

# "measure directors are defined and mentioned in section

[Business](#), [Corporate Governance](#)



“ Measure of a man is what he does with power.”-Plato The above statement by the great thinker Plato, is very applicable to the office of independent directors. As this office is one where we see that the only major constraint or restriction is that of the independent director, himself or herself not being vigilant and not exercising the powers vested in them for the reason the company had given them the office in the first place. The Act of 1956 really had nothing much to say about independent directors other than making them mandatory for registered companies, but the Act of 2013 has a lot more to say on this front<sup>1</sup>.

Independent directors are defined and mentioned in Section 149(6) and therefore it is safe to say that their importance has been realized by law<sup>2</sup>. The independent directors serve the basic role of balancing interests and uphold corporate standards of their respective company<sup>3</sup>. An independent director is a non-executive director, who has no relations with the company that may inculcate any sort of bias whatsoever in his or her relationship with the company. <sup>4</sup> Even in the NASDAQ rules, an independent director has been amply recognized and also been given a clear definition as well<sup>5</sup>.

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

As already established it is a non-executive office, borne out of morality and ethics, keeping the interests of the company and not the individual wants of the executive directors in mind. The entire procedure as to how an independent director itself gives the observer an idea of the independence of the person<sup>6</sup>. Under the Companies Act, 2013, strict eligibility criteria have been laid down for the appointment of independent directors. Some of which are that an independent director should not be related to the company or hold major stakes in it. He or she should also not be related to any associate or subsidiary company. Neither should his or her relatives have any pecuniary relationship with an associate or subsidiary company. He or she also have to declare to the board that they are independent at the time of their appointment and also notify the board at a time when that status of independence is altered by factors both internal or external<sup>7</sup>. Moreover, an independent director is not allowed to have any sort of stock option or remuneration except for a sitting fee or any profit commission as approved by the members of the company.

The term of office of an independent director is 5 years, he or she may also be reappointed by passing a special resolution to the same effect. Section 150 of the Companies Act, 2013 has laid down the manner and procedure of the appointment of an independent director and thereby settled the matter in the eyes of the positivists<sup>8</sup>. The office of an independent director is one wherein he or she has to balance the interests of the company against the individual aspirations of the executive directors. This is a simple case of vigilance within the company. Every independent director is recognized

today to have a very significant role which is pretty exhaustively described in schedule IV of the Act<sup>9</sup>. He or she is tasked with protecting the interests of the shareholders and also to harmonize the frictions between the interests of the stakeholders, and also to mediate between the shareholder and the management.

“ A board is only as good as its independent directors.” <sup>10</sup>This is true especially for companies whose transactions affect the economy of India herself and by extension, even the world. As part of the company, the independent directors have certain obligations arising out of the dutiful completion of their respective responsibilities. Foremost amongst them is the practice to be continuously updated with the affairs of the company and also acting in guarding the interests of the company itself. A section <sup>11</sup>of the 2013 legislation, makes it mandatory for there to be one independent director in the social responsibility committee of the company. There are different facets of a company which now mandatorily require to have an independent director present in them. The part of the independent director's role, which is by definition likewise a non-official executive, is not exactly as expressed, and to propose a general statement would not be specific and generalisation would be incorrect. What, in any case, is clear is that non-official executives are not occupied with and not anticipated that would be occupied with the everyday administration of the organization.

Rather, they are required to be careful gatekeepers of the exercises of the board all in all<sup>12</sup>. The most critical quality of a vigilance Board is to give guidance to the organization. In a professionally managed organization in

which no individual or gathering holds huge voting rights, the methodologies are planned by the CEO. A business has numerous partner groups, whose interests are affected by procedures, approaches and operations of the business partner groups which have low interest level and high power ought to be kept fulfilled to keep away from them picking up interest and turning into a member of a group, which has abnormal level of interest and high level of influence. Supervisors guarantee cooperation by partner groups, which have high interest level and high power, since they are significant drivers of the change and real rivals of methodologies. Indian corporates do take after a similar practice. As the economies decreased and proprietorship turned out to be more scattered and scattered. There was a progressive move in control from direct proprietors under the control of Board.

The capital suppliers, thought generators and administrators framed unmistakable groupings. The creation, support and dispersion of riches are taken care of by one gathering while the arrangement of capital is finished by another gathering. The organizations need to create surplus for manageability and development and to guarantee sufficient profit for funding to hold the current shareholders and to draw in the potential financial specialists of other partner bunches. This approach prompts overlooking the enthusiasm of those gatherings, which have low power, regardless of the possibility that their advantages are affected essentially by techniques, strategies and operation of the organization. Managers are remunerated for controlling the partners and not for adjusting and securing interests of

different partner bunches or for settling worries of different partner assemblies in simply, reasonable and impartial way. As needs be, the essential role of Independent Directors is to secure the interests of non-controlling shareholders.

In the changing business environment a new visage of corporate administration is developing<sup>13</sup>. In the extent of corporate governance model, the primary role of Independent Directors is to protect the interest of the non-controlling shareholders. In the new paradigm, Independent Directors are expected to take two additional responsibilities. They have to ensure that the executive management is making serious endeavors to meet the social expectations and to act as an arbitrator in a dispute between stakeholder groups.

In the present formulation Independent Directors might not be able to discharge their existing and additional responsibilities effectively<sup>14</sup>. This is majorly due to the fact that the main source of information to put the executive directors under the scanner are the executive directors themselves. This gives rise to a fallacy in the mechanism, as how is the system supposed to be efficient when the subject of the inquiry itself is the source of information for the inquiry. The new concept of having Independent Directors is a welcome step for corporate governance in India. The Act of 2013<sup>15</sup> has conferred greater empowerment upon Independent Directors to ensure that the management & affairs of a company is being run fairly and smoothly.

But, at the same time, greater accountability has also been placed upon them. The Companies Act, 2013 empowers them to have a definite 'say' in the management of a company, which would thereby immensely strengthen the corporate governance systems which prevail in India. However it is also important to keep in mind that good corporate governance is not just the outcome of appropriate selection and effective functioning of the independent directors. Every director, whether independent or non-independent, executive/non-executive has a distinct role in the functioning of the company. It is only when the entire board functions effectively which results in good corporate governance and benefit minority as well as majority shareholder in its long term which maintains a good corporate image in the market. Moreover, it is not just about images it is also about ethics and the proper functioning of a conglomerate. A very important case to cite in this regard would be the highly infamous Satyam scam. It was a respected company and its entire standing in the eyes of the people fell and the independent directors themselves were contended to be guilty by many people<sup>16</sup>.

Such is the tricky path the independent directors walk to guard the core interests of the company at heart. If they are not vigilant enough and the executive directors try and misuse their positions many a times, the independent directors are also blamed without any criminal intentions on their part. The Satyam scam is a burning example of such a scenario. There are conflicting takes as to if we consider independent directors to be "policemen of the boardroom", then it will seriously curtail the freedom of the

board and the executive directors. In the humble opinion of the researcher it is a question of integrity as when one is working for a company, then he or she is expected to know and respect the fact that their actions from offices of responsibility such as an executive director, has consequences and therefore must be tempered. The Naresh Chandra Committee while expressing its view on the role of directors said, "at the core of corporate governance is the Board of Directors. Directors are fiduciaries of shareholders and not of the management. This does not imply that the Board must have an adversarial relationship with the 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 interest of the ultimate owners, and discharge their fiduciary oversight functions.

This is why 'independence' has become such a critical issue in determining the composition of any Board. Clearly, a Board packed with executive directors, or friends of the promoter or of the CEO, can hardly be expected to exercise independent oversight judgment." 17 Such is the potential miasma which the independent directors have a risk of falling into. This is the very crux of the issue here, in the humble opinion of the researcher and therefore must be looked into, the greater the involvement of the independent director, the lesser freedom, so to say of the executive directors of the board of the company. There is a very fine line between these guardians of righteousness becoming impediments for the free functioning of the company. It is here where we face a dilemma and which must be solved for the idea of an independent director is very healthy but it must not be misused either. Such



concepts of company law make these corporate endeavours a double-edged sword.

Indian corporate governance regulations, in respect of board structure and processes, have been found wanting in addressing issues arising from the presence of dominating shareholders in Indian organizations and the new set of regulations are very welcome in bringing about the much required solution to India's corporate governance woes. The mandatory requirement for constituting a nominations and appointments committee of the board, with a majority of independent directors, has certainly brought about the much needed transparency and objectivity in the directors selection process. However this may not be enough and there is, probably, a need to look at incorporating stronger mechanism in the statute for the independent director appointment process. Moreover, in the humble opinion of the researcher, it is a very important position and has great repercussions in the corporate world. A steadfast and fair independent director who respects the freedom of the board, whilst also maintaining a clear stance as to his or her allegiance to the company in the greater scheme of things seems to be the most efficient way for a corporate to utilize the powers and functions of the independent directors at large. For there is no point in having no checks at all on the board, yet those checks should not become invasive and thereby a hindrance. It's a fickle situation which is dynamic and must be controlled and that control will only come in the form of the union of wills of the respective independent directors as well as the executive directors of the company.

It is a simple enough concept, yet actually manifesting it in life is going to be very difficult and its an on-going process as the people involved must be strong willed and understanding at the same time. The concept of independent directors should pivot on the perpetuity of companies, the concept that the directors do change but the company lives on forever, Therefore a structure is needed that further polishes what already exists in the form of the Companies Act, 2013. It is here that the researcher would like to conclude. On the idea that there shall always be the company's we need a future-proof mechanism to insure that the role of independent directors does not encroach upon the jurisdiction of the executive directors while it also maintains the direction of the company in a manner that the company itself does not suffer under the whims of the executive directors without proper consequences.

1 Yogesh Malhan, India: Independent Directors-Under The Companies Act, 2013, Mondaq, Available at: <http://www.mondaq.com/india/x/295386/Contract+Law/Independent+Directors+Under+The+Companies+Act+2013>(last visited: 12th January, 2017). 2 Companies Act, 2013. 3 Who are Independent Directors and what role they play, The Economic Times, Corporate & Industry, Available at: <http://economictimes.indiatimes.com/slideshows/corporate-industry/who-are-independent-directors-and-what-role-they-play/slideshow/17853907.cms> (last visited: 12th January, 2017). 4 Ibid. 5 NASDAQ Marketplace Rule 4200(a)(15), Available at: <http://media.https://assignbuster.com/measure-directors-are-defined-and-mentioned-in-section/>

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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.com/Opinion/ZVZpJgwUI6JBjciOldX4kl/How-independent-are-independent-directors.html> (last Visited: 12thJanuary, 2017). 11Section 135(1) of CompaniesAct, 2013. 12Singapore Institute ofDirectors, Available at: [http://www.sid.org.sg/main/good\\_practise\\_doc/good\\_practiceSGPNo72007](http://www.sid.org.sg/main/good_practise_doc/good_practiceSGPNo72007) (last visited: 12thJanuary, 2017). 13Global Reporting InitiativeReport, 2012. 14Shriram Subramanian, Business Standard, Pressreader, Available at: <https://www.pressreader.com/> (lastvisited: 12th January, 2017). 15Supra at note 2. 16Ashish K. Bhattacharyya, Business Standard, Satyam: How guilty are the independent directors?, Availableat: [http://www.business-standard.com/article/economy-policy/satyam-how-guilty-are-the-independent-directors-109011201009\\_1.html](http://www.business-standard.com/article/economy-policy/satyam-how-guilty-are-the-independent-directors-109011201009_1.html) (last visited: 12thJanuary, 2017). 17The Institute of Company Secretaries in India (2007), Corporate Governance(Modules of Best Practices), 6th (Revised) Edn, New Delhi, TaxmannPublications (P.) Ltd, p. 127.

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