

# ["measure directors are defined and mentioned in section](https://assignbuster.com/measure-directors-are-defined-and-mentioned-in-section/)

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“ Measure of a man is whathe does with power.”-PlatoThe above statement bythe great thinker Plato, is very applicable to the office of independentdirectors. As this office is one where we see that the only major constraint orrestriction is that of the independent director, himself or herself not being vigilantand not exercising the powers vested in them for the reason the company hadgiven them the office in the first place. The Act of 1956 really had nothingmuch to say about independent directors other than making them mandatory forregistered companies, but the Act of 2013 has a lot more to say on this front1.

Independent directors are defined and mentioned in Section 149(6) and thereforeit is safe to say that their importance has been realized by law2. Theindependent directors serve the basic role of balancing interests and upholdcorporate standards of their respective company3. Anindependent director is a non-executive director, who has no relations with thecompany that may inculcate any sort of bias whatsoever in his or herrelationship with the company. 4 Evenin the NASDAQ rules, an independent director has been amply recognized and alsobeen given a clear definition as well5.

Thereforeone thing can be said with a certainty that the office of an independentdirector is one which has been recognized and given due importance over time. The question which the researcher shall attempt to answer during the course ofthis paper is why. Why the office of an independent director is an importantone and what are the functions it serves.

As already established it is anon-executive office, borne out of morality and ethics, keeping the interestsof the company and not the individual wants of the executive directors in mind. The entire procedure as to how an independent director itself gives theobserver an idea of the independence of the person6. Under the Companies Act, 2013, strict eligibility criteria have been laid downfor the appointment of independent directors. Some of which  are that an independent director should notbe related to the company or hold major stakes in it. He or she should also notbe related to any associate or subsidiary company. Neither should his or herrelatives have any pecuniary relationship with an associate or subsidiarycompany. He or she also have to declare to the board that they are independentat the time of their appointment and also notify the board at a time when thatstatus of independence is altered by factors both internal or external7. Moreover, an independent director is not allowed to have any sort of stockoption or remuneration except for a sitting fee or any profit commission asapproved by the members of the company.

The term of office of an independentdirector is 5 years, he or she may also be reappointed by passing a specialresolution to the same effect. Section 150 of theCompanies Act, 2013 has laid down the manner and procedure of the appointmentof an independent director and thereby settled the matter in the eyes of thepositivists8. The office of an independent director is one wherein he or she has to balancethe interests of the company against the individual aspirations of theexecutive directors. This is a simple case of vigilance within the company. Every independent director is recognized today to have a very significant rolewhich is pretty exhaustively described in schedule IV of the Act9. He or she is tasked with protecting the interests of the shareholders and alsoto harmonize the frictions between the interests of the stakeholders, and alsoto mediate between the shareholder and the management.

“ A board is only as goodas its independent directors.” 10This is true especially for companies whose transactions affect the economy ofIndia herself and by extension, even the world. As part of the company, theindependent directors have certain obligations arising out of the dutifulcompletion of their respective responsibilities. Foremost amongst them is thepractice to be continuously updated with the affairs of the company and alsoacting in guarding the interests of the company itself. A section11of the 2013 legislation, makes it mandatory for there to be one independentdirector in the social responsibility committee of the company. There aredifferent facets of a company which now mandatorily require to have anindependent director present in them. The part of the independent directorsrole, which is by definition likewise a non-official executive, is not exactlyas expressed, and to propose a general statement would not be specific and generalisationwould be incorrect. What, in any case, is clear is that non-official executivesare not occupied with and not anticipated that would be occupied with theeveryday administration of the organization.

Rather, they are required to becareful gatekeepers of the exercises of the board all in all12. The most critical qualityof a vigilance Board is to give guidance to the organization. In aprofessionally managed organization in which no individual or gathering holdshuge voting rights, the methodologies are planned by the CEO. A business hasnumerous partner groups, whose interests are affected by procedures, approachesand operations of the business partner groups which have low interest level andhigh power ought to be kept fulfilled to keep away from them picking up interestand turning into an member of a group, which has abnormal level of interest andhigh level of influence. Supervisors guarantee cooperation by partner groups, which have high interest level and high power, since they are significantdrivers of the change and real rivals of methodologies. Indian corporates dotake after a similar practice. As the economies decreased and proprietorshipturned out to be more scattered and scattered. There was a progressive move incontrol from direct proprietors under the control of Board.

The capitalsuppliers, thought generators and administrators framed unmistakable groupings. The creation, support and dispersion of riches are taken care of by one gatheringwhile the arrangement of capital is finished by another gathering. Theorganizations need to create surplus for manageability and development and toguarantee sufficient profit for funding to hold the current shareholders and todraw in the potential financial specialists of other partner bunches. Thisapproach prompts to overlooking the enthusiasm of those gatherings, which havelow power, regardless of the possibility that their advantages are affectedessentially by techniques, strategies and operation of the organizationManagers are remunerated for controlling the partners and not for adjusting andsecuring interests of different partner bunches or for settling worries ofdifferent partner assembles in simply, reasonable and impartial way. As needsbe, the essential role of Independent Directors is to secure the interests ofnon-controlling shareholders.

In the changing business environment a new visageof corporate administration is developing13. Inthe extent of corporate governance model, the primary role of IndependentDirectors is to protect the interest of the non-controlling shareholders. Inthe new paradigm, Independent Directors are expected to take two additionalresponsibilities. They have to ensure that the executive management is making seriousendeavors to meet the social expectations and to act as an arbitrator in adispute between stakeholder groups.

In the present formulation IndependentDirectors might not be able to discharge their existing and additionalresponsibilities effectively14. This is majorly due to the fact that the main source of information to put theexecutive directors under the scanner are the executive directors themselves. This gives rise to a fallacy in the mechanism, as how is the system supposed tobe efficient when the subject of the inquiry itself is the source ofinformation for the inquiry.  Thenew concept of having Independent Directors is a welcome step for corporategovernance in India. The Act of 201315has conferred greater empowerment upon Independent Directors to ensure that themanagement & affairs of a company is being run fairly and smoothly.

But, atthe same time, greater accountability has also been placed upon them. TheCompanies Act, 2013 empowers them to have a definite ‘ say’ in the management ofa company, which would thereby immensely strengthen the corporate governancesystems which prevail in India. However it is also important to keep in mindthat good corporate governance is not just the outcome of appropriate selectionand effective functioning of thee independent directors. Every director, whether independent or non-independent, executive/non-executive has a distinctrole in the functioning of the company. It is only when the entire boardfunctions effectively which results in good corporate governance and benefitminority as well as majority shareholder in its long term which maintains agood corporate image in the market. Moreover, it is not just about images it isalso about ethics and the proper functioning of a conglomerate. A very importantcase to cite in this regard would be the highly infamous Satyam scam. It was arespected company and its entire standing in the eyes of the people fell andthe independent directors themselves were contended to be guilty by many people16.

Such is the tricky path the independent directors walk to guard the coreinterests of the company at heart. If they are not vigilant enough and theexecutive directors try and misuse their positions many a times, theindependent directors are also blamed without any criminal intentions on theirpart. The Satyam scam is burning example of such a scenario. There areconflicting takes as to if we consider independent directors to be “ policemenof the boardroom”, then it will seriously curtail the freedom of the board andthe executive directors. In the humble opinion of the researcher it is aquestion of integrity as when one is working for a company, then he or she isexpected to know and respect the fact that their actions from offices ofresponsibility such as an executive director, has consequences and thereforemust be tempered. The Naresh Chandra Committee while expressing its view on therole of directors said, “ at the core of corporate governance is the Board ofDirectors. Directors are fiduciaries of shareholders and not of the management. This does not imply that the Board must have an adversarial relationship withthe management, but where the objectives of management differ from those of shareholders, the non-executive directors on the Board must be able to speak in the interestof the ultimate owners, and discharge their fiduciary oversight functions.

Thisis why ‘ independence’ has become such a critical issue in determining thecomposition of any Board. Clearly, a Board packed with executive directors, orfriends of the promoter or of the CEO, can hardly be expected to exercise independentoversight judgment.” 17Such is the potential miasma which the independent directors have a risk offalling into. This is the very crux of the issue here, in the humble opinion ofthe researcher and therefore must be looked into, the greater the involvementof the independent director, the lesser freedom, so to say of the executivedirectors of the board of the company. There is a very fine line between theseguardians of righteousness becoming impediments for the free functioning of thecompany. It is here where we face a dilemma and which must be solved for theidea of an independent director is very healthy but it must not be misusedeither. Such concepts of company law make these corporate endeavours adouble-edged sword.

Indian corporate governance regulations, in respect of boardstructure and processes, have been found wanting in addressing issue arisingfrom the presence of dominating shareholders in Indian organizations and thenew set of regulations are very welcome in bringing about the much requiredsolution to India’s corporate governance woes. The mandatory requirement forconstituting a nominations and appointments committee of the board, with amajority of independent directors, has certainly brought about the much needed transparencyand objectivity in the directors selection process. However this may not beenough and there is, probably, a need to look at incorporating strongermechanism in the statute for the independent director appointment process. Moreover, in the humble opinion of the researcher, it is a very important position andhas great repercussions in the corporate world. A steadfast and fairindependent director who respects the freedom of the board, whilst alsomaintaining a clear stance as to his or her allegiance to the company in thegreater scheme of things seems to be the most efficient way for a corporate toutilize the powers and functions of the independent directors at large. Forthere is no point in having no checks at all on the board, yet those checksshould not become invasive and thereby a hindrance. It’s a fickle situationwhich is dynamic and must be controlled and that control will only come in theform of the union of wills of the respective independent directors as well asthe executive directors of the company.

It is a simple enough concept, yetactually manifesting it in life is going to be very difficult and its anon-going process as the people involved must be strong willed and understandingat the same time. The concept of independent directors should pivot on theperpetuity of companies, the concept that the directors do change but thecompany lives on forever, Therefore a structure is needed that further polisheswhat already exists in the form of the Companies Act, 2013. It is here that theresearcher would like to conclude. On the idea that there shall always be thecompany s we need a future-proof mechanism to insure that the role ofindependent directors does not encroach upon the jurisdiction of the executivedirectors while it also maintains the direction of the company in a manner thatthe company itself does not suffer under the whims of the executive directorswithout proper consequences.

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corporate-ir. net/media\_files/irol/87/87823/corpgov/NASDAQ\_Marketplace\_Rule\_4200. pdf(last visited: 12th January, 2016. 6Supra at note 3. 7Ibid. 8Supra at note 1.

9Supra at note 2. 10R. Sukumar, How IndependentAre Independent Directors?, Livemint, Available at: http://www. livemint.

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com/ (lastvisited: 12th January, 2017). 15Supra at note 2. 16Ashish K.

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