
DEFINING ‘DIVERSITY’ IN CORPORATE GOVERNANCE: A GLOBAL SURVEY

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ABSTRACT

This Article explores the connotation of the term “diversity” in the corporate governance sphere and the utility of such a connotation. To explore what the term has come to mean, this Article conducts a comparative analysis of how the term is used in the corporate governance context in the U.S., U.K., Australia, Canada, India, and Malaysia. Based on this analysis, this Article argues that the push for “diversity” (in the way it has come to be understood) on company boards needs to be re-examined and recommends that the SEC needs to define the term in accordance with its policy goals.

I. INTRODUCTION

Diversity is a term that has taken on a significance that is different from its actual meaning in many contexts like the judiciary, education, corporate governance, and publishing.¹ While this Article is concerned only with diversity in corporate governance, it is worth pointing out that the issue is part of a larger phenomenon in which the term “diversity” is being utilized to further equality (rather than diversity) related goals.² In corporate governance, the goal, or at least one of the goals of diversity regulations, is that of improving board functioning in most jurisdictions.

The Oxford English Dictionary defines diversity as “[a] range of different things.”³ The Cambridge English Dictionary is a little more specific. It defines diversity as: “The fact of many different types of things or people being included in

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¹ See Maritza Perez & Ben Hernandez-Stern, *The Federal Judiciary Needs More Latino Judges*, THE HILL (May 24, 2018), <http://thehill.com/opinion/judiciary/389288-the-federal-judiciary-needs-more-latino-judges>; see also Sulaiman Ilyas-Jarrett, *Greater Oxbridge Diversity Will Have Academic as well as Social Benefits*, TIMES HIGHER EDUC. (June 14, 2018), <https://www.timeshighereducation.com/opinion/greater-oxbridge-diversity-will-have-academic-well-social-benefits>; Arifa Akbar, *Diversity in publishing – still hideously middle-class and white?*, THE GUARDIAN (Jan. 21, 2009), <https://www.theguardian.com/books/2017/dec/09/diversity-publishing-new-faces>.

² See Kenan Malik, *We’re Now Confusing Diversity and Equality. Which is Our Priority?*, THE GUARDIAN (June 17, 2018), <https://www.theguardian.com/commentisfree/2018/jun/17/we-are-confusing-diversity-and-equality-which-is-our-priority>.

³ *Diversity*, OXFORD ENGLISH DICTIONARIES, <https://en.oxforddictionaries.com/definition/diversity> (last visited June 19, 2018).

something; a range of different things or people,” as well as “the fact that there are many different ideas or opinions about something.”⁴

Thus, putting these definitions together, diversity can mean a range of different things including different types of people based on ethnicity, culture, and the ideas and opinions they hold. The latter part of the definition relies on different viewpoints; the former relies on different ethnicities and cultures.

It is curious then, that the term “diversity” in corporate governance is focused most specifically on only one type of “diversity,” i.e. gender diversity. Ethnic and cultural diversity, also known as race diversity, has been emphasized only in a few jurisdictions and viewpoint diversity has either been forgotten or mentioned only in passing in the debates surrounding diversity in corporate governance. This is not to say that corporate governance must strictly adhere to the aspects of diversity that have been explained in the dictionaries. On the contrary, corporate governance must adhere to those standards that help the board function better. That, however, is not the central premise of this Article. The argument advanced here is simply that the term “diversity” has become so corrupted that it might not be advisable for corporate governance regulations to use the term without defining it.

To study the meaning given to the term “diversity” in corporate governance, this Article conducts a survey of the relevant laws and regulations on corporate diversity in six jurisdictions to see how the term is defined or, if undefined, the meaning given to it by supporting comments or principles. The jurisdictions chosen are the U.S., U.K., Canada, Australia, India, and Malaysia. This Article restricts itself to common law jurisdictions. European countries like Norway, France, and Germany have introduced quotas for women on company boards and have thus been upfront about promoting women’s representation on company boards rather than using the term “diversity.”

Section 2 of this Article discusses the diversity rule in U.S. corporate governance and Section 3 surveys the use of the term “diversity” in U.S., U.K., Canada, Australia, India, and Malaysia. Section 4 concludes by arguing that the SEC must provide guidance in this regard by defining diversity.

II. “DIVERSITY” IN UNITED STATES CORPORATE GOVERNANCE

In the U.S., the Securities Exchange Act of 1934 requires that shareholders of a company whose securities are listed on a national stock exchange receive a proxy statement prior to a shareholder meeting, whether it be an annual or special meeting.⁵ The information contained in the statement must be filed with the SEC before soliciting a shareholder vote on the election of directors and the approval of other corporate actions.⁶

Following an amendment in 2010, listed companies were required to disclose their diversity policy for nomination of directors and describe its implementation, if

4 *Diversity*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/diversity> (last visited June 19, 2018).

5 15 U.S.C. § 78n (b)(1) (2012).

6 15 U.S.C. § 78n (c) (2012).

they have one in place, in their annual proxy and information statements. The relevant portion of the law states as follows:

[d]escribe the nominating committee's process for identifying and evaluating nominees for director . . . and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.⁷

So, what does the term “diversity” mean here? The SEC’s proposal document for the rule explained that “companies should be allowed to define diversity in ways that they consider appropriate” and that they specifically chose not to define the term.⁸ This would imply that the SEC meant for companies to be able to emphasize one or all forms of diversity, as per its requirements.

Professor Dhir, in a content analysis of proxy disclosures on diversity, found that firms mainly defined diversity to mean non-identity based factors like prior experience rather than identity based factors like race or gender.⁹ More recently, Professor Nili found that the number of companies that use gender as one of the factors of diversity has increased from five companies in 2008 to forty-two in 2012, and fifty-three in 2016.¹⁰ Professor Nili goes on to criticize the current approach “if [they] truly intended to promote better gender diversity disclosure.”¹¹ However, it is clear from the SEC’s proposal document that the aim was to allow flexibility rather than promote one specific factor that may or may not be included in a general definition of the term “diversity.” This narrow focus on gender (and other identity-based factors like race) over and above other types of diversity might be influenced, to some extent, by the international promotion of gender diversity on boards.

III. “DIVERSITY” IN CORPORATE GOVERNANCE – A SURVEY OF REGULATIONS IN FIVE COUNTRIES

This section surveys the meaning of the term “diversity” in the corporate governance context in five jurisdictions, by looking to both the definition, where available, and context of its use.

In the U.K., the Corporate Governance Code sets out in its preface that one way to encourage constructive debate and thus overcome “groupthink” is through “having

⁷ 17 C.F.R. § 229.407(c)(2)(vi) (2012).

⁸ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,344 (Dec. 23, 2009) (to be codified at 17 C.F.R. pt. 229 et al.).

⁹ Aaron A. Dhir, CHALLENGING BOARDROOM HOMOGENEITY: CORP. LAW, GOVERNANCE AND DIVERSITY 213 (Cambridge University Press, reprinted., 2016) (2015).

¹⁰ Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L. REV. 41, (forthcoming 2018) (on file with the author).

¹¹ *Id.* at 43.

sufficient diversity on the board.”¹² However, it immediately adds the following statement to explain the term:

This includes, but is not limited to, gender and race. Diverse board composition in these respects is not on its own a guarantee. Diversity is as much about differences of approach and experience, and it is very important in ensuring effective engagement with key stakeholders and in order to deliver the business strategy.¹³

Thus, race and gender are emphasized although there is acceptance that diversity is not limited to these factors. Further, Principle B2 on board appointments states that appointments should follow a formal, rigorous, and transparent procedure. Yet, the supporting principle states that the search for board candidates should be based on merit, “with due regard for the benefits of diversity on the board, including gender.”¹⁴ Thus, there is a major emphasis on merit as compared to other factors of diversity.

In Australia, again, there is the use of the term “diversity” in general, but with an emphasis on gender diversity. The Australian Stock Exchange (“ASX”) issues corporate governance principles and recommendations (hereinafter “ASX CGPR”). The ASX CGPR introduced recommendations on board gender diversity and subsequently revised them in 2014.¹⁵ The ASX is currently consulting on certain revisions, including the subject of diversity. Currently, the ASX CGPR states that listed companies should “have a diversity policy which includes requirements for the board or a relevant committee of the board to set measurable objectives for achieving gender diversity and to assess annually both the objectives and the entity’s progress in achieving them.”¹⁶

Thus, the initial mention of “diversity policy” is open to interpretation. Yet, the company only needs to set “measurable objectives” to achieve one form of diversity, i.e. gender diversity. The proposed reforms to the ASX CGPR seek to slightly expand the definition of diversity in the commentary to the principle although the “measurable objectives” are still only required for gender diversity. It seeks to add the following statement in the commentary: “A listed entity should have a diversity policy that expresses its commitment to embrace diversity at all levels and in all its facets including gender, marital or family status, sexual orientation, gender identity, age, physical abilities, ethnicity, religious beliefs, cultural background, socio-economic background, perspective, and experience.”¹⁷

Thus, the reform proposal seeks to expand the definition of diversity to include

12 FINANCIAL REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 2 (Apr. 2016).

13 *Id.*

14 *Id.* at 11.

15 See ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS WITH 2010 AMENDMENTS (2d ed. 2010); see also ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (3d ed. 2014).

16 See ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS, at 11 (3d ed. 2014).

17 ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (4th ed. Consultation Draft), at 13, <https://www.asx.com.au/documents/asx-compliance/mark-up-to-third-edition.pdf>.

other identity-based factors like ethnicity, culture etc., and also two factors, “perspective” and “experience,” that refer to viewpoint diversity. However, what this reform proposal does is simply increase the ambiguity of what the diversity policy should involve since the expanded definition does not match the “measurable objectives” requirement for gender diversity alone.

In Canada, the disclosure requirement by the securities regulators directly asks companies to make disclosures regarding nomination of women directors rather than using the term “diversity.” In 2014, Canadian Securities Administrators (a collective of the securities regulatory authorities of various provinces) published amendments to the existing disclosure rules (the CSA Rules).¹⁸ The result of these amendments was, amongst other things, to require companies to disclose whether they had a written policy relating to the identification and nomination of women directors. Where there was no policy, the company is required to disclose the reason for not having one. If the company had adopted such a policy it had to disclose: (i) a short summary of its objectives along with key provisions, (ii) the measures taken to implement the policy, (iii) annual and cumulative progress regarding achieving the objectives of the policy, and (iv) whether and, if so, how the board or the nomination committee measures the effectiveness of the policy.¹⁹ The approach is clear in its goal of promoting the appointment of women directors rather than relying on a general term like “diversity” and then advocating for only one aspect of diversity, i.e., gender.

More recently, a bill amending the Canadian Business Corporations Act received royal assent in Canada. This bill contains a provision requiring companies to disclose information relating to diversity of its directors and senior management.²⁰ The supporting regulations to this amendment are still in consultation stage and propose to broaden the definition of diversity to include not only women, but also aboriginal peoples, persons with disabilities, and visible minorities.²¹ Here, the definition has failed to mention viewpoint diversity altogether. However, by undertaking to define the term, the regulatory choice has been clearly communicated.

In India, the 2013 Companies Act requires public companies of a certain size to appoint at least one woman to the board.²² Subsequently, listed companies were required to have at least one woman on the board.²³ In October 2017, the Kotak Committee (commissioned by the market regulator) recommended that listed companies be required to disclose both the required and available expertise on the board.²⁴ In

18 See CANADIAN SECURITIES ADMINISTRATORS, MULTILATERAL CSA NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 58-101, DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES (Oct. 15, 2014), http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20141014_58-101_noa-national-instrument.pdf.

19 *Id.* at 6.

20 Canada Business Corporations Act, S.C. 2018, C-25.

21 Denise Gan, *Changes Coming to Canadian Business Corporations Act (CBCA)*, NORTON ROSE FULBRIGHT (June 15, 2018), <https://www.specialsituationslaw.com/2018/06/15/changes-coming-to-canadian-business-corporations-act-cbca/>.

22 The Companies Act, XI § 149 (1), INDIA CODE (2013).

23 SECURITIES EXCHANGE BOARD OF INDIA, Listing Agreement, 49 (II)(A)(1), Apr. 17, 2014.

24 See SECURITIES AND EXCHANGE BOARD OF INDIA, REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (Oct. 2017), www.nfcg.in/KOTAKCOMMITTEREPORT.pdf

providing the rationale to this recommendation, the committee focused on the importance of diversity on the board. It stated that a diverse board can help in providing “guidance and direction” to the company.²⁵ The committee gave an indicative matrix of expertise/skills that directors should have under three heads. This matrix included factors under three categories: industry knowledge and experience, technical skills and experience, and behavioral competencies.²⁶ Thus, the report focused on viewpoint diversity (through diversity of experience and skills) rather than on gender or race. These recommendations were accepted by the market regulator, although they are yet to come into force.²⁷

In Malaysia, the Malaysian Corporate Governance Code requires companies to disclose their gender diversity policy, targets, and measures. It also states that “large companies,” which are companies on the FTSE Bursa Malaysia Top 100 Index or those with market capitalization of RM2 billion and above, must have at least thirty percent women directors on their boards.²⁸ The specific provisions regarding diversity are as follows:

4.4 Appointment of board and senior management are based on objective criteria, merit and with due regard for diversity in skills, experience, age, cultural background and gender.

4.5 The board discloses in its annual report the company’s policies on gender diversity, its targets and measures to meet those targets. For Large Companies, the board must have at least 30% women directors.²⁹

Thus, the term diversity is not relied on in itself, but specific diversity factors have been mentioned which include not only cultural background and gender, but also skills, experience, and age. Separate requirements for gender diversity are specified. Again, the regulator has communicated a policy choice to focus on gender diversity while also encouraging, to a lesser extent, other forms of diversity.

It is apparent from the above analysis that the term “diversity” is used open-endedly in corporate governance regulations in almost all the jurisdictions surveyed. What is also apparent is that there seems to be an emphasis on gender diversity in all the jurisdictions surveyed except the U.S.³⁰ As a result of this international emphasis on gender diversity, even when the general term “diversity” is being used, various stakeholders and commentators in U.S. corporate governance have also started to understand the SEC’s diversity disclosure rule to emphasize gender diversity. At any rate, the SEC’s diversity rule is one of the bases on which gender diversity advocacy has progressed.

25 *Id.* at 15.

26 *Id.* at 159.

27 SECURITIES EXCHANGE BOARD OF INDIA, Press Release No. 09/2018, https://www.sebi.gov.in/media/press-releases/mar-2018/sebi-board-meeting_38473.html.

28 SECURITIES COMMISSION MALAYSIA, MALAYSIAN CODE ON CORPORATE GOVERNANCE (2017) at 3, 24, available at <https://issuance.sc.com.my/wp-content/uploads/eng/html/cg/mccg2017.pdf>.

29 *Id.* at 24.

30 See Table A, *infra*.

IV. IS THE NEW MEANING OF 'DIVERSITY' USEFUL?

As Section 3 above showed, most countries have veered towards identity-based factors when implementing diversity in corporate governance. Every country in the survey except the U.S. prioritized gender diversity. This may be a policy choice of the countries in question, but as the Canadian experience shows, it will eventually lead to an expansion of diversity giving prominence to other identity-based factors like being “visible minorities” and “disabilities” with almost no focus on viewpoint diversity. Large proxy advisors often operate in many jurisdictions and many firms now promote gender and race diversity aggressively.³¹ A recent high-profile example is that of Amazon.com, which agreed (after initially recommending against the shareholder proposal)³² to incorporate a diversity policy requiring the board to consider women and minority candidates during the nomination process.³³

While all of these identity-based factors might be worth considering in mentorship programs and other supporting programs at various levels, it might not be efficient for such considerations to crowd out the importance given to other forms of diversity like those that might contribute to viewpoint diversity. It is relevant to recall here that the fundamental task of the board of directors in large public companies is to monitor management. Thus, like independent directors, viewpoint diversity along with the ability of people with diverse viewpoints to challenge the majority view, should be wielded as a tool to sharpen the board’s monitoring ability. It is therefore also important to ensure that viewpoint diversity is sought in candidates (irrespective of whether they are male, female, or belong to majority or minority groups).

Thus, if the SEC wants to ensure that aspects highlighting viewpoint diversity are not left out of the diversity consideration, it must explicitly define diversity. Otherwise, the connotation that the term “diversity” has attained in the international context will become the norm in the U.S.

31 Nili, *supra*, note 10 at 2, (stating State Street Global Advisors, BlackRock, and Vanguard as some examples).

32 AMAZON.COM, Proxy Statement (Schedule 14A) (Apr. 19, 2018), 16.

33 Hallie Detrick, *Amazon Had Opposed a Requirement to Interview Diverse Board Candidates. Now It's Embracing the 'Rooney Rule.'*, FORTUNE (May 15, 2018), <http://fortune.com/2018/05/15/amazon-board-diversity-rooney-rule/>.

TABLE A

Country	Ambiguous "diversity" policy requirement?	Specific focus on gender?	Specific focus on any other facet of diversity (in terms of disclosures)?	General mention of any other facets of diversity?
U.S.	√			
U.K.	√	√		√
Australia	√	√		√ (Consultation in progress)
Canada	√	√	√ (Consultation in progress)	
India		√	√	
Malaysia	√	√		√