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INDEPENDENT DIRECTORS IN INDIA: GUARDIANS OF CORPORATE GOVERNANCE OR INSTRUMENTS OF BOARDROOM COMPLIANCE?

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ABSTRACT

The independent director occupies a peculiar position in Indian corporate law. Conceived in the era of Clause 49 of the Listing Agreement, hardened by the Satyam scandal, and codified in the Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the office is expected to monitor management, protect minority shareholders and lend credibility to board decisions. This paper asks whether independent directors in India function as genuine guardians of corporate governance or have been reduced to instruments of boardroom compliance. It traces the evolution of the office, analyses the present statutory framework and the judicial approach to it, and tests the institution against the structural reality of promoter-controlled Indian companies, where the 'independent' director is typically nominated by the very shareholders whose conduct he or she is supposed to oversee. The paper argues that Indian law has been strong on the form of independence, namely definitions, quotas and committee composition, but weaker on its substance, namely selection, incentives, information and credible accountability. Drawing on the experience of the United Kingdom and the United States, it proposes calibrated reforms directed at appointment, remuneration, resources, liability and disclosure, so that independence is secured in fact and not merely certified on paper.

Keywords: Independent Directors, Corporate Governance, Companies Act 2013, SEBI LODR, Promoter Control, Minority Shareholders

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INTRODUCTION

Every system of corporate law must answer an uncomfortable question: who watches those who run the company? In widely held companies the answer offered by the law is the board of directors, and within the board, the independent director. The idea is simple. A director who has no material connection with the management or the controlling shareholders is better placed to question a proposal, to resist a self-interested transaction and to tell the shareholders what the insiders would prefer them not to hear. Independence, in other words, is a means of producing honest monitoring.[3]

The Indian setting complicates this simple idea. Unlike the dispersed ownership model of the United States and the United Kingdom, the typical Indian listed company has a promoter or promoter group holding a controlling block of shares. The central governance problem is therefore less the familiar conflict between professional managers and scattered shareholders and more the conflict between controlling and minority shareholders.[4] In such a company the controlling shareholder can, directly or through the board, decide who is appointed as an independent director, how long that person stays, and what he or she is paid. The guardian is, in a real sense, chosen and rewarded by the party to be guarded against.

Indian law has nonetheless invested heavily in the office. Section 149 of the Companies Act, 2013 requires a minimum proportion of independent directors on the boards of listed companies, Schedule IV prescribes a detailed Code for Independent Directors, and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR Regulations') layer further requirements on board composition, committees, tenure, resignation and shareholder approval.[5] Yet governance failures have continued to surface in companies whose boards were, on paper, fully compliant. The coexistence of dense regulation and recurring failure invites the question which this paper addresses: are independent directors in India guardians of corporate governance, or instruments of boardroom compliance?

The paper adopts a doctrinal and analytical method, supplemented by a comparative look at the United Kingdom and the United States. It proceeds in seven parts. Part I sets out the

[3] Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 Journal of Law and Economics 301.

[4] Afra Afsharipour, 'Corporate Governance Convergence: Lessons from the Indian Experience' (2009) 29 Northwestern Journal of International Law and Business 335; Umakanth Varottil, 'Evolution and Effectiveness of Independent Directors in Indian Corporate Governance' (2010) 6 Hastings Business Law Journal 281.

[5] Companies Act 2013, ss 149, 150, 152 and sch IV; Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, regs 16, 17, 18, 19 and 25 (hereafter 'LODR Regulations').

theoretical foundations. Part II traces the evolution of the office in India. Part III examines the present legal framework. Part IV considers the judicial approach. Part V critically evaluates the institution. Part VI draws comparative lessons, and Part VII offers reform proposals. The central argument is that India has built an elaborate architecture of formal independence but has left the sources of substantive independence, namely selection, incentives, information and accountability, largely untouched.

I. THEORETICAL FOUNDATIONS: AGENCY, MONITORING AND THE LIMITS OF INDEPENDENCE

A. The Monitoring Model

The intellectual case for independent directors rests on agency theory. Berle and Means observed that the separation of ownership from control leaves managers with the power, and often the incentive, to run the enterprise in their own interest.[6] Jensen and Meckling formalised the point by describing the costs of monitoring, bonding and residual loss that arise when an agent acts for a principal.[7] Fama and Jensen then argued that the board is the organ that ratifies and monitors important decisions, and that outside directors, who depend for their reputation on being seen as competent monitors, are the natural instrument for controlling managerial opportunism.[8] This is the monitoring model, and it is the model on which most corporate governance codes, including India's, are built.

B. The Principal–Principal Problem

The monitoring model assumes that the independent director's principal is the dispersed body of shareholders. Where a controlling shareholder exists, the model needs adjustment. Bebchuk and Hamdani have shown that independence defined only as independence from management does little to protect minority shareholders against a controller, because the controller can influence the selection of the very directors who are labelled independent.[9] Their analysis applies with particular force to India. A definition of independence that screens out ties to the company, its promoters and their relatives is a necessary condition, but it is not a sufficient one, because it says nothing about who appoints, renews and rewards the director.

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[6] Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan 1932).

[7] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

[8] Eugene F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy 288; Fama and Jensen (n 3).

[9] Lucian A Bebchuk and Assaf Hamdani, 'Independent Directors and Controlling Shareholders' (2017) 165 University of Pennsylvania Law Review 1271.

C. Formal Independence and Substantive Independence

It is useful to separate two senses of independence. Formal independence is a matter of status: the director satisfies a checklist of statutory criteria relating to pecuniary relationships, past employment and family ties. Substantive independence is a matter of disposition and capacity: the director is willing to dissent, has the information with which to form a view, and is not exposed to retaliation or loss of income for doing so. Regulation naturally gravitates towards the former because it can be verified through a declaration. The latter is harder to legislate for, and it is here that the Indian framework is most exposed to the charge of reducing independence to compliance. The remainder of this paper tests the institution against that distinction.

II. EVOLUTION OF THE OFFICE OF INDEPENDENT DIRECTOR IN INDIA

The Companies Act, 1956 contained no concept of an independent director. The institution entered Indian law through securities regulation, influenced by the report of the Cadbury Committee in the United Kingdom, which had recommended a significant role for non-executive directors on boards.[10] Acting on the recommendations of the Kumar Mangalam Birla Committee, SEBI introduced Clause 49 into the Listing Agreement in 2000, requiring listed companies to have a prescribed proportion of non-executive directors and, within them, independent directors, and to constitute audit committees.[11]

Subsequent committees refined the framework. The Naresh Chandra Committee examined corporate audit and the role of independent directors, and the Narayana Murthy Committee reviewed Clause 49, leading to its revision in 2004.[12] The Expert Committee on Company Law chaired by J J Irani recommended, in 2005, that the definition and role of independent directors be placed in the statute itself.[13]

The turning point came with the Satyam scandal of January 2009, when the company's founder-chairman confessed to falsification of accounts running into several thousand crore rupees. Satyam's board, which included a number of independent directors with distinguished credentials, had only weeks earlier approved a proposal to acquire two companies owned by

[10] Report of the Committee on the Financial Aspects of Corporate Governance (Gee 1992).

[11] Securities and Exchange Board of India, *Report of the Kumar Mangalam Birla Committee on Corporate Governance* (1999).

[12] Ministry of Company Affairs, *Report of the Naresh Chandra Committee on Corporate Audit and Governance* (2002); Securities and Exchange Board of India, *Report of the SEBI Committee on Corporate Governance* (Narayana Murthy Committee) (2003).

[13] Ministry of Company Affairs, *Report of the Expert Committee on Company Law* (J J Irani Committee) (2005).

the promoter family, a proposal that was withdrawn within hours after a sharp investor reaction.[14] The episode demonstrated that an independent board could be formally constituted and yet fail at the very moment it was needed. It shaped the legislative design of the Companies Act, 2013, which for the first time defined independent directors in the statute, prescribed a Code for Independent Directors, created a databank of eligible persons and introduced a specific liability standard.[15]

The Uday Kotak Committee on Corporate Governance, which reported in October 2017, marked the next phase.[16] Many of its recommendations were accepted by SEBI and incorporated into the LODR Regulations in 2018. They included a minimum board size for the largest listed entities, a requirement that at least one independent director be a woman, a stricter regime for the resignation of independent directors and enhanced approval requirements for the continuation of non-executive directors beyond the age of seventy-five. Later amendments in 2021 and 2022 added shareholder-approval safeguards for the appointment and removal of independent directors, discussed below. The trajectory is one of steadily increasing formal regulation, and it sets the scene for the evaluation in Part V.

III. THE PRESENT LEGAL FRAMEWORK

A. Definition and Eligibility

Section 149(6) of the Companies Act, 2013 defines an independent director as a non-executive director, other than a nominee director, who in the opinion of the board is a person of integrity and possesses relevant expertise and experience. The director must not be, and must not have been in the recent past, a promoter of the company or its holding, subsidiary or associate company, nor related to any of them. Further, neither the director nor relatives may have had a pecuniary relationship with the company or its related entities beyond the prescribed thresholds, other than remuneration as a director.[17] The LODR Regulations contain a parallel definition for listed entities.[18] Every independent director must give a declaration of

[14] For an account of the episode and its implications for independent directors, see Varottil (n 4).

[15] Companies Act 2013, ss 149(6), 149(8), 149(12), 150 and sch IV.

[16] Securities and Exchange Board of India, *Report of the Committee on Corporate Governance* (Uday Kotak Committee) (5 October 2017).

[17] Companies Act 2013, s 149(6).

[18] LODR Regulations, reg 16(1)(b).

independence at the first board meeting of each financial year and whenever circumstances change.[19]

A distinctive feature of the 2013 Act is the independent directors' databank. Section 150 requires that a person intending to be appointed as an independent director be registered in the databank maintained under the rules, and the rules further require passing an online proficiency test within a prescribed period, subject to exemptions for experienced persons.[20] The databank is meant to widen the pool beyond the networks of existing promoters, a point to which Part V returns.

B. Board and Committee Composition

Under section 149(4), every listed public company must have at least one-third of its total number of directors as independent directors, and the rules prescribe a minimum of two independent directors for certain other public companies by reference to paid-up capital, turnover or outstanding borrowings.[21] The LODR Regulations go further. Where the chairperson of a listed entity is an executive director or is related to the promoter or a person occupying a management position, at least half of the board must consist of independent directors, and otherwise at least one-third.[22] The largest listed entities are additionally required to have a minimum number of directors.[23]

Independent directors also dominate the committees through which governance is exercised. The Act requires the audit committee to have a majority of independent directors, and the nomination and remuneration committee to have at least half independent directors.[24] The LODR Regulations are stricter, requiring that two-thirds of the members of the audit committee and of the nomination and remuneration committee be independent directors, and that the chairperson of each be an independent director.[25] Approval of material related party transactions is correspondingly routed through independent members of the audit committee.[26]

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[19] Companies Act 2013, s 149(7).

[20] Companies Act 2013, s 150; Companies (Appointment and Qualification of Directors) Rules 2014, r 6. The databank is administered by the Indian Institute of Corporate Affairs.

[21] Companies Act 2013, s 149(4); Companies (Appointment and Qualification of Directors) Rules 2014, r 4.

[22] LODR Regulations, reg 17(1).

[23] ibid.

[24] Companies Act 2013, ss 177(2) and 178(1).

[25] LODR Regulations, regs 18(1) and 19(1).

[26] LODR Regulations, reg 23.

The architecture, in short, treats independent directors as the gatekeepers of the transactions most open to abuse by controlling shareholders.

C. Appointment, Tenure and Removal

An independent director holds office for a term of up to five consecutive years and may be re-appointed for one further term of up to five years on the passing of a special resolution. No person may serve more than two consecutive terms, and after the second term a cooling-off period of three years applies before the person may be associated with the company in any capacity other than as an independent director.[27] Independent directors are not liable to retire by rotation.[28] Removal under the Act is by ordinary resolution of the shareholders after special notice, and for a second term by special resolution.[29]

For listed entities SEBI has tightened these processes in two steps. With effect from 1 January 2022, regulation 25(2A) of the LODR Regulations requires that the appointment, re-appointment or removal of an independent director be approved by a special resolution of the shareholders.[30] Recognising that a special resolution can be blocked by a promoter group that is divided or hostile, SEBI introduced in November 2022 a proviso under which an appointment is deemed approved even where the special resolution fails, provided that votes cast in favour exceed votes cast against and, importantly, the votes cast by public shareholders in favour exceed those cast against. An independent director so appointed may be removed only if the same two conditions are met in favour of removal.[31] The proviso is a notable concession to minority voice, because it makes the view of public shareholders decisive in a limited class of cases.

The LODR Regulations also regulate exits and re-entry. A vacancy caused by the resignation or removal of an independent director must be filled within a prescribed time, an independent director who resigns may not be appointed as an executive or whole-time director of the entity or its group for a stipulated period, and a listed entity must disclose the detailed reasons given

[27] Companies Act 2013, ss 149(10) and 149(11).

[28] Companies Act 2013, s 152(5).

[29] Companies Act 2013, s 169.

[30] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2021, notification no SEBI/LAD-NRO/GN/2021/38 dated 6 August 2021.

[31] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations 2022, effective 14 November 2022, inserting provisos to reg 25(2A).

by a resigning independent director.[32] Independent directors may not serve on more than seven listed entities, and no more than three where they hold a whole-time directorship elsewhere.[33]

D. Role, Duties and Evaluation

Schedule IV to the Companies Act sets out guidelines of professional conduct, the role and functions of independent directors, and their duties. The role includes helping the board bring an independent judgment to bear on strategy, performance and standards of conduct, scrutinising the performance of management against agreed goals, satisfying themselves on the integrity of financial information and the robustness of financial controls and risk management, and safeguarding the interests of all stakeholders, particularly minority shareholders.[34] Independent directors must meet at least once a year without non-independent directors and members of management, and the entire board must evaluate each independent director's performance.[35] The LODR Regulations add an obligation on the listed entity to run familiarisation programmes.[36] Every director, whether independent or not, is also bound by the general duties in section 166, including the duty to exercise due and reasonable care, skill and diligence and to exercise independent judgment.[37]

E. Remuneration and Liability

To protect independence, the Act bars independent directors from receiving stock options and confines their remuneration to sitting fees, reimbursement of expenses and a profit-related commission approved by the members.[38] The LODR Regulations additionally require a special resolution where the annual remuneration payable to a single non-executive director exceeds half of the total annual remuneration payable to all non-executive directors.[39]

On liability, section 149(12) provides that an independent director is liable only in respect of acts of omission or commission by the company which had occurred with his knowledge, attributable through board processes, and with his consent or connivance, or where he had not

[32] LODR Regulations, regs 25(6), 25(11) and 30 read with sch III pt A. The vacancy timeline was refined by the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2024, effective December 2024.

[33] LODR Regulations, reg 17A.

[34] Companies Act 2013, sch IV, pt II.

[35] Companies Act 2013, sch IV, pts VII and VIII; LODR Regulations, regs 17(10) and 25(3).

[36] LODR Regulations, reg 25(7).

[37] Companies Act 2013, s 166(2) and (3).

[38] Companies Act 2013, ss 149(9) and 197(5); Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014, r 4 (ceiling on sitting fees).

[39] LODR Regulations, reg 17(6)(ca).

acted diligently.[40] The provision was intended as a calibrated shield against the vicarious liability that had previously attached to all directors indiscriminately. SEBI has also required the top listed entities to take directors and officers liability insurance for their independent directors.[41]

IV. THE JUDICIAL APPROACH

Indian courts have rarely been called upon to define the content of independence, but several lines of authority bear on the office. The first concerns the fiduciary character of directors. The Supreme Court has long held that directors stand in a fiduciary relationship to the company and must act with fidelity to its interests, a position now statutorily reflected in section 166.[42]

The second line concerns the personal liability of directors who are not involved in day-to-day management. In the context of dishonoured cheques, the Supreme Court has repeatedly held that a director cannot be prosecuted merely by virtue of holding office and that specific averments showing that the person was in charge of, and responsible for, the conduct of the business are necessary.[43] In *Pooja Ravinder Devidasani v State of Maharashtra*, the Court applied the principle to non-executive directors and quashed proceedings where nothing showed that the director was responsible for the affairs of the company.[44] These decisions give some comfort to independent directors, but they were rendered before section 149(12) and concern a different statute, and they do not settle how the 'board processes' standard will operate in cases of alleged failure of oversight.

The third line is represented by *Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd*, arising from the removal of Cyrus Mistry as executive chairman of Tata Sons in 2016.[45] The Supreme Court set aside the order of the National Company Law Appellate Tribunal, which had restored Mr Mistry, and held that his removal did not amount to oppression or mismanagement. In the course of its analysis the Court emphasised that section 166(3) obliges every director to exercise independent judgment. Commentators have observed that, by treating the duty of independent judgment as common to all directors, the Court did not give separate

[40] Companies Act 2013, s 149(12).

[41] LODR Regulations, reg 25(10).

[42] *Official Liquidator v P A Tendolkar* (1973) 1 SCC 602.

[43] *SMS Pharmaceuticals Ltd v Neeta Bhalla* (2005) 8 SCC 89; *Maksud Saiyed v State of Gujarat* (2008) 5 SCC 668.

[44] *Pooja Ravinder Devidasani v State of Maharashtra* (2014) 16 SCC 1.

[45] *Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd* (2021) 9 SCC 449.

weight to the distinct, statutorily defined role of independent directors under section 149 and Schedule IV, and that the judgment leaves unaddressed what additional expectations attach to the label 'independent'.[46] The point is not that the Court was wrong on the oppression question, but that the case illustrates how little jurisprudence exists on the distinct standard of conduct expected from an independent director.

Finally, the collapse of Infrastructure Leasing and Financial Services Ltd ('IL&FS') in 2018 shows the limits of judicial and regulatory oversight after the fact. On a petition by the Union of India under sections 241 and 242 of the Companies Act, 2013, the National Company Law Tribunal, Mumbai, by an interim order of 1 October 2018, suspended the existing board and reconstituted it with persons proposed by the Government.[47] Investigations by the Serious Fraud Investigation Office and other agencies followed. Whatever the eventual determination of individual responsibility, the episode demonstrated that a board containing independent directors and board committees had not prevented a systemic failure from developing.

V. GUARDIANS OR COMPLIANCE INSTRUMENTS? A CRITICAL EVALUATION

The evidence of the preceding Parts points in two directions. There is a real regulatory effort to give independent directors the means to act as guardians, and there are structural features that tend to convert the office into a compliance function. This Part examines both, starting with the features that weaken substantive independence.

A. The Selection Problem

The most basic weakness lies in the process of selection. Under the statutory scheme the nomination and remuneration committee identifies candidates, the board recommends them, and the shareholders approve them. Where a promoter group controls the general meeting, shareholder approval is a formality, and the committee and the board are themselves shaped by the promoter's choices. Empirical and doctrinal work in India has long noted that independent directors are frequently drawn from the personal and professional networks of promoters, and that the pool of persons willing and able to serve is thin.[48] The databank was designed to broaden the pool, but registration only establishes eligibility. It does not alter who in practice

[46] Vishesh Gupta, 'The Tata-Mistry Judgment: An Imaginary Paradox in the Duties of the Directors' (RSRR, 9 June 2021) <https://www.rsrr.in/post/the-tata-mistry-judgment-an-imaginary-paradox-in-the-duties-of-the-directors> accessed 10 November 2026.

[47] *Union of India v Infrastructure Leasing & Financial Services Ltd* Company Petition No 3638 of 2018 (NCLT Mumbai, order dated 1 October 2018).

[48] Varottil (n 4); Afsharipour (n 4).

proposes a name from the databank, and a promoter remains free to select the registered person he or she knows.

The 2021 and 2022 amendments to regulation 25(2A) must be understood in this light. By requiring a special resolution, SEBI raised the approval threshold, and by adding the public-shareholder proviso it made sure that a hostile or divided promoter group could not entirely frustrate an appointment that public shareholders supported. These are positive developments. But they apply at the stage of approval, not nomination, and the practical power of the controller to propose candidates is unaffected.

B. Dependence, Remuneration and Reputation

A second weakness concerns incentives. The ban on stock options and the cap on sitting fees were designed to prevent compromising financial entanglement, and the profit-related commission is limited by the statute. These constraints are defensible, but they have a consequence that is seldom acknowledged: the independent director's principal rewards for service are reputational and relational. An independent director who earns the displeasure of the controlling shareholder risks non-renewal and, in a small and interconnected market, the loss of other board seats. The incentive structure thus rewards cooperation. The prohibition on equity-linked pay removes one source of conflict but does not create any positive incentive to dissent, and the very modest fees typical of many boards may mean that a seat is valued for its status more than its income.

It is also notable that the statutory test of independence relies on an opinion of the board that the director is a person of integrity, and on the director's own declaration. Although the Act requires the board to take the declaration on record after due assessment, both are inherently self-certifying exercises, which is what one would expect of a compliance-oriented mechanism.[49]

C. Information Asymmetry and Limited Time

A third weakness is informational. Independent directors meet a handful of times each year, typically on the basis of papers prepared by management. They have no staff, no independent advisers by default and no assured access to internal audit or operating personnel. Schedule IV directs them to seek clarifications and, where necessary, to obtain professional advice at the company's expense, but whether this is done in practice depends on the willingness of the

[49] Companies Act 2013, ss 149(6) and 149(7); LODR Regulations, reg 25(8) and (9).

board and the company to facilitate it.[50] The numerical cap on directorships, which limits the number of boards on which one person may sit, helps, but it cannot by itself ensure that those who sit on several boards have the time to read the papers of each. The audit committee, which does the most critical work, is also the committee that depends most on the information supplied by the management whose accounts it reviews.

D. Liability: Between Over-deterrence and Impunity

The liability regime is a fourth source of ambiguity. Section 149(12) limits the liability of independent directors, which prevents over-deterrence and encourages competent persons to accept office. But the standard of 'knowledge attributable through board processes' and 'diligence' is open-textured, and the cases show that the line between a diligent and a negligent director is drawn only after a failure has occurred. The risk is that rational independent directors respond to this uncertainty by building a paper trail rather than by probing management. Careful minuting of questions asked, reliance on management certificates and obtaining of professional opinions can establish diligence in the formal sense without producing any real scrutiny. This is a defensive-compliance response, and it is encouraged rather than discouraged by a regime that rewards documentation.

At the same time, the shield may be too thin for those who do probe. Where regulators and investigators, with hindsight, treat the independent director as the person who should have known, directors have an incentive to avoid contentious boards. The result is a system in which the cautious are protected and the questioning exposed, which is the opposite of what the monitoring model requires.

E. The Silent Exit

Resignation is the one tool an independent director possesses that does not depend on the goodwill of the controller. The LODR Regulations, following the Kotak Committee, require detailed reasons for resignation to be disclosed. This is a sound step, because a resignation accompanied by a candid statement is a strong signal to the market. However, in practice resignation letters are often brief and formulaic, citing personal commitments or other pre-occupations. The difficulty is that a director who departs under protest may fear defamation claims, loss of future appointments or regulatory attention, and the disclosure regime does not

[50] Companies Act 2013, sch IV, pt II(5) and pt III. The provision enables an independent director to obtain appropriate independent professional advice at the expense of the company in the discharge of duties.

offer any mechanism for verifying the reasons stated. A signalling mechanism that is so rarely used for its intended purpose operates, in effect, as a disclosure formality.

F. Evidence That the Institution Can Guard

A critique confined to the weaknesses would be unfair. There are respects in which independent directors perform a genuine protective function. The routing of material related party transactions through independent members of the audit committee, and the minority-sensitive approval mechanism for their appointment, have given independent directors real leverage over the transactions most prone to abuse. Independent directors have, in several well-known cases, resigned citing concerns about governance, and their resignations have drawn the attention of regulators, auditors and investors. The proficiency test, the databank and the mandatory separate meeting have raised the baseline of preparation and professionalism. Compliance and guardianship are not mutually exclusive: formal requirements create the conditions in which a willing director can act, and the better directors use them.

The more accurate conclusion is therefore that the Indian independent director is a conditional guardian. Where the individual is of strong character, has a supportive committee chair, and sits on the board of a company whose controller values credibility, the institution works. Where any of those conditions fails, the formal apparatus continues to operate but its protective content is lost, and the office becomes an instrument of compliance. The regulatory challenge is to reduce the dependence of guardianship on fortuitous conditions.

VI. COMPARATIVE PERSPECTIVES

The comparison with the United Kingdom and the United States helps to identify where India is unusual. In the United States, the New York Stock Exchange requires listed companies to have a majority of independent directors and to hold regular executive sessions of non-management directors, and the Sarbanes-Oxley Act requires fully independent audit committees.[51] The US system, however, was designed for dispersed ownership, and the exchange rules exempt a ‘controlled company’ from the majority-independence requirement, which suggests that the US model has not been designed to solve the controlling shareholder problem.[52] The Indian experience, where controlling shareholders are the norm, therefore cannot be handled by importing the US model without adaptation.

[51] New York Stock Exchange, *Listed Company Manual*, s 303A.01 and s 303A.03; Sarbanes-Oxley Act 2002, s 301 (15 USC § 78j-1(m)).

[52] New York Stock Exchange, *Listed Company Manual*, s 303A.00.

The United Kingdom offers a more instructive example. The UK Corporate Governance Code requires that at least half of the board, excluding the chair, be non-executive directors whom the board considers independent, and it lists circumstances, including tenure of more than nine years, which are likely to impair independence.[53] The Code also relies on a senior independent director who is available to shareholders if concerns cannot be resolved through normal channels.[54] More importantly for present purposes, the Listing Rules for companies with a controlling shareholder introduced a dual-voting mechanism: the election of an independent director must be approved both by the shareholders as a whole and by the independent shareholders as a separate class.[55] The mechanism directly addresses the selection problem identified in Part V, because it gives minority shareholders a veto over those who are to represent them.

The Indian proviso to regulation 25(2A) shares the policy of the UK mechanism, since it makes the view of public shareholders relevant, but it operates only as a fallback when a special resolution fails. The UK rule makes minority approval an independent requirement. The lessons are twofold. First, independence in a controlled company must be secured through the votes of the minority, not only through an assessment of the candidate's relationships. Second, the UK experience of a nine-year tenure marker suggests that a debate on time limits ought to be conducted on the footing that long service can both erode independence and build expertise, and that a rigid rule is a rough instrument.

VII. REFORM PROPOSALS

The analysis above suggests that further additions to the checklist of formal requirements will produce diminishing returns. The proposals below are directed instead at the sources of substantive independence.

A. Make Minority Approval an Independent Requirement

In listed companies with an identifiable promoter or controlling shareholder, the appointment and re-appointment of an independent director should require the approval of a majority of the votes cast by public shareholders, as a distinct condition in addition to the existing approval requirement. This would convert the present fallback in the proviso to regulation 25(2A) into

[53] Financial Reporting Council, *UK Corporate Governance Code* (2018), provisions 10 and 11.

[54] ibid, provision 12.

[55] Financial Conduct Authority, Listing Rules (originally LR 9.2.2E, now carried into the current UK Listing Rules).

a general rule, in line with the UK dual-voting approach, and would make candidates accountable to the constituency they are meant to protect.

B. Open Up Nomination

The nomination and remuneration committee should be required to record and disclose the process by which each independent director candidate was identified, including the use of the databank or an external search, and the role of institutional investors and proxy advisers in the process. Institutional investors and mutual funds, who are bound by stewardship responsibilities, should be encouraged to propose candidates and to disclose how they voted on independent director resolutions.

C. Strengthen Information and Resources

The entitlement under Schedule IV to obtain independent professional advice at the company's expense should be backed by a standing budget approved annually by the audit committee, so that the exercise of the right does not require a confrontation with management. The separate meeting of independent directors should have a prescribed minimum agenda, including a review of related party dealings and the quality of information received, and the proceedings should be recorded and made available to the statutory auditors. Boards with an executive or promoter-related chairperson should be required to designate a lead independent director, on the model of the UK senior independent director, as the first point of contact for minority shareholders and regulators.

D. Clarify the Liability Standard

The Ministry of Corporate Affairs and SEBI should issue authoritative guidance on the application of section 149(12). The guidance should clarify that the recorded dissent of an independent director on a matter, or the escalation of concerns through the lead independent director or the auditors, will ordinarily be relevant evidence of diligence, while a failure to attend meetings, to read papers or to act upon red flags will not be excused. The aim is to reward questioning rather than mere documentation, and to avoid hindsight-driven enforcement against directors who raised concerns and were overruled.

E. Reform Pay and Disclosure of Relationships

The bar on stock options should be retained, as equity-linked pay in a controlled company would tie directors to the promoter's fortunes. What is needed is greater transparency about the real economic relationships of independent directors. Listed entities should disclose in a standardised manner all payments, including payments to firms of which the director is a

partner or consultant, and the number of other boards on which the director serves with the same promoter group. Fees should also be benchmarked and disclosed so that excessively low or excessively generous remuneration can be identified.

F. Make Resignation Disclosure Meaningful

A resigning independent director should be required to file a structured statement addressing prescribed questions, including whether the director disagreed with the board on any matter and whether information was withheld. SEBI should review such statements and maintain a public record of resignations that cite governance concerns, so that the signal is not lost. Protection against retaliation, through a clear statutory immunity for good-faith disclosures of this kind, would reduce the cost of speaking.

G. Improve Board Evaluation and Capacity Building

Board evaluation under Schedule IV and regulation 17(10) is presently an internal exercise. Companies should be required to disclose the evaluation methodology and the main findings in aggregate form, and to commission an external evaluation at periodic intervals. The databank proficiency test should be supplemented by continuing education focused on financial analysis, related party transactions and the practical exercise of dissent, and the databank should be used to publish aggregate information on the number of persons actively serving, so that concentration among a small set of directors can be monitored.

CONCLUSION

The independent director in India is neither the heroic guardian that the rhetoric of corporate governance sometimes suggests nor the empty instrument that cynics describe. The office has been built carefully. The Companies Act, 2013 defines it, protects it through tenure rules and a calibrated liability standard, and supplies a Code that describes what independent directors must do. SEBI's regulations have added shareholder-approval safeguards and disclosure requirements, and the 2022 proviso in regulation 25(2A) recognises that public shareholders have a legitimate voice. These are real achievements.

At the same time, the design remains weakest where independence matters most: in who chooses the director, what the director stands to gain or lose, what the director knows, and what happens when the director speaks. As long as promoters control selection and renewal, as long as reputational rewards flow from cooperation, and as long as the liability regime encourages paper trails rather than questions, the office will tend to operate as a compliance function whose

value depends on the character of the individual. The history of Satyam and the collapse of IL&FS are reminders that formal compliance can coexist with serious failure.

The answer to the question posed in the title is therefore that independent directors in India are conditional guardians: they are capable of real oversight, but the law presently leaves that capability dependent on fortunate circumstances. The reforms proposed in this paper, namely a distinct minority-approval requirement, transparent nomination, resourced independence, a clearer liability standard, meaningful disclosure of relationships and resignations, and credible evaluation, would reduce that dependence. They do not require abandoning the existing architecture. They require its completion, so that independence in India is measured by what directors are able to do and not by what they are certified to be.