40% of its municipal-owned company boards to be female. The Norwegian ministry of local government said the new law is the first of its kind in Europe and will go into effect

120. Center for Corporate Diversity releases new data: *The Number of Women Board Directors in Norwegian Companies by June 1, 2007*, available at <http://www.corporatediversity.no/>.

121. See further Toomey, above n 115; R Milne 'Skirting the boards' *Financial Times* 14 June 2009; A Hole *Government Action to Bring about Gender Balance*, available at <http://www.womenonboards.org.au/events/diversity2009/norway.htm>.

122. Centre for Corporate Diversity *Presentation of the Nordic 500 Corporate Boards* (Oslo, March 2009).

123. Cranfield *Female FTSE Board Report 2009* at 38.

124. On the possibility of relocation, see M Becht, L Enriques and V Korom 'Centros and the cost of branching' (2009) *Journal of Corporate Law Studies* 171; see Cranfield, *ibid*.

on 1 January. The new law is set to cover up to 1500 companies in which the state has at least a two-third ownership. The ministry said the rules will have an implementation period of 2 years.¹²⁵

Spain's boardroom quotas

Spain, following the example set by Norway, and having a history of low representation of women at the higher corporate levels, took steps to redress the problem through legislation as well as through encouragement of voluntary best practice steps. In 2007, the Statutory Law on effective equality between men and women was approved. This law contains provisions designed to improve the gender balance on company boards and to bring about equality of treatment of men and women in commercial enterprises. Article 45, for example, requires enterprises with at least 250 persons each to develop an equality plan that provides for equal treatment and opportunities and that eliminate discriminatory practices and may also voluntarily develop equality plans. Other enterprises must implement anti-discrimination measures. In addition, Art 74 requires companies to publicise their actions with regard to their responsibilities relating to equality. Article 75 specifies that companies obliged to present in their annual accounts the number of women on their boards and they are required to seek, by 2015, a 60:40 presence of men and women on their boards of directors. In addition, the Combined Code on Corporate Governance, revised in 2006, contains a comply or explain requirement on diversity in the board of directors. Paragraph 15 of the Code recommends that the board composition should reflect a diversity of knowledge, gender and experience in order to carry out its functions efficiently, objectively and independently. The Special Working Party on Corporate Governance noted in its report in 2006 that the recommendation is based not just on ethical grounds or on corporate social responsibility grounds but it also makes no economic sense for a company not to utilise the potential talent of half the population.¹²⁶

The legislation does not specify penalties for companies that fail to meet these quotas but companies managing to meet the targets will be given preference with regard to competition for publicly procured contracts.

The results in Spain so far appear to be less dramatic than in Norway, though it should be remembered that the Spanish legislation is more recent and the date for which the equal representation is sought is not until 2015. The IBEX 35 figures reveal that, during the 2 years since the law was enacted, the numbers of women directors within the IBEX have crept up from 26 to 35, rising by only a percentage point from 2008 to 2009 to only 6.9%.¹²⁷ The Cranfield School Female FTSE Report for 2009 also notes that in Spain women still represent only 7.6% of board directors in Spanish

125. See further *The Star Online*, published Sunday 27 December 2009, available at <http://biz.thestar.com.my/news/story.asp?file=/2009/12/27/business/20091227074452&sec=business>.

126. CNMV *Informe del Grupo especial de Trabajo sobre Buen Gobierno de las Sociedades Cotizadas, Código Unificado de Buen Gobierno* (19 May 2006). See also A Carrasco Gallego and J Laffarga Briones 'La Diversidad de género en el Código Unificado español y la práctica empresarial' (2007) 4 Pecunia 1.

127. See I Casas Delgado 'La Ley de Igualdad avanza muy tímidamente en las grandes empresas' *Terra Noticias* 8 March 2009, available at <http://noticias.terra.es/Mundo/2009/0308/Actualidad/La-Ley-de-Ig> and see also F Balaguer 'La Ley de Igualdad no avanza en los

listed companies.¹²⁸ Nevertheless, as the report observes, in the past 2 years, the number of female directors has increased by 29.1%.¹²⁹ Furthermore, the number of companies with at least one female director has risen from 40% to 55% and the number of companies with multiple female directors has more than doubled, going from 11 in 2006 to 25 in 2008, representing now slightly over 19% of all companies.¹³⁰ In 2008, over 74% of the IBEX 35 companies had at least one female director, when in 2006 this percentage was only 54%.¹³¹

The experiences of Norway and Spain have been receiving considerable attention in the press and on campaign websites and the obvious question is whether legislative quotas should be introduced in the UK. As noted above, the Fawcett Society favours such a development and the new coalition government has promised in its agreement that it 'will look to promote gender equality on the boards of listed companies'.¹³² Lynne Featherstone, the new Equalities Minister, recently acknowledged that the pay gap occurs in part because there is a lack of women in senior roles and in enterprise, and has stated the need to go much wider than focusing on straightforward discrimination.¹³³ However, the Queen's Speech on 25 May made no mention of dealing with the gender issue in company boards.

Would such quotas work in the UK? In the UK, arguably, there does not exist an adequate supporting framework to make such a law workable, unlike in Norway where supporting mechanisms were introduced by the Norwegian Business Confederation in preparation for the law's entry into force and where a stakeholder-oriented corporate law system exists in which the notion of diversity might be more easily accepted. Additionally, the increase in director positions noted in Norway has occurred on the supervisory boards. It is not clear that the same increases have been made on the management boards. Norway is also ahead of the game in terms of childcare provision. This is a continuing problem for women in Spain, as is the case in the UK.¹³⁴ Without sufficient childcare resources and paternity leave provision, women are likely to face difficulties in the director positions where the long-hours culture still prevails. Norway's political system also has an established quota system enabling women to participate in politics more easily and thereby culturally showing a more open door to quotas in the business domain. A quota in that arena in the UK might have provided a model for the business sector to learn from, as would be possible in other jurisdictions. The UK's generally soft regulatory approach to business might not be compatible with mandatory requirements relating to boardroom composition. Our system relies more on reporting and disclosure requirements and on a 'comply or explain' system, as well as on principles-based rather than rules-based regulation. None of these features sit easily with the rigidity of a quota system. On the

consejos de administración' *El Mundo* 20 June 2009, available at <http://www.elmundo.es/mundodinero/2009/06/03/economia/12440>.

128. Cranfield, above n 123, at 40.

129. *Ibid.*

130. *Ibid.*

131. *Ibid.*

132. *The Coalition: Our Programme for Government* May 2010, p 18.

133. Lynne Featherstone's speech to the Fawcett Society, 28 May 2010, available at <http://www.homeoffice.gov.uk/media-centre/speeches/L-Featherstone-Fawcett-Society>

134. Although all three countries have met the Barcelona Target on childcare provision, it is acknowledged that private child care is expensive in the three countries; see J Plantenga and C Remery *The Provision of Childcare Services: A Comparative Review of 30 European Countries* (European Commission, 2009).

other hand, such features may actually strengthen the arguments for quotas. Quotas would, for example, sharpen up corporate reports on gender issues. Companies would be less able to fudge their reports where the measures are clear. Some commentators also note that the comply or explain approach to the Corporate Governance Code has the effect of creating rules that are harder in practice,¹³⁵ thus weakening the claim that hard rules are not appropriate in the business context.

Despite these potential hostilities, the current push for greater equality at senior levels in both the public and private sectors lends support for the possibility of quotas. The weaknesses in the anti-discrimination laws that have been exposed give reason for tackling the problem of gender inequality within the corporate law system itself.

What model might the UK adopt? Norway and Spain reveal variations on a theme. The Norwegian approach is certainly the stronger. Its mandatory requirements and fierce potential sanctions have won clear results. Spain, on the other hand, has adopted a softer approach, requiring companies to strive to achieve the desired proportions and by offering procurement incentives rather than draconian sanctions. The jury is still out on Spain since the deadlines remain some way off, though the early indications are that there has been some movement upwards in women's representation in the boardrooms. The current financial crisis will also have to be taken into account as that is likely to complicate the statistics. It is likely that the new coalition government in the UK, if it takes any steps at all, would opt for the softer approach and the sanction of dissolution is most unlikely to come about given the UK's business-friendly regulatory culture.

If quotas were to be introduced in the UK, the jurisdiction of the courts would need to be clarified. Whilst introducing quotas via the company law has its attractions because that approach would be more direct, the commercial courts might struggle with the inevitable challenges. The Employment Tribunals might be more at home with the issue having long been used to dealing with discrimination laws. Another attraction of the tribunals is that they have broad discretion and mediation abilities giving them a wider range of potential solutions. However such a law would be introduced, it would require a multi-layered and multi-party supporting structure. Within companies, those responsible for reporting would have to be trained to deal with the issue; and those involved in recruitment and appointment, both inside and outside the company, would require training and access to candidate lists featuring women. The Confederation of British Industry and the Institute of Directors would be required to support and participate in the quota system. In Norway, the role of the Industry Confederation has been crucial to the success of the quota system.

CONCLUSION

Much of the debate on gender equality in the boardroom has revolved around the concept of diversity. Increasing diversity and widening the talent pool is presented as an attractive prospect for the business and is, therefore, arguably a more politically acceptable response to the problem. Diversity has thus become a key word that appears to embrace two sides of the same dilemma. Diversity is seen as the solution to the continuing problem of discrimination – acceptance of diversity means that a discriminatory stance is inappropriate or invalid or obsolete. Diversity also brings the

135. M Moore 'The end of comply or explain in UK corporate governance?' (2009) 60 *Northern Ireland Legal Quarterly* 85.

benefits of variety: different classes and peoples come with different skills and talents. There are, however, a number of problems with this increasing focus upon diversity. There are different kinds of diversity and diversity may be as narrow or as wide as each company prefers. Most attention focuses on demographic aspects of diversity such as gender, age and ethnicity. Diversity itself does not necessarily eradicate discrimination.

The close connection between the concept of diversity and the business case for gender quotas is relevant. Although both Norway and Spain referred to egalitarian/human rights arguments to support the introduction of their legislative quotas, it is also clear that the business case played a key role. In Norway, that led to direct intervention in company law. Arguably, however, the corporate culture in Norway would be more accepting of such steps than might be possible in the UK. The corporate social responsibility debate in the UK has highlighted the limitations of a business-oriented approach. It leads to light touch regulation and an emphasis on voluntary initiatives. These are unlikely to achieve effective results.

The business case might lead only to tokenistic recruitment of women, so that a company can say it is a diverse business without really being so. In such situations, it is difficult for women to make a positive impact on the business and those selected face constant battles as the token recruits. One might also object in principle to the need for a business case to defend the recruitment and promotion of women.

The time seems right for the government to step up its actions if its intentions are to be considered as sincere. One might think that such a step is unlikely with a Conservative-Liberal Democrat coalition, but in Norway it was a Conservative Minister who introduced the quota regime. This could be highlighted as a true indication of the 'New Politics' expounded by the coalition government. In any event, if both government and the corporate community are genuine about their support for corporate social responsibility, gender equality in the boardroom provides a clear measure of their sincerity. Quotas provide a basis for that measurement. Clearly, quotas would not by themselves be sufficient. The corporate culture itself needs to be addressed. Otherwise the risk is that women who are placed in board roles will be forced to curtail their identities.

Some writers suggest that there is no appetite for quotas.¹³⁶ Women do not want to be or feel patronised and would prefer to be promoted or appointed on merit. A counter-argument is that the current system is not meritorious either. Ahead of us are the Norwegian politicians who already talk about the quota debate as history.¹³⁷ Norway and Spain have shown a positive way forward. Other countries are indicating that they are likely to follow their example. The UK may ultimately have no choice but to take the same direction.

136. See Toomey, above n 115.

137. *Ibid.*