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INDEPENDENT DIRECTORS IN INDIA: EXAMINING THE BALANCE BETWEEN CORPORATE ACCOUNTABILITY AND LEGAL PROTECTION

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Abstract

The independent director is asked to perform a contradiction: to be at once an insider trusted with the firm's confidence and an outsider willing to confront those who appointed her. Indian law has pursued this figure for two decades, from the voluntary committee reports of the early 2000s into Clause 49 of the Listing Agreement, and thence into the Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, as recalibrated by the Kotak Committee. This article argues that the framework oscillates between two failures. It over-deters, exposing non-executive directors to a width of civil, securities, and quasi-criminal liability that the safe harbour in Section 149(12) does not reliably contain, raising the price of board service and thinning the pool of candidates.

It simultaneously under-deters, because an architecture of formal independence—promoter-controlled nomination, pecuniary dependence, and asymmetric information—produces directors structurally unable to discipline the controller they are meant to check. Contrasting the Indian record from Satyam to IL&FS with the oversight-and-exculpation settlement reached in Delaware and the United Kingdom, it proposes a calibrated resolution: a diligence standard defined by demonstrable board-process conduct; a graduated liability structure capping non-fraud penalties while preserving full liability for knowing participation; strengthened independence mechanisms; and a SEBI safe-harbour framework. Anchored in the constitutional guarantees against arbitrariness and in favour of occupation, the proposal seeks to make independence functional without making service ruinous.

Keywords: Independent Directors, Corporate Accountability, Safe Harbour, Oversight Liability, Corporate Governance, Formal Independence.

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I. Introduction

The independent director is a creature of mistrust. She exists because the law has concluded that those who run and control a company cannot be left to monitor themselves, and that dispersed, rationally passive minority investors will not do it for them. Into this gap the law inserts an outsider, nominally disinterested, expected to read the papers, ask the awkward question, and, when conscience requires, dissent. In the post-liberalisation Indian economy, where ownership remains concentrated in family and promoter blocks, this expectation carries particular weight: the independent director is the principal institutional answer to the agency problem of Indian firms, which is not the classic manager–owner conflict but the conflict between controlling and non-controlling shareholders.[1] Yet the figure is structurally unstable, and that instability is produced by the law's own design. The framework oscillates between two pathologies.

At one pole lies over-deterrence: exposure of non-executive directors to a width of liability such as civil penalties, securities enforcement, vicarious criminal liability under cheque-dishonour and other penal statutes, and the shadow of the fraud provision is so broad and unpredictable that competent persons decline to serve, demand insurance, and resign at the first sign of trouble. At the other lies under-deterrence: a regime of merely formal independence in which the promoter selects the monitor, pays her fee, controls her information, and can secure her continuance, so that "independence" checks nothing.[2][3] The thesis is that these are two faces of a single doctrinal failure: a conception of independence and of liability that is formal rather than functional.

The law tests independence by a checklist of pecuniary and relational disqualifications, not by whether the director can actually exercise independent judgment, and it calibrates liability by the director's office and the occurrence of harm rather than by what she did in the board process. Correct the formalism on both sides, make independence turn on genuine appointment and information, and liability turn on demonstrable conduct and the oscillation can be dampened. Part II reconstructs the statutory architecture; Part III examines the safe harbour of Section 149(12) and the exposure around it; Part IV turns to protection and the near-absence of a business-judgment rule; and Part V draws on Delaware and the United Kingdom to propose a

1 On the "principal–principal" agency problem in concentrated-ownership economies, see generally Umakanth Varottil, Evolution and Effectiveness of Independent Directors in Indian Corporate Governance, 6 Hastings Bus. L.J. 281 (2010); Report of the Committee on Corporate Governance (SEBI, Oct. 2017) [hereinafter Kotak Committee Report].

2 See infra Part IV.B (resignation trends as a signal of risk).

3 The two pathologies coexist, afflicting different directors at different firms: a conscientious outsider at a well-run firm bears the first; a captured outsider at a controller-dominated firm embodies the second.

ISSN: 2582-6433

calibrated reset anchored in constitutional principle.[4]

II. The Statutory Architecture Of Independence And Its Evolution

A. From Voluntary Codes to Clause 49: The Committee Era

The Indian independent director was born of committees. The Confederation of Indian Industry's voluntary code of 1998 and SEBI's Kumar Mangalam Birla Committee supplied the first regulatory content, which SEBI translated into Clause 49 of the Listing Agreement in 2000, defining independence largely by the absence of "pecuniary relationships" with the company. Three reports refined the architecture: the Naresh Chandra Committee (2002) on auditor independence; the Narayana Murthy Committee (2003), which tightened the definition and strengthened the audit committee; and the J.J. Irani Committee (2005), which framed the recommendations shaping the eventual statute.[56] Two features bear emphasis. First, independence was conceived from the outset as the absence of disqualifying ties rather than the presence of any capacity to resist the controller that is a negative, checklist conception the statute would inherit.

Second, the obligations were initially contractual, enforced by the threat of delisting, so the sanction fell on the company and its investors rather than the delinquent director; the move to statute in 2013 was an attempt to attach consequences to the individual. The CII's Desirable Corporate Governance: A Code (1998), the first indigenous articulation, was voluntary and aspirational, and its softness drove SEBI to make Clause 49 a mandatory listing condition. The revised Clause 49, operative from 2006, sharpened the definition and keyed the minimum proportion of independent directors to whether the board was executive- or non-executive-chaired, yet retained the negative, relationship-based test. Because SEBI's authority rested on the listing agreement, the only effective sanction for breach fell on the company and its shareholders, not the director.[789]

4 The method is doctrinal and comparative; the empirical claims about resignation trends and the candidate pool are directional and flagged for verification against SEBI and exchange disclosures. See infra Part IV.B.

5 Report of the Kumar Mangalam Birla Committee on Corporate Governance (SEBI 2000); SEBI Circular SMDRP/Policy/Cir-10/2000 (Feb. 21, 2000) (inserting Clause 49). Clause 49 was a contractual listing condition rather than statute.

6 Report of the Naresh Chandra Committee on Corporate Audit and Governance (2002); Report of the SEBI Committee on Corporate Governance (Narayana Murthy Committee) (2003); Report of the Expert Committee on Company Law (J.J. Irani Committee) (2005). The revised Clause 49, operative from 2006, incorporated much of the Narayana Murthy Committee's work.

7 Confederation of Indian Industry, Desirable Corporate Governance: A Code (1998) —generally regarded as the first Indian corporate governance code and the antecedent of the Birla Committee's work.

8 Clause 49 of the Listing Agreement (as revised, effective Jan. 1, 2006). The one-third/one-half independence requirement turned on the status of the chairperson, a design carried into the Companies Act and the LODR.

9 SEBI Act, 1992, §§ 11, 11A, 11B, 21, No. 15 of 1992 (India); the listing agreement was enforced under § 21 of

ISSN: 2582-6433

B. Codification in the Companies Act, 2013

The Companies Act, 2013 codified the independent director for the first time. Section 149(4) requires every listed public company to have at least one-third independent directors. Section 149(6) supplies a definition built from a cascade of negative conditions: the director must be a person of integrity and relevant expertise, must not be a promoter or related to promoters or directors, and must have with her relatives and no "pecuniary relationship" with the company or its group beyond permitted remuneration and prescribed thresholds.[10] Sections 149(10) - (11) permit a term of up to five consecutive years, renewable once by special resolution, to a maximum of two terms, after which a three-year cooling-off period applies. Section 150 establishes supply: independent directors may be drawn from a data bank maintained by a notified body, subject to a proficiency self-assessment test. Appointment runs through Section 152.[11] The remuneration provisions are central and often misunderstood.

Section 149(9), read with Section 197, entitles an independent director to sitting fees, reimbursement, and a members-approved profit-linked commission, but bars any stock option. The prohibition is coherent—equity compensation would convert the monitor into a residual claimant whose interest in a buoyant share price might blunt scrutiny—but it generates the pecuniary-dependence paradox examined below: the only permitted remuneration is paid by the very company the director must police. Section 166 sets her duties: good faith to promote the company's objects for the benefit of members as a whole, due care, skill, diligence, and independent judgment.[12] Schedule IV, i.e. the Code for Independent Directors translates these obligations into a code of conduct, roles, and the manner of appointment, resignation, and evaluation, and contemplates that independent directors meet separately at least once a year without management present.

In form the most functional part of the architecture, it has in practice operated as aspiration rather than enforceable standard.[13] Section 149(7) requires every independent director to declare, at her first board meeting and annually, that she meets the independence criteria—converting the negative test into a recurring personal affirmation whose falsity carries consequences. Section 149(8), with Schedule IV, binds company and director to the Code: a

the Securities Contracts (Regulation) Act, 1956.

10 Companies Act, 2013, § 149(4), No. 18, Acts of Parliament, 2013 (India) [hereinafter 2013 Act]; see Companies (Appointment and Qualification of Directors) Rules, 2014, r. 4 (prescribed unlisted public companies).

11 2013 Act, § 149(10)–(11). The design attenuates the familiarity that erodes independence over time. See infra Part II.C.

12 2013 Act, § 149(9) proviso and sch. IV, read with § 197(5)–(7) (prohibition on stock options for independent directors). The policy is to avoid aligning the monitor's pay-off with a rising share price she is meant to scrutinise.

13 2013 Act, sch. IV, ¶¶ I–VIII. The separate-meeting requirement (sch. IV, ¶ VII) is the statute's principal device for insulating the independent directors' deliberation from management. See infra Part V.A.

ISSN: 2582-6433

formal letter of appointment, the manner of resignation and removal, a code of conduct, and the separate meeting.[1415] The independence criteria are where formalism is most visible. Section 149(6) disqualifies persons with a pecuniary relationship exceeding prescribed thresholds, relatives with specified ties, and recent employees, proprietors, or partners of specified entities; the Companies (Amendment) Act, 2017 permitted limited transactions below a threshold.

The databank and online proficiency test were meant to professionalise supply, but a register of the willing and a multiple-choice examination test availability and baseline knowledge, not the courage or access functional independence demands. Easing the Section 160 candidature deposit lowered the barrier to entry without altering who controls the gate.[161718]

C. The LODR Overlay and the Kotak Committee Reset

For listed entities the Companies Act is overlaid by the SEBI (LODR) Regulations, 2015, which repeat and exceed the statutory baseline. Regulation 16(1)(b) defines the independent director in terms aligned with Section 149(6), and Regulation 17 governs board composition, including the Kotak Committee requirement that the top listed entities have at least six directors.[1920] Three sub-regulations inserted after 2017 tightened appointment. Regulation 17(1A) bars continuation of a non-executive director aged seventy-five or more absent a special resolution. Regulation 17(1C) requires shareholder approval within three months of appointment, foreclosing long interim tenures. Most significantly, Regulation 25(2A) subjects the appointment, re-appointment, and removal of an independent director to shareholder approval by special resolution.[21] The special-resolution device illustrates the limits of formal

14 2013 Act, § 149(7). The annual declaration exposes the director to liability for a false statement and reinforces the formal character of the test, which certifies the absence of disqualifying ties rather than monitoring capacity.

15 2013 Act, § 149(8), sch. IV. The letter-of-appointment requirement documents the director's role and furnishes the evidentiary record against which diligence is later assessed. See infra Part III.A.

16 2013 Act, § 149(6)(c)–(e), as amended by the Companies (Amendment) Act, 2017. The precise thresholds have been revised, but the analytic point survives: the test enumerates forbidden relationships, never required capacities.

17 Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019; Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019. The proficiency test exempts individuals with prescribed tenures of board or senior experience.

18 2013 Act, § 160, as amended to exempt independent directors and NRC- or Board-recommended candidates from the deposit requirement. The reform addresses a cost of candidature, not the structural bias examined in Part II.D.

19 SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 4 (Sept. 2, 2015) [hereinafter LODR], traceable to §§ 11 and 11A of the SEBI Act, 1992. Where the two instruments diverge, the stricter governs.

20 LODR, reg. 16(1)(b), reg. 17(1); SEBI (LODR) (Amendment) Regulations, 2018 (implementing the Kotak Committee's board-size and independence recommendations). See Kotak Committee Report, supra note 2, recommendations 1–3.

21 LODR, reg. 17(1A), inserted w.e.f. Apr. 1, 2019 —a proxy for board refreshment and against entrenchment by age.

ISSN: 2582-6433

reform.

Because it requires a three-fourths majority, a promoter with a substantial block can block an appointment the minority desires or secure one it opposes. The SEBI (LODR) (Sixth Amendment) Regulations, 2022 therefore added a proviso: where the special resolution fails but votes in favour exceed those against and public shareholders' votes in favour exceed those against, the appointment is deemed made, with a symmetrical test for removal. The proviso gives the minority a decisive voice—but also confesses that the ordinary machinery, left to the controller-dominated general meeting, does not reliably select independent monitors.[22] The LODR structures the director's work through mandatory committees. Regulation 18, with Section 177, requires an audit committee with a majority of independent directors and an independent chair; Regulation 19, with Section 178, requires a nomination and remuneration committee (NRC) similarly composed.

Regulation 25 caps the number of listed-entity independent directorships, mandates familiarisation programmes, and since Kotak requires D&O insurance for the largest entities' independent directors.[23] The LODR adds composition requirements the Act does not: a minimum board of six for top-tier entities, at least one woman director (an independent woman for the largest), minimum meeting frequency and maximum gaps, and board evaluation of independent directors. The Kotak recommendation to separate the chairperson and MD/CEO roles was adopted and then made voluntary—a reversal illustrating the political economy of reform in a promoter-dominated market.[24] Regulation 24 extends independence into the group, requiring an independent director of the holding company to sit on the board of each material unlisted subsidiary, and Regulation 4 sets the governance principles against which the specific obligations are read.[25]

D. Formal Versus Functional Independence

The architecture tests independence formally. A director qualifies by clearing the negative checklist of Section 149(6) and Regulation 16: no promoter kinship, no disqualifying pecuniary relationship, no recent employment. Nothing asks whether, on a promoter-controlled board,

22 SEBI (LODR) (Sixth Amendment) Regulations, 2022, proviso to reg. 25(2A). The alternative mechanism applies to appointment and removal but not re-appointment, producing an acknowledged inconsistency with the Companies Act's special-resolution requirement for re-appointment. See 2013 Act, § 149(10).

23 LODR, regs. 18–19; 2013 Act, §§ 177–178. The audit committee—oversight of financial reporting, related-party transactions, and the auditor relationship—is the principal situs of the independent director's monitoring function. The NRC's control of nominations is examined in Part II.D.

24 LODR, reg. 17(1)(a)–(c). The minimum-board-size and woman-director requirements were phased in for the top 500, then top 1,000, listed entities following the Kotak Committee.

25 LODR, reg. 24(1) (independent director on the board of a material subsidiary) and reg. 4 (governance principles). Regulation 24's group dimension matters in India, as the IL&FS episode would demonstrate. See infra Part III.C.

ISSN: 2582-6433

she can exercise the independent judgment Section 166(3) demands. Three structural features defeat the formal test's functional ambition. First is nomination. Although the NRC must be majority-independent, the promoter typically controls the board that constitutes it and, through the controlling block, the general meeting that ratifies its choices. The monitor is selected, in substance, by the party to be monitored and the objection the Kotak Committee itself registered and the special-resolution reforms only partly answer.[26] Second is pecuniary dependence.

The ban on stock options was meant to purify incentives, but it leaves commission, sitting fees, and reputational capital as the director's stake—all flowing from continued good standing with the controller who can decline to propose re-appointment. The director is independent of the firm's equity but not of the controller's goodwill.[27] Third is information asymmetry (Part IV.C). The director sees what management chooses to place before the board. Without an independent route to internal audit, the whistleblower channel, and external advice at the company's expense, her capacity to detect wrongdoing is bounded by the candour of those she monitors. The formal test certifies that she is unconflicted; it cannot certify that she is informed. Independence can thus be real on paper and empty in practice, i.e. the under-deterrence pole. The same formalism haunts the liability side, which asks what office the director held and what harm occurred rather than what she did.

That the drafters understood the deficit is clear from the reforms they attempted like the special-resolution regime, the public-shareholder proviso, the tenure caps, the separate-meeting requirement and all efforts to manufacture by rule the independence the negative test cannot guarantee. Their persistence suggests the problem is not under-regulation but mis-location: so long as the controller composes the board, funds the director, and meters her information, rules layered atop a captured appointment will underperform.[28][29]

26 The Kotak Committee observed that the efficacy of independent directors is undermined where the controller dominates their selection, and recommended enhancing the role of the NRC and the transparency of appointment. Kotak Committee Report, supra note 2. A majority-independent NRC is not independent of the controller if the controller composes the board from which it is drawn.

27 The "pecuniary dependence problem": formal independence coexists with economic reliance on the appointer. See, e.g., James D. Cox & Randall S. Thomas, Corporate Governance (structural bias); for India, Varottil, supra note 2.

28 On the formal/functional distinction, see Varottil, supra note 2; Kotak Committee Report, supra note 2. India has multiplied formal rules without resolving the functional deficit.

29 Jurisdictions facing the same concentrated-ownership problem rely on majority-of-the-minority mechanisms and long-tenure safeguards rather than refined negative definitions. See infra Part V.A. The Regulation 25(2A) proviso gestures toward these devices but stops short of a systematic functional test.

ISSN: 2582-6433

III. Accountability: The Exposure Of The Independent Director

A. The Safe Harbour of Section 149(12)

The Act anticipates over-deterrence. Section 149(12) provides that an independent director, and a non-executive director who is not a promoter or key managerial personnel, is liable only for acts of the company that occurred with her knowledge, attributable through board processes, and with her consent or connivance, or where she had not acted diligently. On its face a potent shield, it inverts the default of collective board responsibility, requiring proof of a nexus between the wrong and the director's own knowledge or want of diligence. The phrase "attributable through Board processes" directs attention to the minutes, agenda, papers, and the director's recorded participation or dissent.[30] The safe harbour is reinforced by Section 134(5) and by Section 166, whose diligence standard supplies the content of the "acted diligently" gateway. Together they articulate a process-based standard: the independent director discharges her duty not by guaranteeing outcomes but by participating competently in the board's deliberation.

The difficulty, developed in Part III.C, is that enforcement has not consistently respected this orientation, proceeding against directors on the strength of office and the fact of corporate wrongdoing.[31] Two features deserve emphasis. First, the annual declaration under Section 149(7) and the board's record of participation form the evidentiary spine of any later defence: minutes recording attendance, questions, and dissent transmute the abstract gateway into a provable fact. Second, Indian law has long held that a director may not shut her eyes to the affairs she oversees; the duty is one of informed engagement, of which Section 166(3)'s demand for "independent judgment" is the modern expression.[32]

B. The Width of Exposure: Fraud, Vicarious Liability, and the Securities Regime

Surrounding the safe harbour is a wide field of liability. Section 447 defines fraud expansively and attaches severe punishment, and its breadth can draw in directors whose connection to the wrong is attenuated. Section 463 is a counter-weight: a court may relieve a director who acted

30 2013 Act, § 149(12). Its three gateways—knowledge attributable through board processes; consent or connivance; failure to act diligently—are conjunctive in form but have been read disjunctively in practice.

31 2013 Act, § 134(5) (directors' responsibility statement); § 166(3) (due and reasonable care, skill, diligence and independent judgment). A director who applied independent judgment to the information before the board, sought clarification where papers were deficient, and recorded dissent has, on the text, acted diligently within § 149(12).

32 The "attributable through Board processes" language directs attention to the documentary record; a director relying on the safe harbour must ensure her dissent and requests for information are minuted. See infra Part V.B.

ISSN: 2582-6433

honestly and reasonably and ought fairly to be excused.[3334] The most acute vicarious exposure has historically arisen under Section 141 of the Negotiable Instruments Act, 1881, which fixes liability for cheque dishonour on those in charge of and responsible for the company's business. The Supreme Court has repeatedly held that mere directorship does not attract Section 141: the complaint must specifically aver that the director was in charge of and responsible for the business. In Pooja Ravinder Devidasani v. State of Maharashtra the Court quashed proceedings against a non-executive director, and in Sunita Palita v.

Panchami Stone Quarry it held that independent and non-executive directors ought not to stand trial absent specific allegations, cautioning against routine impleadment.[35] Under the securities regime the exposure is different. The SEBI Act, 1992 empowers SEBI to impose monetary penalties and remedial directions, and the Supreme Court has held that directors cannot escape responsibility for the integrity of a listed company's disclosures by pleading ignorance. In N. Narayanan v. Adjudicating Officer, SEBI the Court upheld penalties and stressed that those who accept board positions assume a duty of diligence they cannot abdicate. The Securities Appellate Tribunal has distinguished directors who participated in the violation from non-executive directors with no roletracking the Section 149(12) gateways, though the SEBI Act contains no identical safe harbour.[36] Exposure has narrowed in one respect.

The Companies (Amendment) Act, 2020 recategorised numerous compoundable, non-fraud offences as civil defaults attracting monetary penalties, reducing the quasi-criminal exposure non-executive directors faced for technical lapses. The gravest residue is the fraud jurisdiction: the Serious Fraud Investigation Office may investigate on a reference, and the arrest powers attached to Section 447 fall on directors as a class before culpability is individuated.[37] The vicarious-liability line under the Negotiable Instruments Act has continued to develop in the director's favour, the Court reiterating that office alone does not create liability and quashing

33 2013 Act, § 447 (punishment for fraud). The width of the definition has generated concern that non-executive directors may be arrayed in fraud prosecutions without individuated allegations. Section 447 is a predicate offence for the SFIO's jurisdiction under § 212.

34 2013 Act, § 463, succeeding Companies Act, 1956, § 633. The relief is discretionary and retrospective, so it mitigates but does not prevent the burden of defending proceedings. See infra Part IV.A.

35 S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89; National Small Industries Corp. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 (vicarious liability under § 141 is not automatic and requires specific role-based averments).

36 N. Narayanan v. Adjudicating Officer, SEBI, (2013) 12 SCC 152 —double-edged: it affirms a genuine duty of diligence (consistent with the § 149(12) gateway) yet is cited for the broader proposition that directors are accountable for corporate disclosures. It is best read as about directors who failed the diligence standard, not as authority for liability regardless of diligence.

37 Companies (Amendment) Act, 2020 (decriminalising and recategorising various offences; lower-penalty provision, 2013 Act, § 446B) . A partial answer to over-deterrence that leaves untouched the fraud provision, the securities regime, and the vicarious-liability statutes.

ISSN: 2582-6433

complaints pleaded without role-specific averments.[38]

C. Enforcement Practice Against the Statutory Text: Satyam to IL&FS

The gap between the safe harbour's text and enforcement practice is best seen in the defining episodes. The Satyam fraud, revealed in 2009 when the chairman confessed to a long-running falsification of accounts, implicated a board that included eminent independent directors. Though the principal culpability lay with the executive promoters, the episode subjected the independent directors to investigation and reputational damage, crystallising the fear that an outsider could be ruined by a fraud she neither knew of nor could reasonably have detected. Satyam prompted the very safe harbour Section 149(12) would codify—the originating anxiety of the over-deterrence pole.[39] The IL&FS collapse of 2018 sharpened the anxiety. After the financier defaulted, the Union Government secured the supersession of its board and the SFIO pursued the directors; whether, and on what basis, independent and non-executive directors should be proceeded against became acute.

The Yes Bank crisis of 2020, though driven by its promoter-executive, again placed board oversight under scrutiny and reinforced the perception of diffuse exposure when a large institution fails.[40] The Tata Sons–Cyrus Mistry litigation illuminates a different facet: the position of directors in a controller-dominated company where the controller's removal of the chairman was challenged. The Supreme Court upheld the removal and declined to find oppression. Read against the safe harbour, these episodes reveal a pattern: the statute conditions liability on knowledge attributable through board processes or a failure of diligence, yet the practical risk has flowed less from adjudicated findings than from investigation, impleadment, and reputational cost, which arrive before any tribunal tests the gateways. The Ministry of Corporate Affairs implicitly conceded this by directing that such directors not be arrayed in prosecutions unless the Section 149(12) conditions are prima facie met.[41]

The safe harbour is therefore textually sound but institutionally under-enforced. It protects the director who litigates to final judgment; it does little for the one who must spend years, and

38 Siby Thomas v. M/s Somany Ceramics Ltd., (2023) (quashing a complaint for want of specific averments under § 141), reaffirming S.M.S. Pharmaceuticals (2005) 8 SCC 89 and Pooja Ravinder Devidasani (2014) 16 SCC 1. Because the protection operates at the quashing stage, the process is the punishment.

39 On the Satyam episode, see Kotak Committee Report, supra note 2, and contemporaneous literature. The point is the demonstration effect: distinguished independent directors enmeshed in a fraud investigation signalled that the office carried uninsurable reputational risk.

40 The Government's application for supersession of the IL&FS board was made under 2013 Act, §§ 241–242 and allowed by the NCLT, with proceedings before the NCLAT. The SFIO's investigation under § 212 extended to past directors.

41 Tata Consultancy Services Ltd. v. Cyrus Investments Pvt. Ltd., (2021) 9 SCC 449 —relevant less for liability than for its account of how board decisions are taken in a promoter-controlled group and the independent director's room to dissent. See also Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan, (2005) 1 SCC 212.

ISSN: 2582-6433

reputation, establishing that she falls within it. A problem of this shape cannot be solved by the text alone, because the deterrent is the process, not the outcome. The post-2013 Company Law Committees have repeatedly recommended clarifying that non-executive directors be proceeded against only where the statutory conditions are met. A safe harbour that must be re-affirmed by circular and re-recommended by committee is one its addressees have not treated as self-executing.[42]

IV. Legal Protection: The Shield And Its Limits

A. The Architecture of Protection

Against this exposure the law arrays protective devices. The first is the safe harbour itself. The second is insurance: Section 197(13) permits a company to insure its directors against liability for negligence, default, or breach of duty, the premium not treated as remuneration except where guilt is proved. The LODR converts the permission into a mandate for the largest entities: Regulation 25(10) requires D&O insurance for their independent directors.[43] The third device is indemnification, available within the limits of Section 197 and the general law. The fourth is Section 463 relief—the court's discretion to excuse a director who acted honestly and reasonably. The fifth, and weakest in India, is the business-judgment rule: Indian statute does not codify it, and the courts, though reluctant to second-guess bona fide commercial decisions, have not developed the structured deference that in Delaware presumptively shields informed, disinterested, good-faith decisions.[44] The protective architecture is real but asymmetric in time. The safe harbour, relief, and judicial reticence operate ex post. Insurance and indemnity pre-fund cost, but D&O policies carry exclusions—for fraud, known circumstances, and certain regulatory penalties—that bite precisely in the cases the director most fears, and the premium and the company's willingness to insure are within the controller's gift.[45] The near-absence of a structured business-judgment rule is the missing ex ante shield. Indian courts defer to bona fide commercial decisions as a matter of reticence grounded in the general law, not through a

42 Reports of the Company Law Committee (2016), (2019), and (2022) —successively recommending that independent and non-executive directors be protected from liability for defaults to which they were not party, foreshadowing the MCA circular and the reforms proposed in Part V.B.

43 2013 Act, § 197(13). The proviso—premium counts as remuneration if guilt is established—preserves the deterrent against the insured's own fraud while permitting protection against honest error.

44 2013 Act, § 197(7), (13). Indian law has no bespoke indemnification code comparable to § 145 of the Delaware General Corporation Law; indemnification operates within the Act's remuneration and related-party constraints and the common law. See infra Part V.A.

45 D&O exclusions for fraud and dishonesty are standard, reinforced by the § 197(13) proviso; regulatory penalties may be uninsurable on public-policy grounds. The protection is thickest for honest mistake and thinnest where complicity is credibly alleged—coherent, but no reassurance to the honest director worried about the accusation rather than the finding.

ISSN: 2582-6433

crisp, burden-shifting presumption. The contrast with Delaware is sharp: there an informed, disinterested, good-faith decision enjoys a presumption the plaintiff must rebut, whereas the Indian director must affirmatively establish her diligence to claim the Section 149(12) shield. Indemnification, too, is thinner than its Delaware analogue, India having no code comparable to Section 145 of the Delaware General Corporation Law, so the scope of indemnity and advancement of defence costs is uncertain—itself a cost the honest director bears.[46]

B. Deterrence, Moral Hazard, and the Shrinking Pool

The protective devices generate this Part's central tension: the more completely the law shields the director, the weaker her incentive to monitor; the less it shields her, the fewer competent persons serve. Over-protection courts moral hazard—a fully insured, indemnified director with little stake in catching wrongdoing. Under-protection courts over-deterrence—the thinning of the pool as able professionals weigh the modest commission against the tail risk of ruin.[47] India sits too close to the over-deterrence pole. The period after IL&FS saw a marked rise in independent-director resignations from listed companies, read by commentators as a response to perceived liability risk. A monitoring office whose occupants exit under stress is not performing its function, and the exit removes experienced directors when oversight is most needed. Because permitted compensation is capped and equity-free, the firm cannot easily pay the premium the risk commands, and the market for monitors clears at lower quality.[48]

The moral-hazard concern is not merely theoretical. Where the controller selects, pays, informs, and insures the monitor, and the monitor faces liability only on proof of knowledge or gross want of diligence the controller can obscure, her dominant strategy may be quiet acquiescence punctuated by formal compliance. The under-deterrence pole is sustained not by the absence of liability rules but by the combination of formal independence and comprehensive protection.[49] The resignation signal is now partly observable: following LODR amendments, a listed entity must disclose detailed reasons for an independent director's resignation and her confirmation that no other material reason exists—tightened because boilerplate notices were

46 On judicial reluctance to second-guess bona fide commercial decisions, see Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981) 3 SCC 333; Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579. The deference is ad hoc and offers no reliable ex ante defence.

47 On the law-and-economics of fiduciary liability, see generally Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991). The Indian calibration must find the point at which the diligent monitor is protected while the complicit one is not.

48 Elevated independent-director resignations after IL&FS and during heightened enforcement were widely noted in the financial press and governance commentary. Resignation data should be verified against SEBI disclosures and exchange filings under LODR reg. 30 and Schedule III.

49 This is the under-deterrence mechanism: neither the independence rules nor the protective rules are individually defective, but together they produce a monitor insulated from both the controller's displeasure and the law's sanction, with little incentive to exercise independent judgment. Cf. supra Part II.D.

ISSN: 2582-6433

concealing governance distress. The compensation a rational professional demands to bear the tail risk of office is a cost of capital for monitoring that the capped, equity-free remuneration cannot meet.[50]

C. Independence and Information Asymmetry

Underlying both poles is information. A director can neither be fairly blamed for failing to detect what she could not see, nor usefully protected into vigilance she has no means to exercise. The design gestures at the problem—Schedule IV entitles her to information and independent advice at the company's expense, the audit committee oversees internal audit, and the LODR mandates whistleblower mechanisms—but leaves her dependent on management for the flow. The audit committee's effectiveness turns on direct, unfiltered access to the internal and statutory auditors, including the right to meet them without management present. Where access is nominal, diligence is bounded by management's candour, and the "acted diligently" gateway becomes difficult to satisfy in either direction.[51] The information problem explains why protection and accountability cannot be calibrated apart from the independence mechanisms of Part II.

A director with genuine access—an independent nomination route, unfiltered information, external advice at company cost, and a protected channel to internal audit and whistleblowing—can be held to a meaningful diligence standard and protected for honest error without moral hazard, because her diligence is observable through the board process. A director without such access can be neither fairly accountable nor safely protected. The reform of Part V therefore treats independence, accountability, and protection as one system. The statute's answer is the vigil mechanism and the audit committee's privileged access. Sections 177(9) - (10) require certain companies to establish a whistleblower mechanism with direct access to the audit committee chair and safeguards against victimisation. The audit committee may investigate any matter within its remit, obtain external advice, and secure the attendance of officers and auditors, including the right to meet the auditors without management present—access on which the "acted diligently" gateway practically depends.[52]

50 LODR, reg. 30 read with sch. III, Part A (disclosure of resignation of directors, with detailed reasons and the resigning independent director's confirmation). The requirement was introduced to prevent the evasive resignation letter from masking a loss of confidence in management.

51 2013 Act, sch. IV (right to information and independent advice); LODR, regs. 18, 22 (audit committee oversight; vigil mechanism/whistleblower); 2013 Act, § 177(9)–(10). The formal entitlements are robust; practical access depends on board culture and the chair's cooperation.

52 2013 Act, § 177(9)–(10) (vigil mechanism and protected disclosure to the audit committee chair); LODR, reg. 22 —the statutory instruments by which the independent director can, in principle, pierce the information filter.

ISSN: 2582-6433

V. A Comparative Lens And A Calibrated Reset

A. Oversight Liability and Exculpation: Delaware, the United Kingdom, and

Beyond Delaware offers the most developed body of law on oversight liability. In re Caremark International Inc. Derivative Litigation held that the oversight duty is breached only by a sustained or systematic failure and an utter failure to implement any reporting system, or conscious disregard of known risks is calling such a claim possibly the most difficult in corporation law on which to win. Stone v. Ritter grounded the duty in good faith, within the duty of loyalty. Marchand v. Barnhill revived Caremark liability where a mono-line food company's board established no system to monitor its most important compliance risk, showing the high threshold is not absolute immunity.[53] Crucially, Delaware pairs its demanding threshold with statutory exculpation. Section 102(b)(7) of the Delaware General Corporation Law permits a charter to exculpate directors from monetary liability for duty-of-care breaches—though not for disloyalty, bad faith, or knowing violations.

The effect is a coherent calibration: directors are protected ex ante for honest, informed, good-faith conduct and exposed for disloyalty and knowing wrongdoing. India has the exposure but not the matching ex ante protection.[54] The United Kingdom proceeds through codified duties and soft-law governance. Sections 171 to 177 of the Companies Act 2006 codify directors' general duties, including Section 172 (promoting the company's success) and Section 174 (reasonable care, skill and diligence on a part-objective, part-subjective standard). The UK Corporate Governance Code, on a comply-or-explain basis, structures board independence and the non-executive role, drawing on the Higgs Review. The United States adds a federal overlay: Sarbanes-Oxley imposed audit-committee independence, certification, and internal-control requirements, and NYSE standards require a majority-independent board and wholly independent key committees.[55]

Singapore and Hong Kong, closer to India in their concentrated-ownership profiles, rely on code-based independence standards with enhanced tests for long-tenured directors—nine-year tenure limits, two-tier votes—confirming that jurisdictions facing the principal–principal problem strengthen the functional dimension of independence rather than rest on a negative

53 In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 967, 971 (Del. Ch. 1996)—a demanding, good-faith-based threshold for oversight liability, deliberately high so as not to deter service through hindsight liability.

54 Del. Code Ann. tit. 8, § 102(b)(7) (charter exculpation for duty-of-care breaches, with carve-outs for loyalty, bad faith, intentional misconduct, knowing violations of law, and improper personal benefit; 2022 amendment extending comparable exculpation to certain officers). Exculpation plus the business-judgment rule produces a predictable ex ante allocation that § 463 discretionary relief does not replicate.

55 Companies Act 2006, c. 46, §§ 171–177 (UK); § 172 (duty to promote the success of the company); § 174 (reasonable care, skill and diligence on a combined objective/subjective standard). See Re D'Jan of London Ltd [1994] 1 BCLC 561.

ISSN: 2582-6433

checklist.[56] Delaware's oversight threshold is only half its settlement; the other half is a business-judgment rule protecting the informed, disinterested decision ex ante. Under Aronson v. Lewis the rule presumes directors acted on an informed basis, in good faith, and in the honest belief the action served the company, which the plaintiff must rebut. It was the perceived harshness of Smith v.

Van Gorkom, holding directors liable for an uninformed though honest merger approval, that prompted Section 102(b)(7) exculpation a sequence instructive for India, where the over-deterrence concern is live but the exculpatory response has not been made.[5758] The United Kingdom's case law is equally pointed on the non-executive director. In Re Barings plc (No. 5) the court held that a director may not abdicate oversight by leaving everything to others and that the duty to supervise delegated functions is non-delegable; in Re D'Jan of London Ltd the dual objective-subjective standard, later codified in Section 174, found negligence in the signing of an unread insurance form.[59] Among the concentrated-ownership Asian jurisdictions, Singapore's 2018 Code subjects an independent director serving beyond nine years to a two-tier shareholder vote, and Hong Kong imposes comparable safeguards thus confirming that where controllers dominate, independence is protected by giving the minority a decisive voice. Australia reinforces the point from the other side: in the Centro litigation non-executive directors were held to a real obligation to read and understand the financial statements they approved, showing that a conduct-based standard can impose genuine accountability without strict liability for every failure.[60]

B. A Calibrated Doctrinal and Statutory Model for India

The comparative survey yields a template. India must preserve its exposure for the complicit director while supplying the ex ante protection and functional independence it lacks. The proposal has four limbs, bound by a fifth, designed to operate as one system. First, a statutory

56 Singapore Code of Corporate Governance (2018) (two-tier shareholder approval for directors serving beyond nine years); Hong Kong's Corporate Governance Code (similar long-tenure safeguards). Where the controller dominates, formal independence must be supplemented by mechanisms giving the minority a decisive say. See supra Part II.D.

57 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The presumption allocates the burden to the challenger and immunises process-sound decisions from hindsight review—the structural opposite of the Indian director's position, who must affirmatively establish diligence to claim the § 149(12) shield.

58 Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Del. Code Ann. tit. 8, § 102(b)(7) (enacted 1986 in response). India has imported the exposure half of the equation through §§ 166 and 447 and securities enforcement without the protection half.

59 Re Barings plc (No. 5), [1999] 1 BCLC 433 (directors remain responsible for supervising delegated functions); Re D'Jan of London Ltd, [1994] 1 BCLC 561 (Hoffmann L.J.) (objective/subjective care standard). Oversight liability abroad turns on the director's own conduct—the process-based inquiry this article urges for India.

60 Australian Securities & Investments Commission v. Healey (2011) 196 FCR 291 (the "Centro" case) (non-executive directors owe a duty to apply their own minds to, and carefully review, the financial statements)—the exemplar of calibrated accountability: demanding of engagement, not punitive of honest, informed error.

ISSN: 2582-6433

clarification of the diligence standard. Section 149(12) should be amended, or authoritatively construed, so that the "acted diligently" gateway is defined by demonstrable board-process conduct: whether the director attended and prepared for meetings, engaged with the information before the board, sought clarification where papers were deficient, recorded dissent where she disagreed, and relied in good faith on management, auditors, and experts where reasonable. This would convert the safe harbour from a textual promise into an operational test and reduce impleadment on the strength of office alone.[61] Second, a graduated liability structure.

For non-fraud oversight failures where the director neither knew of nor connived in the wrong but is said to have fallen short of diligence, civil penalties should be capped by reference to her remuneration, preserving a real but proportionate sanction. For knowing participation, consent, or connivance, full liability should remain, undiluted by cap, insurance, or indemnity. The cap makes the honest director's maximum exposure calculable and proportionate; the carve-out preserves the deterrent where it belongs.[62] Third, strengthened independence mechanisms. Nomination should run through a genuinely independent route—an NRC process insulated from controller direction, with appointment subject to the approval of a majority of the minority, building on the public-shareholder test in the Regulation 25(2A) proviso.

Separate meetings of independent directors should be substantive, minuted, and reported; and the director's right to independent advice at the company's expense, and to unfiltered access to internal audit and the whistleblower channel, should be made enforceable rather than hortatory.[63] Fourth, a SEBI safe-harbour guidance framework and enforcement protocols. SEBI should issue guidance, parallel to the Ministry of Corporate Affairs circular, committing enforcement staff to a prima facie attribution analysis before proceeding against a non-executive or independent director, and the SEBI Act should be amended to incorporate a safe harbour analogous to Section 149(12), so the two regimes speak with one voice. These protocols attack the deterrent that is the process itself—the years of investigation and

61 The proposed standard borrows the structure of the Delaware oversight inquiry and the reliance principle, under which a director may rely in good faith on information and reports prepared by officers, auditors, and experts. Cf. Caremark, 698 A.2d at 967–71; Del. Code Ann. tit. 8, § 141(e). Codification would give the diligent director an ex ante, process-based defence rather than an ex post plea for § 463 mercy.

62 The graduation mirrors the § 102(b)(7) logic—exculpation for care, none for loyalty or knowing wrongdoing—in the Indian penalty idiom. A remuneration-linked cap for non-fraud oversight lapses answers over-deterrence without creating moral hazard, because it is unavailable to the director who knew or connived; it should attach to penalty, not to established compensatory liability.

63 The majority-of-the-minority mechanism generalises the Regulation 25(2A) proviso, which already privileges public-shareholder votes. See supra Part II.C. Making Schedule IV's information and advice entitlements enforceable—e.g., by requiring the board to record and explain any refusal of a requested advisory engagement—would attack the information asymmetry identified in Part IV.C.

ISSN: 2582-6433

reputational cost that precede any finding.[64]

A fifth, institutional limb binds the first four: SEBI and the Ministry of Corporate Affairs should publish, and periodically review, data on proceedings initiated and concluded against independent and non-executive directors, so that enforcement practice is visible and the attribution protocols auditable. Transparency is the discipline that converts a safe-harbour promise into a safe-harbour practice.[65] The reliance principle is the doctrinal keystone of the proposed standard, and it is uncodified rather than alien in Indian law. A director who in good faith relies on financial statements, reports, and representations prepared by officers, auditors, and qualified experts—without notice that reliance is unwarranted—should be treated as having acted diligently within Section 149(12). Codifying it, as Delaware and the Model Act have done, would supply the ex ante certainty the Indian director lacks while preserving the carve-out for the director on notice that reliance was misplaced.[66]

C. Constitutional and Policy Anchoring, and Counterarguments

The proposal is not merely efficient but constitutionally grounded. Enforcement against an independent director on the strength of her office, without individuated attribution, is vulnerable under Article 14 as arbitrary, for it treats unlike cases alike the complicit and the diligent without the rational nexus to culpability the equality guarantee demands. The diligence-based standard and graduated structure supply that nexus, tying consequence to conduct.[67] Article 19(1)(g) reinforces the point. The right to practise any profession protects the professional like the retired civil servant, the academic, the chartered accountant and who serves as an independent director, and a liability regime so unpredictable that it effectively deters entry imposes a burden that must satisfy the reasonableness standard of Article 19(6).

And investor protection, the lodestar of the securities regime, is served, not sacrificed: functional independence gives investors a monitor who can actually monitor, while proportionate liability keeps her in the chair.[68] Two counterarguments must be met. The first is

64 See Ministry of Corporate Affairs, General Circular No. 1/2020, supra note 58. The proposal extends its logic to the securities regime and binds it in a published protocol, so the director's protection does not depend on the forum. See supra Part III.B.

65 Published, reviewable enforcement data would let the legislature and the courts assess whether the § 149(12) threshold is in fact applied, and would deter the reflexive impleadment this article criticises. See supra Part III.C.

66 Cf. Del. Code Ann. tit. 8, § 141(e) (good-faith reliance on records, officers, and experts); Model Business Corporation Act § 8.30. Indian law reaches a similar result episodically through Tendolkar and the § 149(12) gateway, but without a codified reliance safe harbour the protection remains a matter of ex post judicial appreciation. See supra Part III.A.

67 On manifest arbitrariness, see Shayara Bano v. Union of India, (2017) 9 SCC 1; and the arbitrariness doctrine of E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, and Maneka Gandhi v. Union of India, (1978) 1 SCC 248. Impleadment untethered from § 149(12) attribution lacks the rational nexus Article 14 requires.

68 Constitution of India, art. 19(1)(g), read with art. 19(6). The State may regulate the occupation in the interest of investor protection, but liability untethered from culpable conduct is not a reasonable, proportionate restriction.

ISSN: 2582-6433

that capping non-fraud penalties will dull the monitoring incentive. But the cap attaches only to the director who did not know and did not connive, and only to penalty rather than proven compensatory liability; the diligence standard remains a real obligation, and the carve-out for knowing wrongdoing is complete. The incentive to avoid complicity is undiminished and only the tail risk of ruinous liability for honest lapses is removed.[69] The second is that strengthening minority say in appointments will produce deadlock or activist capture. But the Regulation 25(2A) proviso's design shows the public-shareholder test to be a floor against controller entrenchment, not a veto handed to transient minorities, and it can be bounded by quorum and threshold requirements.

On balance the model corrects both pathologies: it makes independence functional by attacking controller capture and information asymmetry, and accountability proportionate by tying liability to conduct and capping the honest director's downside.[70] The argument gains force from the proportionality doctrine governing restrictions on fundamental rights. A restriction on serving as an independent director must pursue a legitimate aim, be rationally connected to it, be no more than necessary, and strike a fair balance; a regime that deters the diligent along with the complicit fails the necessity and balancing limbs, because a calibrated, conduct-based alternative achieves investor protection at lower cost to the right.[71]

VI. Conclusion

The independent director in India is asked to monitor a controller who selects her, pays her, informs her, and insures her, under a liability regime that threatens ruin for lapses she may have had no means to prevent. It is unsurprising that the office oscillates between emptiness and peril. Both pathologies trace to a single formalism: an independence test that asks what the director is not rather than what she can do, and a liability regime that asks what office she held and what harm occurred rather than what she did. The cure is to functionalise both. Define diligence by demonstrable board-process conduct and graduate liability so the honest director's

A calibrated, diligence-based regime is the proportionate alternative.

69 The objection assumes deterrence scales with the magnitude of the worst-case sanction. But where the worst case is so catastrophic and uncertain that it deters service altogether, reducing the sanction's variance for the honest director can increase net monitoring by retaining able monitors. See supra Part IV.B.

70 The alternative-appointment mechanism shows a public-shareholder test can defeat entrenchment without conferring a minority veto. See supra Part II.C. In the concentrated-ownership Indian setting, fears of activist capture are overstated: the dominant risk remains controller dominance.

71 On the four-pronged proportionality standard, see Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353; K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1. The existence of a less restrictive, equally effective alternative renders the status quo's over-inclusive deterrence constitutionally suspect under Article 19(6).

ISSN: 2582-6433

downside is bounded and the complicit director's is not; give the minority a real say in appointment and the director real access to information; and bind the regulators to a threshold attribution analysis. None of this requires India to abandon its mandatory, regulator-led model or import Delaware wholesale.

It requires only that the law finish the work the Satyam-era reforms began and making independence mean the capacity to resist, and accountability responsibility for one's own conduct.

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