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EDITORIAL NOTE

The Editorial Board of International Journal of Law & Management Studies is pleased to announce the publication of the fourth issue of the journal anticipating that the readers would have an enriching experience. The Editorial Board has witnessed a significant diversification in the scope of the journal with contributions in the areas of Company law, Competition law, Criminal Law and Contracts by inclusion of articles on cyber crimes, environmental legislations, Standard Form of Contracts among others.

Intellectual Property Rights has always been a focus area of IJLMS with contributions in the nature of Protection of Functional Designs and Character Merchandising substantiating the same. Company Law, the crux of commercial laws, has been discussed on various fronts, ranging from it's Nature and Origin, Misrepresentation in Prospectus to the recent addition, the One-Person Company and Corporate Social Responsibility. Further contributions have been received analyzing prevailing trends in the Food market.

It is always important for the economy to realign to the needs of business organisations. As is said, *it is the harmony between the **business fraternity**, that propels growth, **and the state**, that promotes welfare, **that brings** about economic stability and development.* Growth of Business actuates Economic Growth, which, in turn ignites prosperity. Many new developments have taken place in the Commercial Law and Legal Regulation sector ranging from the development of Competition Law to the Goods & Services Tax. There are crucial areas where law interacts with business and regulates market in order to promote healthy practices and discourage those which impede progress. Many growing fields of law require attention and reformation within the modern regulation framework bringing about pioneering changes in their operation. Enacted in 2002, replacing the MRTP, Competition Law seeks to promote competitive spirit in the Indian Economy rather than merely focussing on eliminating monopolies.

The journal dedicates this issue to such growing areas of law which help in the growth and development of the economy. We also hope that the contributors and the readers would benefit from the research work presented in the journal.

Editor-in-Chief



STANDARD FORM CONTRACT- WHETHER AS STANDARD IN ITS ADAPTATION?
A COMPARATIVE ANALYSIS AND EVALUATION ACROSS JURISDICTIONS¹

ABSTRACT

The popularity of Standard Form Contracts as well as their commercial sense makes it inevitable that they will remain largely in use in at least the foreseeable future. With globalization and the expansion of private international law as a field of law, it has become increasingly significant for firms, individuals and even governments to understand how key nations across the world respond to form contract and adapt them in their legal system. This is useful both for carrying business with them and gaining inspiration regarding a change in the domestic legal system.

This essay seeks to explore the treatment of Standard Form Contracts across three principal jurisdictions- UK, India and USA. This paper will channelize itself in the direction of gaining an overview of the legislative and judicial attitude of these jurisdictions towards standard form contracts and the extent to which these countries are impeded or facilitated in their quest to regulate Standard Form Contracts by the traditions and restrictions of their legal system. The predominant focus will be on the Indian treatment of Standard Form Contracts and the extent to which the Indian Legal system has been flexible and quick to recognize and adapt itself to new legal developments such as the contracts in question.

An overview of relevant case law as well as brief outline of the significant statutory instruments will be done for each jurisdiction. After exploring the stance in each jurisdiction individually, a comparison will be drawn up and the strengths and weaknesses of each approach will be brought forth as well as a discussion on how the approach has changed over the decades. The nuances of each Judiciary's approach, such as what elements does each Judiciary lay more emphasis on, will be brought forth. In addition to examining these national approaches, ideas of eminent jurists will be examined as well as their applicability to each system will be commented upon.

Keywords: Doctrine of Notice, Fundamental Breach, Public Policy, Standard Form Contracts, Unconscionable Term

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INTRODUCTION

Though there are many competing definitions, the words “standard form contract” (hereinafter referred to as “SFC”) refer to a contract (whether simple or under seal) which is made between one party which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form.² These are generally readymade computerized drafts and the other party only has to sign on it to conclude the contract.³ Sometimes called “adhesion contracts” they are defined by Black’s Law Dictionary as

Standardized contract form offered to consumers of goods and services on essentially ‘take it or leave it’ basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.⁴

Central to the concept of protection against the inequality caused by SFCs is the idea that the two parties have unequal bargaining power. Anson has said that only when equality of bargaining power between contracting parties exists, can freedom of contract be a reasonable social ideal.⁵ He has added that seen this way, freedom of contract is merely an illusion.

Having conceptualized SFCs, their adaptation in the United Kingdom will be elaborated upon. Following that the Indian approach will be explored and then the American approach will be outlined. The focus the paper is not on the advantages or disadvantages of standard contract but the ways in which three jurisdictions- UK, India and USA have dealt with them. An evaluation regarding the three approaches as well as other novel approaches that could be taken will be undertaken before the conclusion.

² H. B. Sales, *Standard form Contracts*, 16 Mod. L. Rev. 318, 342 (1953)

³ Dr. Gokulesh Sharma, Judge, *The Crisis of Standard Form Contracts* available at: <http://drgokuleshsharma.com/pdf/STANDARD%20FORM%20CONTRACTS.pdf> (last accessed, August 16, 2016)

⁴ Black’s Law Dictionary, Sixth Edition, p. 40

⁵ *Vishnu Agencies (Pvt. Ltd) v. Commercial Tax Officer*, 1978 AIR 449



POSITION IN UK

The 19th century assumption in the UK was that parties contract in furtherance of their self-interest and thus they enter into the contract “freely”.⁶ The person who entered into a contract in ignorance of its terms (in the absence of fraud or misrepresentation) was a “fool” who the Courts would not assist.⁷

The case of *L'Estrange v. F. Graucob Ltd.*⁸ is a landmark case which portrays the English stance toward SFC and the Strict Contract theory which was applied to them. In this case, the plaintiff-buyer purchased a slot machine by signing on a SFC. One clause of the same declared that any express or implied condition, statement or warranty, statutory or otherwise not stated was excluded. The buyer tried to recover damages for breach of implied warranty and stated that she could not read the contract because of the size of the print. The decision was against the plaintiff and the following rule was evolved: when a contract is signed, the party signing is bound by it whether or not he has read the document, unless there is fraud or misrepresentation.

To remedy injustice that is so caused due to SFC, English courts evolved the Fundamental Breach Rule of construction according to which an exemption clause can be validly used only when the party carries forth the contract in its essence.⁹ However, the main issue that has been taken up with this theory is that it leads to uncertainty as parties will not know whether the rule can be applied or not until they have come to Court. The case of *Karsales (Harrow) Ltd v. Wallis*¹⁰ furthers the fundamental breach rule. In this case, contract for sale of a preowned car was made and a clause was contained according to which an implied warranty and condition regarding the roadworthiness, age, fitness of the car was excluded. However, there was a substantial difference between the car agreed to be sold and the one actually delivered. It was held by Lord Denning that such exemption clauses can work only if otherwise the contract is carried out in its essential parts. They cannot serve to exempt the party from the very reason that contract is made.

⁶George Gluck, *Standard Form Contracts: The Contract Theory Reconsidered*, 28 Int'l & Comp. L.Q. 72, 90 (1979)

⁷*Ibid*

⁸ [1934] 2.K.B. 39

⁹*Supra* Note 5

¹⁰[1956] 1 W.L.R. 936



In *Schroeder Music Publishing Co. Ltd. v. Macaulay*,¹¹ plaintiff-artist contracted with music publishers who could terminate agreement at 1 months' notice (plaintiff could not) and also were not obligated to publish any of the works of the plaintiff. The House of Lords held in this case that since there was clearly an inequality in terms of the bargaining power, a test had to be done regarding whether the restrictions only covered reasonable protection of legitimate interests. However, the present was an unreasonable restraint of trade and hence, void. In the case of *Clifford David Management Ltd. v. WEA Records Ltd.*¹², wherein 2 song writers signed a SFC with the Plaintiff music publisher (who was also their manager) assigning copyright privileges for international publication. It was for duration of 5 years and could be prolonged to 10 years at choice of plaintiff. The parties had not understood the contract nor had they had it explained to them and the manager stood in a strong bargaining position *vis-à-vis* the songwriters.

In UK, there are statutes of limited subject matter such as the Railway and Canal Traffic Act, 1954 which have the 'just and reasonable test' for exemption clauses- such as S. 7 of the aforementioned Act. A separate theory has been evolved for ticket cases, wherein by just a notice (and with no assent from passenger) railway companies cannot discharge themselves from the crux of their duty (safe conveyance) unless the notice has been brought to the knowledge of the passenger and there is express assent on his part signifying the same.¹³

Doctrine of Informed Notice has also been evolved by the UK courts which casts a duty on the stronger party to point out burdensome/ unexpected terms to the Offeree.¹⁴ But when the Offeree accepts these (whether with or without objects), he is bound by them.¹⁵ The case is more complex when the Offeree has accepted the contract but is not aware of the standard conditions. If he has placed his signature, he is bound.¹⁶ Even if he has not placed his signature, he will be bound if he was aware of the conditions or if he had sufficient notice that conditions existed.¹⁷

There has been some obiter regarding treatment of unreasonable conditions as invalid.¹⁸ However,

¹¹[1974] 3 All ER 616

¹²[1975] 1 All ER 237

¹³*Henderson v. Stevenson*, (1875) L.R. 2 Sc. & Div. 470

¹⁴*Supra* Note 8

¹⁵*Walker v. York and North Midland Ry.* (1853) 2 E. & B. 750

¹⁶*Parker v. S.E. Ry.* (1877) L.R. 2 C.P.D. 416, 421

¹⁷*Harris v. Great Western Ry.* (1876) 1 Q.B.D. 515.

¹⁸*Thompson v. L.M.S. Ry.* (1930) 141 L.T. 382, 390, 391.



the degree of unreasonableness required for invalidity is not prescribed.¹⁹The ambit of 'fraud' has been extended by judicial construction in order to vitiate the contract if the condition is so out of the ordinary that the party signing could not have the intension of being restricted by it.²⁰

POSITION IN INDIA

In India, the statutory remedies that a person can avail of with regard to SFC are:

- S. 31(1) of Specific Relief Act, 1963²¹
- S. 19A (if induced by undue influence) r/w S. 16(1) of Indian Contract Act²² (hereinafter referred to as "ICA")
- S. 23 of ICA

In terms of State actions, it is the duty of the State to act fairly- Article 14 mandates the State to act fairly in contracts too, especially when there is unequal bargaining power and contract is not negotiated.²³ State power has to be exercised fairly and reasonably- when the function is administrative, doctrine of fairness ensures fair action.²⁴The judicial stance is that if a clause in a contract is unfair or irrational, it is amenable to judicial review²⁵- this applies whether the contract is a SFC or not. In the case at hand, it was held that when a government entity enters into a contract with private persons and the clauses are being arbitrary, unjust and unreasonable, its action is amenable to writ jurisdiction.

One of the most important cases in India relating to SFCs is *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly and Anr.*²⁶ With relation to employee's contract of employment, it was opined that such standard form agreements are considered as contracts even though freedom of contract is lacking. This case discussed the position under American Law as

¹⁹Supra Note 1

²⁰*Gibaud v. Great Eastern Ry.* (1920) 125 L.T. 76, 78.

²¹ The Specific Relief Act, 1963 (Act No. 47 of 1963)

²² The Indian Contract Act, 1872. (Act no. 9 of 1872)

²³*United Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404

²⁴*Excise Commr. v. Issac Peter*, 1994 4 SCC 104

²⁵*LIC v. Consumer Education & Research Centre*, (1995) 5 SCC 482; *Nisha Singhai v. M.P. Housing Board*, AIR 1996 MP 212

²⁶1986 AIR 1571



stated in “Reinstatement of the Law-Second” and the Universal Commercial Code, noting that the more standardized an agreement is, the more likely that the contract or a term is unconscionable. The concept of “distributive justice” was also examined with relation to the Law of Contracts.

*Lingappa Pochanna Appelwar v. State of Maharashtra*²⁷ was referred to in this regard. The aforementioned judgment regarding property of Scheduled Tribes had promulgated the idea of greater legislative control of unfair agreements. In the *Brojo Nath Ganguly* judgment, Article 38 of the Constitution was also viewed in the context of contractual equality. The test of reasonableness and fairness in a contract as it had evolved in the UK was analyzed, in particular the cases of *Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd.*²⁸ and *John Lee & Son (Grantham) Ltd. v. Railway Executive*²⁹ as well as *Lloyds Bank Ltd. v. Bundy*³⁰.

After a comprehensive discussion regarding the stance of UK and USA toward SFC, the Court, opined that India must not latch on to the “outmoded concepts and outworn ideologies” and must match its “thinking cap” to the present. Seminally, the Court declared that the courts will strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, between parties with unequal bargaining power and will refuse to enforce the same. This principle would not apply to all contract which had slight illegality but which were so unfair and unreasonable that they “shock the conscience of the Court”.

In the same case (i.e. *Brojo Nath*) Validity of Rule 9(1) of Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules of 1979 was tested based on the public policy rule. This rule gave power to the Corporation to terminate service of permanent employee by giving him three months’ notice in writing or to pay him equivalent of three months’ basic pay and clearness allowance. But there were no guidelines as to how (i.e. in what circumstances) Corporation could exercise this power. This rule was set aside as it contravened Article 14 and the rule of natural justice, being arbitrary and reasonable. Following this case and the public policy ground under S. 23, a certain Clause 14 of an appointment letter was held illegal by the Court.³¹It

²⁷ (1985) 2 SCR 224

²⁸ 1973 (1) Q.B. 400

²⁹ 1949 (2) All. E.R. 581, 584

³⁰ 1974 (3) All E.R. 757

³¹ *BCPP Mazdoor Sangh and Anr. v. N.T.P.C. and Ors.*, 2008 AIR 336



has been held in *M.H. Jagannadha Rao v. Indian Oil Corporation Limited*³² that only when action was patently illegal and opposed to public policy, Court's jurisdiction could be triggered, not for some trivial illegality.

The judicial inclination is toward State action conforming to the ideals of fairness and reasonability and extending requirements of Article 14 to contractual matters in order to regulate the conduct of the State, keeping in mind the unequal bargaining power that often persists in such contracts.³³ There is always a presumption of undue influence when there is inequality of bargaining power, economic duress and unconscionable terms.³⁴ A State cannot have the privilege of being more unreasonable than did a private individual.³⁵ On the other hand, it has been said that if a clause is widely used by parties whose bargaining power is more or less equal, then there is a presumption of the clauses being fair and reasonable.³⁶ Supreme Court has held that an unconscionable term in a contract (in this case, of employment) is void under both S. 23 of Indian Contract Act and Article 14 of the Constitution.³⁷ This includes a contract by the State (or any other entity) which by default has the "superior bargaining position". If a party was forced by other party into renegotiating contract and the party in question had no real choice regarding the matter, his consent does not stand good as it is bogged down by economic duress.³⁸

Regarding public policy, the Courts have opined that it cannot be precisely defined but refers to a matter which concerns public good and public interest and is not limited to the policy any government.³⁹ In a case before the Delhi High Court, 2 clauses of a SFC between a monopolistic multinational company and an (much smaller) Indian entrepreneur were struck down and declared illegal and void as they were deemed to be "unreasonable, oppressive, against public policy and public interest".⁴⁰

It is suspected that the "length, complexity and obtuseness" of SFCs may be because of one party

³²2014 (6) ALT 311

³³*Shrilekha v. State of U.P.*, AIR 1991 SC 537

³⁴*Supra* Note 31

³⁵*Ibid*

³⁶*Bihar State Electricity Board, Patna and Ors. v. Green Rubber Industries and Ors.*, AIR1990SC699

³⁷*CIWT Corporation v. B.N. Ganguly*, (1986) 3 SCC 156; *DTC v. DTC Mazdoor Congress*, AIR 1991 SC 101.

³⁸*Atlas Express Limited v. Kafco*, (1989) 1 All. ER 641

³⁹*Oil & Natural Gas Corporation Ltd. (ONGC) v. Astra Construction Pvt. Ltd.*, 2013(3) ArbLR 112 (Gau)

⁴⁰*M/s. Unikol Bottlers Ltd. v. M/s. Dhillon Kool Drinks and another*, MANU/DE/0008/1995



(who drafts the contract) wishing to discourage the other party from reading it.⁴¹ In the case of *Unico v. Owen*⁴² too, it was pointed out that the ordinary consumer hardly ever reads the fine print and even if he made the effort, he would not comprehend the jargon used which creates a need to have the agreement explained to him. While not referring to the above, in a case where the conditions of carriage were not fully incorporated in the e-tickets, but were referred to, the Court held that this was sufficient notice to bind the parties in question as the passengers could have demanded a copy and read it.⁴³ The Judiciary has generally deprecated the practice of public sector entities in using blanket clauses that have no regard to the transaction at hand and has opined that such clauses should be omitted by the relevant entity.⁴⁴

POSITION IN USA

In the United States of America, primarily three remedies are available to redress the damage caused by SFCs⁴⁵:

- S. 327 of Second Restatement of Contract
- Article II of the Uniform Commercial Code
- Judicial interpretation of Unconscionable Contracts

According to S. 327, a person is taken to have adopted a form if he has assented to the same and the form is used to frame conditions regarding performance of similar agreements. If the party can show that the other party had reason to believe that a clause in the form is such that the assenting party could not consent to it, then the assenting party can bypass the application of those objectionable clauses.

Article II of the Uniform Commercial Code is also relating to SFCs and can be used by Courts to alter the contract according to the reasonable expectation of the parties. When there is a conflict of a SFC with the impression of that contract, the former is adjusted. In *Berg v. Stromme*,⁴⁶ the

⁴¹Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 St. Louis U. L.J. 909, 918 (2000)

⁴²(1967) 50 N.J. 101

⁴³*Inter Globe Aviation Ltd. v. N. Satchidanand*, (2011) 7 SCC 463

⁴⁴*Economic Transport Corporation v. Charan Spg. Mills (P) Ltd.*, (2010) 4 SCC 114

⁴⁵Ronald C. Griffin, *Standard Form Contracts*, 9 N.C. Cent. L.J. 158, 177 (1977-1978)

⁴⁶79 Wash. 2d 184



Court said that it will refuse to give effect to a disclaimed of warrant clause even though it was commercial acceptable as disclaimers will be ignored when evidence shows that item to be purchased was discussed. Also, in *Henningsen v. Bloomfield Motors*⁴⁷ the court refused to give effect to a contract, stating it was unconscionable as the buyer was had not wholly understood what he was losing in exchange for that which he was buying.

Another case that advanced the concept of unconscionable contracts is the case of *Weaver v. American Oil*.⁴⁸ Weaver was a gas station attendant and rented a gas station of American Oil. At the time of signature, the agent representing American Oil did not explain or even point out the important clauses of the agreement. Sometime later, when an American Oil employee came to repair gas pumps at the station that there was a fire which harmed Weaver and he filed a law suit. However, the company took shelter behind the exculpatory clause before the Trial Court. However, the Appeal Court ruled in favor of Weaver holding that the exculpatory clause in question was adhesive as well as unconscionable and for it to be binding, it needed to be known and accepted by Weaver (which it was not).

ANALYSIS

SFCs across the world (or at least the three jurisdictions that have been studied so far in this essay) have more or less the same features. They mostly involve unequal bargaining power and the stronger party attempts to wedge in clauses which favor himself/itself and are disproportionately unfair to the other party. The difference lies in the ways and the extent to which the Courts have strived to protect the novice citizen or the naïve buyer.

Admittedly, there are a few statutes such as the Railway and Canal Traffic Act, 1954 in the UK which attempt to further the Reasonability test. However, these statutes are extremely subject specific and are unable to advance their tests to the broader arena of general common law. Tracing the history of SFCs in the UK shows a marked shift in the attitude of the Courts from first viewing the standard form contracts from the lens of traditional contract theory to recognizing the upcoming banes of the SFCs and evolving a myriad of theories to counteract the ill effects of SFCs.

⁴⁷32 N.J. 358

⁴⁸ 257 Ind. 458,



These theories include the Theory of Fundamental Breach and Doctrine of Informed Notice. Courts have over time, through their decisions, also laid the consequences of signature with knowledge, signature without knowledge of conditions, signature with awareness of conditions or sufficient notice. This helps in forming anticipating the consequences of actions and shows clarity in legal thought.

Though the Indian Legal System is much more reliant on Statutes than UK law, there is no Indian statute which addresses the SFC dilemma squarely. There is only the ICA and the Specific Relief Act, neither of which contemplate application to form contracts as they were enacted envisaging traditional forms of contract. Bulk of jurisprudence in India is derived from judicial interpretation and compared to the UK, there are few cases in India involving such form contract and only one case which comprehensively seeks to address them (*Brojo Nath Ganguly Case*). However, unlike the UK, Indian court decisions have repeatedly sought to highlight the constitutional element (particularly Article 14) to such contracts and have generally sought to first uncover (through application of Article 12) whether the entity in question is a government entity. The ideals of fairness, justice and equality, contravention to public policy as well as unconscionable contracts have been emphasized on far more zealously than in the UK.

The position of the USA toward SFC is unique because there are 2 statutes that deal exclusively with SFC and cases involving them are creatively interpreted by the Judiciary.

EVALUATION

Since the growth of SFCs, what has plagued policymakers as well as jurists is which system to adopt to regulate them. The British, Indian and American approaches as well as their comparative strengths and weaknesses has been stated above. One jurist has suggested that an Act may be passed setting up a tribunal or commission of lawyers, business men and representatives of the sufferers of the SFCs.⁴⁹ However, this sort of solution is not likely to be accepted in India where there is at least one judicial member (e.g. A retired judge of the High Court or Supreme Court) and where there hardly exists any kind of jury system after 1962.⁵⁰ Another idea was to include a

⁴⁹*Supra* Note 18

⁵⁰*K.M. Manavati v. State of Maharashtra* AIR 1962 SC 605



provision in the Model Rules of Professional Conduct⁵¹ that would prohibit lawyers from drafting an agreement that had “legally prohibited terms” or “would be held to be unconscionable as a matter of law”.⁵² However, for this an exhaustive list of such terms would have to be drawn up (which is nearly impossible). Furthermore, lawyers cannot accurately predict what would be held unconscionable each and every time.

A potent idea is for governments or intergovernmental agencies to create standard form contracts such as the two European standard construction contracts which have been adopted.⁵³ This contract is compulsory for projects financed by European Development Fund. This could be adapted across regions in order to ensure equivalent treatment regionally to constructors.

CONCLUSION

The issue of SFCs involves balancing of a lot of inherently conflicting ideologies- for example, that of capitalism vs. the socialist welfare state theory, traditional contract theory vs. new contractual jurisprudence, advancement of business interest v. protection of the novice buyer/customer/party. Each jurisdiction serves to solve this SFC puzzle armed with its own legal history and tradition. The SFC dilemma also makes it strikingly clear that a legal system needs to be flexible enough to adapt to such changes otherwise it will be left to handle them using archaic laws/pronouncements that are ill-suited to be applied to modern concepts. This will cause grave injustice as seen in the case of *L'Estrange*.

Though each country's law/ legal system is created to suit its own unique needs, the occurrence of and the problems created by SFCs remain similar throughout the world, opening up a possibility to adapt each other's practices or adapt a common practice. For instance, though Indian Judiciary is no longer bound to follow or even peruse through UK judgments, it has extensively referred to UK and even USA pronouncements in the area of SFCs in order to keep itself in pace with the changing times and modify Indian law accordingly. Like the European Union and some other organizations, there could be compulsory adoption of SFCs.

⁵¹Model Rules of Professional Conduct (Discussion Draft 1980)

⁵²William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 *Geo. J. Legal Ethics* 799, 860 (1992-1993)

⁵³R. N. H. Gould; D. D. W. Helps, *European Standard General Conditions of Contract*, 21 *Int'l Bus. Law*. 271, 275 (1993)



However, one thing that has become clear through the above analysis and evaluation is that a specialized approach is needed toward SFCs i.e. they are to be treated as a unique category of contracts that merit a jurisprudential evolution of concepts in order to regulate them.



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CHARACTER MERCHANDISING AND COPYRIGHT LAW IN INDIA⁵⁴

ABSTRACT

The topic is very appealing. The reason is the growing market of the merchandised products, ranging from a Barbie box to Batman apparel. The concept of Character Merchandising is an interesting concept. The current day situation revolves around the industry because the sales figures show that it hampers the stores in India as well.

The characters involved are protected either by the Copyright or other laws. But, a lack of a specified law makes it difficult for the legislators to legislate in this matter. Products featuring Hannah Montana or Doraemon are sold more than other ordinary products.

When dealing with the rights and duties to the owners of the characters, the copyright law governs. But, there is no strait-jacket formula, leading to excessive exploitation by the traders. They use the reputation of the popular characters to earn profits.

Till a new legislation is enacted, no owner or character will be able to exercise or claim rights over their creation. Hence, there is an urgency to bring into action a specific law dealing with the protection of such characters and to allow the public to exploit the characters to a certain extent. This extent has to be fixed so that there is no misuse of the same.

Therefore, this present article throws light on the same.

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INTRODUCTION

Being a parent to a 21st century kid, would you buy him a BATMAN T-SHIRT or an ordinary one? Or would you buy her a BARBIE DRESS or again an ordinary dress?

The answer is quite obvious. Well, this is the concept of Character Merchandising.

To understand the entire concept, many aspects have to be looked into. This paper will specifically aim at the legal aspect of the concept, emphasizing on Copyright. The reason to know and study about this is technological advancement and awareness and to recognize the loopholes. Once these loopholes are understood, logical and practical suggestions can be made.

Character merchandising is simply the commercial exploitation of a famous character or personality. It is believed that this originated in South East Asia and specifically in India. Even Ramayana merchandise proved to be a huge market.

It can be divided in three types, namely:

- Merchandising of fictional characters
- Personality merchandising
- Image merchandising

The present paper will deal with the interesting concept of Character Merchandising, linking it with the law of Copyright in India. It will also deal with *Article 2(3) of the Berne Convention*, throwing light of the working.

Character Merchandising is both a bane and a boon to the industry and India is becoming a large market to manufacture such merchandized products. The paper discusses the emerging trend of character merchandising in the present era, in a democratic country, like India. Character merchandising is the adaptation or secondary exploitation by the creator of a fictional character by a real person or by one or several authorized third parties of the essential personality features of a character. It is then related to various goods and services in the market which gets the customer to buy this particular good/service. The characters who are used for merchandising may be Characters are either fictional or real.

Some of the many examples are:



- A birthday cake in the shape of a fairy tale castle.
- A laptop skin with the picture of the famous Batman.
- A pencil box with the picture of Big Hero 6.

CHARACTER MERCHANDISING

In order to understand character merchandising, it is first important to understand the meaning of merchandising. Merchandising is any practice or plan that contributes to the sale of a product or service to a retail consumer. It helps marketing the right product or service at the right place, the right time, at the right price and in the right quantities, which increases the demand of the same, like, Kareena Kapoor advertising for Pantene Shampoo. Simply put, it is commercially using the wide appeal of a popular character for merchandising of products and services.

Merchandising of intellectual property is the marketing technique where the goods or services are such that it attracts the customers. A t-shirt depicting the MARVEL characters, a coffee mug carrying the image of Angry-bird, a toy made in the shape Transformer, are all popular and common examples of merchandising. In all these examples, Intellectual Property such as trademarks, copyrights and designs belonging to others have been used by the producer of goods/services. The producer could do that only through licensing of relevant rights.

HISTORY

➤ Origin of Character Merchandising

The first instance of this concept can be traced back to the era where the Disney cartoons were a much hyped issue. One of the employees set up a department for dealing with the commercial exploitation of Mickey Mouse, Minnie Mouse, Pluto, etc. Slowly, the concept evolved over time, when books on famous authors started publishing. During the 20th century, films like Rambo, James Bond, Men in Black, etc became existent.

Looking at the philosophical aspect of the concept, Hegel's theory of '*individual property is the extension of his personality*' is quite relatable. As in, the personality of the character cannot be trespassed by anyone else. But, this will only be allowed when that character has created some sort of distinctiveness in the market.



Moreover, with the use of radio, films, television and advertising, the concept became an industry in its own right. Recently, it has, therefore, become a '*multi-billion industries in the Western World.*'

PRESENT STATUS OF THE MARKET IN INDIA

Character Merchandising is now a \$2.5 billion industry in India itself. The reason behind which is the way the characters of either the films or the books are being merchandised in the market, for the expansion of the business.

This concept is applicable to both the cartoon character and the human form, whichever type gains some distinctiveness in the market becomes exploitable. There are so many examples to prove this point of view, namely, Chhota Bheem, Donald Duck, Harry Potter, etc.

Hence, this article deals with the emergence of this industry in India, from the point of view of the legal constraints and the loopholes.

➤ **Types**

There are mainly *three types* of character merchandising, as given below:

- ***Famous fictional human*** or non-human character, either appearing in a literary work, in a cinematograph film or as an artistic work. The examples of fictional character merchandising are X-Men, GI Joe and James Bond toys, and t-shirts with images of Angry Birds, Doraemon and Disney characters.

In India, the famous example is that of *Chhota Bheem*. It is widely used as designs on cakes, dresses, books, etc. Chhota Bheem has also reached international markets like Indonesia and Singapore.

- ***Personality merchandising*** where a famous real person, who could be a celebrity from the entertainment or sports industry or a national or international hero, or some of their essential personality features, are used for merchandising; like use of Victoria Beckham's name in respect of perfumes; branding of Shah Rukh Khan inspired home décor; Lakme products by Sonam Kapoor and many more. This is also known as *celebrity merchandising*.
- The third type, which is a ***hybrid*** of the first two types. Here, the personality features of a fictional character from a movie or tele-series, portrayed by a real person, like character



Shaktimaan portrayed by Mukesh Khanna in the television series or Benedict Cumberbatch in Sherlock. The association between the character and the actor should be distinctive in the eyes of the public. This is *image merchandising*.

➤ **Reasons for Growth of Character Merchandising in India**

India has seen a great increase in the industry revolving around the concept of Character Merchandising. Being a developing nations, there are a few factors which have resulted in the growth of the market. Some of this are-

- ***Technological advancements***– In the form of radios, television and film. These help in portraying the concept. Also, many channels for kids’ entertainment, like Animax, cartoon Network, etc are another way of spreading awareness. Examples of the same can be pencils, mugs or T-shirts that are associated with Powerpuff Girls, Ben 10 and Chhota Bheem.
- ***Effective tool*** –The country’s one of the major earning is because of this industry. Being a populated country, the sales are also huge.
- ***Increased viewership***– The viewers are large because of the population. Hence, the customers are also huge. This in turn results in the industry’s boost. One of the examples can be the famous movie based on the band One Direction, named ‘*This is us*’. This takes the show or movie to the *next level*. Viewers don’t tend to forget about the film or the show after watching it.

LEGAL ASPECT OF THE METHOD

➤ **Legal Framework**

The biggest flaw relating to Character Merchandising is that there is no separate law which specially deals with this concept. It is only safeguarded under trade-mark, designs and copyright acts. For example: Bollywood star Amitabh Bachhan has protected his name and he prevents people from using it to earn profits.

The general notion is that the owner who is the creator or holder of the character can exercise authority over his/her work. For example, cartoon characters are the properties of the creators who drew them. Legally, characters are protected through various steps as a form of Intellectual



property rights. Pinky and Heidi are considered to be literary works, whereas Noddy is strip cartoon, protected under this law.

➤ **Copyright**

A fictional character when introduced in a literary or as an artistic work, it is to be governed by the principles of Copyright. The authors of the works have copyright over the characters. But, if the character is a work for hire, the party commissioning the creation of the character holds copyrights, for example, the famous character of Comedy Nights with Kapil, *Gutthi*.⁵⁵ Further, when a fictional character is a part of a movie or a tele-series, the producer of the series has copyrights over the character.⁵⁶

The copyright does not come into existence itself. To make a character protectable under the Copyright laws, it is vital to treat the character as an individual piece of work.⁵⁷ It should be developed extensively and should have a reputation on its own. Hence, only when it becomes so extremely reputed already that it is easy to base the whole merchandising scheme around it, it is used for fictional character merchandising.⁵⁸

Once a work is created, it can be protected under the Copyright laws. Any sort of registration is not a compulsion. For example, *Big Hero 6* being a cinematographic work, the copyright vests with the producer of the show. Any related poster, advertisement or pictorial representation can be protected as an artistic work under the copyright law in India. So if any person uses any image from the show itself without the consent of the producer, it will amount to infringement.

The owner is granted the exclusive right to reproduce the work in any material form, issue copies of the work to the public, perform or communicate the work to the public, make or include in a cinematograph film the work, and make a translation or adaptation of the work.⁵⁹

⁵⁵ The Indian Express, Don't copy 'Gutthi', warn 'Comedy Nights with Kapil' producers dated November 20, 2013, available at <http://www.indianexpress.com/news/dont-copy-gutthi-warn-comedy-nights-with-kapil-producers/1197206/>.

⁵⁶ R.G. Anand v. Delux Films, AIR 1978 SC 1613.

⁵⁷ Malayala Manorama v. V T Thomas, AIR 1989 Ker 49.

⁵⁸ *Infra* at point 9.

⁵⁹ Section 14 of the Copyright Act, 1957.



Under the *Copyright Act, 1957*, a cinematograph film is defined as “any work of visual recording and includes a sound recording accompanying such visual recording”.⁶⁰ However, the copyright in the cinematograph film using such character i.e. film or television show as per the facts of the case, would rest with the producer.

The tests to determine whether the character being used is a distinctive character and is recognized by the general public at large are as follows:

a. The “Especially Distinctive” or “Character Delineation” test

This test is the basic concept which has been discussed earlier. Unless and until the character is not known separately among the public, the character cannot be protected under the Copyright law. It is based on the premise that the less developed the characters, the less they can be copyrighted. Even the manner the character acts out can also be copyrighted under the laws.

b. The “Story Being Told” test

This test deals with the aspect that when the character is the pivotal part of the work and not merely a support, the character can be protected under the law.

With respect to whether the artist performing the character is granted any copyright ownership in relation to his performance of the character, the courts have held that “*there is no ‘work’ in the cine artiste’s performance which is protected by the Act. In the view that is taken of the definition of “artistic work”, “dramatic work” and “cinematograph film”, it would appear that the Copyright Act, 1957, does not recognize the performance of an actor as ‘work’ which is protected by the Copyright Act*”.⁶¹ The law however acknowledges that it is the artist who performs the role of the character in a cinematograph film and makes it identifiable to the public at large and therefore the Copyright Act, 1957 vests in the artist moral rights of the performer which give him the right to claim to be identified as the performer of his performance and to restrain or claim damages in respect of any distortion or modification of his performance which would be prejudicial to his reputation.⁶²

⁶⁰ Section 2(f) of the Copyright Act, 1957.

⁶¹ Fortune Films v. Dev Anand, AIR 1979 Bom 17.

⁶² Section 38B of the Copyright Act, 1957.



Lastly, with respect to the ownership in the fictional character, it is important to note that **Section 38A (2) of the Copyright Act, 1957** states that “*once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film, he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film: Provided that, notwithstanding anything contained in this subsection, the performer shall be entitled for royalties in case of making of the performances for commercial use.*” Therefore, a fictional character in a cinematograph film has its rights with the producer of the same, in absence of an agreement otherwise. But, there can be no waiver of an artist’s right to royalty.

➤ **Berne Convention**

Article 2 (3) of the Berne Convention says that “*Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.*” Therefore, the concept of Character Merchandising is covered under this aspect in the worldwide scenario as well.

But, in India, the lack of a specific Act for protection of such characters leads to confusion. The other laws though grant protection to them, yet there is no strait-jacket formula that has to be adopted. This creates vagueness in adopting the other laws. If there existed a separate legislation, there would be lesser chaos in protection of the characters. This is thus leading to the misuse of the characters.

Inference from the available legislations does not help in dealing with the problem of protection of such characters. The industry uses the popularity of these characters to earn profits. Hence, there is an urgent need to enact some separate legislations on this topic, with regard to the ownership and other neighboring rights.

CASE LAWS

- Recently, there was a clash between an actor playing the role of a popular character **Gutthi** who is also the producer of the series. The clash led to the actor moving out of the series to air his own show. The first television channel issued a public statement that the character Gutthi has been created for the original tele-series and so, it has copyright over the same. The actor



issued another statement asserting his personality rights and saying that it is he who has attained recognition as and is always associated as Gutthi. Owing to this clash of rights, none of the parties could use the character Gutthi in their respective shows during the time of the clash.⁶³

- In the landmark case of *Star India v. Leo Burnett*⁶⁴, it was noted:

“The fictional characters are generally drawings in which copyright subsists, e.g., cartoon, and celebrities are living beings who are otherwise very famous in any particular field, e.g., film stars, sportsmen. It is necessary for character merchandising that the characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears. Only then can such character be moved into the area of character merchandising. This presumes that the character has independently acquired such reputation as to be a commodity in its own right independently of the goods or services to which it is attached or the field/area in which it originally appears. It is only when this is established on evidence as a fact, that the claimant may be able to claim a right to prevent anyone else from using such a character for other purposes.”

- In a recent case of *Disney Enterprises Inc. &Anr. Vs. Santosh Kumar &Anr.*⁶⁵, the Delhi High Court held the defendant liable for selling products containing representations of characters such as Hannah Montana, Winnie the Pooh, etc whose merchandising rights were owned by the plaintiff. The court held that there is an intense degree of association between the plaintiffs and the aforementioned characters which is why any reference to these characters reminds the public exclusively of the plaintiffs.
- Very recently, Mr. Pran Kumar Sharma, the creator of the famous character Chacha Chaudhary, passed away. Pran created this Indian superhero along with various other captivating cartoons and with them was created history in the Indian comic and children’s book industry.

The death of the creator generated chaos in the country regarding his works.

⁶³*Supra* at point 3.

⁶⁴ 2003(27) PTC81(Bom).

⁶⁵CS(OS) 3032/2011.



Since he was the creator of the comic strips and its characters, the copyright over his works and fictional characters will subsists for sixty years calculated from next year, as per Indian copyright laws. Post the expiry of the copyright term, the copyright will cease to exist in all the works and such works will fall in public domain for everyone to utilize the same. Therefore, it is certain that Pran's comic strips will continue to be re-published, adapted on a broader scale and translated in several more languages by their publishers until the expiry of the copyrights in order to reap maximum benefits from such comic strips and characters within the copyright term.⁶⁶

- The character of Spider-Man has existed for almost 40 years, created at Marvel Comics in the early 1960s. Before the film, it was a part of the comic books, etc. but, now it has spread worldwide. After a complex history, *Variety* reported that Columbia/Sony acquired the rights to produce a feature (including sequels) and rights to produce a live-action TV series for a cash advance of \$10–15 million

EMERGING TRENDS AND CONTEMPORARY CHALLENGES

In the contemporary world, there is an increasing relationship between the Television and the characters. This is leading to a huge market worldwide.

The partnership between the famous Disney and the KK Modi Group in 1993 for sale of the Disney merchandise in 2001 has played a vital role in the growth of this industry.

The large showrooms like Pantaloons, Westside, Shoppers Stop, etc have also paved way for better and more access to merchandised products. Approximately, the growth has increased from 9 per cent (2015) to 20 per cent (2020).

Even the sports groups are extremely active in the participation of character merchandising in India. For example, Harbhajan Singh. Also, the very own Warner Bros has tied up with about 20 companies in India including retailers such as Tata group's Trent and Primus Retail for selling merchandises of cartoon characters including Batman, Superman, Tom and Jerry and Scooby-Doo.

⁶⁶Pankaj Sharma (2014); "Pran dies but Chacha still alive in the heart of his readers"; Available from <http://www.iamin.in/en/new-delhi/news/pran-dies-chacha-still-alive-heart-his-readers-41446> (accessed 23/11/2015).



Adults seem to be taking cartoons more seriously than kids in the present era. The reason being that these are a big business sector developing in the country. The annual rate of merchandising in Indian markets range between 30-35%. Arun Sir deshmkh, the chief executive of Reliance Trends gives a rough estimate of these products at about \$2.5-billion yearly.

The owners of internationally acclaimed characters like Ironman, Batman, Harry Potter, etc have also acquired statutory rights by registering the names of the fictional characters as trademarks in India. On the Indian side, the owners of fictional character Munnabhai have also registered such character name as a trademark.

RECOMMENDATIONS

As this is a growing industry, some factors have to be kept in mind, that have been ignored. A few of which are:

- Codification of a proper law dealing with character merchandising in India.
- Copyright Law be amended to include some provisions expressly dealing with such issues.
- The Act should also include other aspects that may need protection, for example, the voice of the character, etc.
- A strait-jacket formula be laid down to differentiate between characters popular among public and those which are merely a support to the work of the creator, to bring under the ambit of providing protection.

CONCLUSION

There is an urgent need to protect the rights and interests of the creators who had taken strains to create a work. Though the Act provides some protection, yet that is not explicitly defined. Also, there is a need to lay down the standard to check whether a character falls in the ambit of being protected. India is an emerging business market for the concept. But, the lack of laws may lead to a downfall of the industry in India. Hence, if the need is fulfilled in time, the growth of the industry will be unstoppable and the protection will encourage for a better future.

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THE PARADIGM OF “FUNCTIONAL DESIGN”⁶⁷

ABSTRACT

Drawing the square of law regarding functional design is quite difficult, standing in the circle of this multi-dimensional intellectual property law jurisprudence. Functional design is a new emerging thought, and how law governs it, is a question of contemporary world. The law of intellectual property is multifarious and is looked upon from different angles. It is not certain under what head of intellectual property does functional design fall within accurately. By expanding the thought process in a simple and straight way, scope and applicability of law governing functional design is covered by patent, copyright, trademark, design, and everything that it covers. Therefore, it is difficult to determine under what head does the law governs the attributes of functional design, under the realm of intellectual property rights.

Functional design is a unique case. A functional design does not constitute to be a finished product out of the intellect. Attributing the value of property in that case is a moot point under the intellectual property law jurisprudence. There are continental differences in the thoughts about the treatment to be attributed for functional design under the international realm of this contemporary world. Intellectual property is evolving gradually and functional design is one among the many attributes of that evolution. Therefore, it is important that the law parallels this evolution to suit the needs of the present day and ensure world that for every right, remedy is ensured.

The right to property is an internationally recognized fundamental right. At what point, the coin actually flips and the legality intervenes is to be decided at this juncture, when the attributes of functional design calls for the fabric of legalism. Would functional design draw up to become another recognized intellectual property where the traits of patent, copyright trademark and design integrate? Or would functional design be fit into either of the pigeonholes of the intellectual property jurisprudence? Both are equally leveling arguments from different schools of thought. If

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Salmond was an intellectual property law philosopher, he would have thought so of making functional design yet another category of intellectual property. On the other hand, while assuming Winfield to that defence, would have argued for fitting functional design inside either of the various pigeon holes of intellectual property rights jurisprudence. Therefore, functional design is a questioning paradigm today before, international law of intellectual property rights.

Keywords: Paradigm Attribution, Functional Design, Intellectual Property, Tort Law, Value of Property



INTRODUCTION

The utility nature and scope of functional design⁶⁸ is wide and not narrow. It is legally governed very much subjectively by the intellectual property jurisprudence. Functional design is a functional part of a particular unfinished product. The functional design is a prototype arguing that the particular product has such and such advantages and minimum disadvantages. The functional design is similar to a design. At the same time, it can be patented as well. The prototype of a work covered by the copyright laws is also a functional design in that regard. Their lineage grows gradually. Technical specifications of functional design, functional requirement, functional specifications, and functional design templates are all the multifarious phases of this functional design. Functional Design presents a challenge to intellectual property jurisprudence. How such things can be protected is quite peculiar case to solve. Design is a term which refers to the appearance and composition of something say a primary drawing or model. However, functional design is something similar to a design but not completely attributable to it. It does qualify the requisites of a design but not largely to the functionality aspect of it. This calls for the modus operandi of attributing law to it. How can law be attributed to the minute aspects of intellectual property law? This is a moot point.

Tort law is a civil law remedy. It has its origin from the Common law countries. It is uncodified but consolidated piece of multifarious rights ensuring remedies. In simple terms it is wrongful act or an infringement of a right drawing a liability exclusive of contractual liabilities. It is important to trace the root and apply law from the root. The cause of action begins from the light of how to protect the functional design. Would it be protected by a Tort law or law of contracts? It is to analyze the laws applicable. The tort law is more suitable for protecting the infringement of a wrongful act against the protection of a functional design. When Tort law is applied in the case of protecting a functional design, always there are possibilities of a contractual relationship making the functional design in question. Functional designs can be contractual as well. Functional designs might be contractual as well as otherwise. Functional design in a sense is at the converging point between applying either of the laws. It is quite difficult to differentiate the differences of why Tort

⁶⁸Meaning of Functional Design, <http://www.encyclopedia.com/doc/1O11-functionaldesign.html/> (Accessed on 5th August 2016)



law is better than applying a contractual liability upon a wrongful infringement against the protection of a functional design.

There is a paradigm in law applicable to functional design. This paradigm is at the root of the finite phrase of intellectual property law jurisprudence. The law of intellectual property is both contractual and tortious at the same time. The relationship between the parties might be contractual. But the protection element which is required to be attributed to a particular functional design is very much tortious of nature. Therefore, the importance of both a contractual or tortious claim cannot be ruled out of the square of intellectual property law. The European Union has not come up with a consensus as to how can we regulate the law for functional designs. It is under the questions of thoughts. Various schools of thoughts on intellectual property strive to draw better intellectual property jurisprudence for the contemporary world of the 21st century. The lights are focused on how to protect the attributes of a prototype. Whether the correct formula could be a blend of Tort law, Contract law and Intellectual Property law?

THE “TORTS” INSPIRATION & THE “CONTRACTUAL” CONCEPTION

The idea of regulating functional design by law can be primarily looked up from two basic angles of law to understand its nature scope and applicability. The law of torts inspires not infringing the right through a wrongful act. And further, through the law of contract conception of not driving to breach the contract. Like Torts law and Contract law, functional design is also a primitive kind in itself. Like how torts law and contract law are circles inside the jurisprudence of rights duties and liabilities, functional design is a gradually developed circle from the endeavors of intellectual property jurisprudence.

Functional design's scope is very wide. Its scope extents from, a “to do list” to a “working plan” written down in a paper, everything starts with a primitive design. An intangible idea drawn up to tangibility is a functional design. In such a case, there is high probability of risk in determining the cause of action when a functional design is called for a legal dispute. Therefore, it is important to determine the scope and bandwidth of rights and duties of parties involved within the claim. Tortious inspiration and contractual conception is something very much related to functional design, all are very much primitive by nature and purpose. Functional design of an intellectual property determines the conclusive rights and duties of a party. Further, it determines the need for



protection through an agreement considering the uncertainty of the development of that particular primitive design prototype.

It is difficult and new to see a theory applicable and similar blending with two basic primitive theories of law. A metaphor or a simile in a poem is a functional design. It is widely used however, not copied. How are the rights and duties being safeguarded within the realm? What are the role played by a tortious inspiration and a contractual conception? There is a narrow line of relationship between everything. Functional design is largely normative in nature on the other hand intellectual property is more economical and positive in its application. Therefore, the rights and duties vary according to the subject matter involved. The subject matter functional design would be backed by an agreement between parties which might have led to a dispute.

There is likeliness for a tortious act to be committed on a functional design structure of a commercial website. Once an error in functional design of something has happened, it constitutes a *Novus Actus Interveniens*. This would have a perpetuating effect. That is how torts law impacts upon the scope and ambit of functional design. Commission of an economic tort can also call for the law of torts. In either case the cause of action would be the functional design. The color of an agreement runs throughout the relationship between law and a particular functional design in question. The likelihood of economic losses is more when a particular functional design fails. Therefore, functional design is a naïve concept like novelty in patent law or a manuscript in copyright law. Therefore, it is time to recognize and determine this naïve design to be one among the ingredient of designs law to constitute fulfill design protection.

QUALIFYING PROPERTY VALUE

The intellectual property is under the utilitarian's domain. Utilitarianism is inherent inside the fabric of property. Qualifying property value has been partial towards functional design. There is a protection given for design. However, functional design is an interdisciplinary subject matter which requires special attention both through minimum rights (*jure conventionis*) and national treatment. Tracing the history back to Article 1⁶⁹ of Paris Convention which objected about

⁶⁹Paris Convention 1883, www.wipo.int/treaties/en/ip/paris/ (Accessed on 13th August 2016).



industrial property, contemplated various multidisciplinary fields of property. All this property did have an industrial property to later evolve as an intellectual property. Although, the Paris Convention failed to define all these multidisciplinary fields and left it at the discretion of the member nation-states to determine at their discretion as to how all would go about each fields of property.

Principle of National Treatment, Independence and Priority was at a competitive imbalance to draw automatic protection for the various multidisciplinary fields of property under the international intellectual property jurisprudence. The enforcement mechanisms lack strong teeth to bite and protect every intellectual property. The contemporary scenario of functional design is primitively more like the situation of the evolving intellectual property in the 17th century. Three centuries past when we look at the Designs Act, 2000 which control and amend the law relating to the protection of design in India, which does not cover explicitly anything regarding functional design. The inclusive definition of design is an inclusive and exhaustive one limiting itself from including functional design. S. 21 of the India Designs Act, 2000 purports the application of a design at industrial and international exhibitions. The evolution of intellectual property also started with the Austrian Government securing temporary protection for the national creations and inventions exhibitions in the 17th century. Likewise, the evolution of functional design also has to be regulated at a global level.

The intellect is valued when the property is valued. To qualify the value behind functional design it is necessary and proportional that we need to impart the character of property to it. The requisite presumptions for attributing a property value to functional design are multifarious. Firstly, it can be presumed for the functional design to have a goal, secondly, the use, thirdly, the audience who will use it. Considering these three assumption in mind it is important to ask certain pertinent questions. Firstly, how is it going be used? Secondly, how it engages a user? Thirdly, how does it handle mistake? These three basic questions can determine the functional design's property value. Once the property value is attributed functional design is also a property of the intellect which requires a protection under the realm of the intellectual property law jurisprudence.

From the unsettled position of law, functional design creates a paradigm of coming within the conglomeration of intellectual property rights. Functional design is a property having industrial



values. It is at the same time novel and artistic. Its subjective nature keeps it non-exhaustive. Therefore, it is important to draw the platform for regulating functional design under intellectual property law.

ENDORISING INTELLECTUAL PROPERTY

The idea of functional design is to be endorsed within the square of intellectual property. The idea is not distinct from industrial property. Therefore, the circle of functional design can be integrated into the field of intellectual property jurisprudence either as a separate head or can be integrated to designs. Functional design cannot be regulated by the dictums of torts law or contract law. Even though, the presence of infringement of a right and an agreement are inherent in the fabric of functional design. Functional design cannot be dissected and understood. As the word “function” has a diverse and multifarious connotation in the contemporary world. Therefore, it is difficult to narrow down the meaning of the word “function”. The word “design” is regulated by law. But functional design has to be understood as a whole and not by dissecting the phrase. When the phrase is dissected and understood the two words are separate from each other imparting an entirely different connotation. The law cannot be partial towards the fundamentality of functional design.

The laws of functional design are limited to jurisdictions. It has to be recognized universally. The World Intellectual Property Organization, World Trade Organization, convention and referral rules have a model role to play in understanding deliberating the role and attributes of functional design. The evolution is complete when functional design is globally drawn to shallow out the uncertainty of its treatment. India per say does not have an express legislative framework on this regard even though, the legal precedents have dealt with it differently. From opinion to opinion to persuasiveness should the law move in order to fulfill the purpose of affirming the blanket of law? It is always answered in the negative. The law should be full and complete. It should not be supplanted. Therefore, in the light of the potential of intellectual property law jurisprudence in completing the law of functional design standing within the four walls of the intellectual property jurisprudence.

Before, bringing functional design into the realm of intellectual property it is important narrow down and pull out the purpose of drawing a separate law for regulating functional design. This is



important to explain the statement and reason why functional design has come into existence. The purpose behind functional design is primary to understanding and very primitive. Illustratively, a flow chat representing an operation, its role is very much limited and subject to change and betterment. But it does have a value attached. This value can be an inherent novelty or a primitive manuscript. Then the question why functional design should not be governed by copy right or patent widens itself. Thus, intellectual property law cannot escape from endorsing functional design as an intellectual property. It is obliged to regulate and protect the idea and reason behind functional design. It is difficult to differentiate functional design objectively or define it separating it from the square of intellectual property law. After endorsing the attributes of functional design it is equally important as to how it is regulated. This regulation should be prospective and should not override or defeat the purpose of bringing functional design under the realm of intellectual property.

PARADIGM CONCLUSION

Functional design is a paradigm of structure. Functional design is wide and naïve. Its aliveness has not been controlled by legalism. It's a utility model. It has to be regulated. In the process of regulation, the best applicable law would be recognizing functional design as a separate field within the realm of intellectual property right. Making functional design dependent would be reducing its utility and minuteness. Although it is more inclined towards the ideas and lineage of designs it can be separated from design and kept as an independent discipline as its application is beyond the scope and applicability of Designs Act. The Designs Act 2000 does not incorporate the blending of *Novus Actus Intervenience* with a functional design. Functional design is normative and wider from the scope and fathom of designs. Therefore, the modus of attributing law to it should be in a manner where the principle of self-determination is not violated.

Narrowing down the law is a problematic brief. Functional design is a minute aspect within the intellectual property law regime. Law has to narrow down its wide wings from design to define the key term of functional design. Law has to understand depth of its applicability. Functional Design is neither legally defined nor illustratively explained in any legal statute. The idea of functional design is a challenge before the intellectual property realm. By analyzing every subjective and exhaustive definition of functionality and design it would be easier to blend both



together and work out a proper full and complete legal definition for functional design. The moot point whether defining would be enough is yet another question. Fabricating anything with the color of law would attribute rights, duties, remedies and liabilities. Therefore, that argument also holds valid.

Yet another issue is how can functional design be protected? Functional design can be given protection voluntarily. The necessity and proportionality of registering a copyright or patent is very not mandatory. It's an additional protection in this competitive era. Therefore, if the maker wishes to have a protection for his functional design could have. Keeping registration of functional design mandatory would be breeding abuse of dominance. Through functional design, a primitive tangible expression of a structure is tried to be protected. This scenario can reduce the competitors' breathing space in the field. Thus, it is better to keep the registration very much a voluntary act. This voluntary act draws the applicability and role of Torts law and Contract law into the realm of intellectual property right. Both are initiated from the acts or omissions out of a voluntary act. Arguendo, Torts law inspires intellectual property law through functional design and the Contract law's conception arrives when there is a breach of an agreement with respect to the functional design being the subject matter. Therefore, the correct formula to deal with functional design would be the blend of Torts law, Contract law and Intellectual Property law.

Under the utilitarian domain of intellectual property functional design being a primitive has its least effect upon utilitarianism of intellectual property. The interdisciplinary subjection of functional design protects the base of an individual's creativity and originality of his structure. The competitive imbalance created out of national treatment and priority is minimized. Functional design is not distinct. It stands within the realm of industrial property. It does have a novelty and obviousness attached to it. Its structure makes it simpler to understand the idea. That is creativity and innovation. That ought to be protected. Like how that primitive idea of comparative explanation has gradually developed into a regime of comparative law. Functional design therefore, ought to be endorsed by industrial property and subsequently intellectual property. Functional design is in a sense the integrating nucleus of intellectual property and industrial property.



The applicability of functional design is universal and is not limited to structures and patterns in intellectual property jurisprudence. It extends from primitive structures to Boolean patterns of trade commerce and intercourse. Therefore, functional designs fathoms cannot be measured in Richter magnitude scale. Thus should be blanketed with law to protect it from the gray shadows of lawlessness.



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JURISDICTIONAL DILEMMA IN TRANSNATIONAL BANKRUPTCIES⁷⁰

ABSTRACT

The menace of transnational bankruptcies has perforated the corporate governance regimes all around the world. The globalized economy, created by the technological revolution and series of steps taken by the International community, has made the globe a singular market hereby firms interact with the market without any inhibitions of geographical limits. Globalization has created a dire need for prudential norms which would facilitate methodical liquidation without wounding a major chunk of the economy. This paper is an attempt to illustrate the effect of the transnational bankruptcy and the hurdles faced in the creation of effective structure to tackle the problems of transnational bankruptcy, the authors further suggest a regime of collective approach by the states to curb the menace.

Keywords: Globalization, Jurisdiction, Prudential Norms, Transnational Bankruptcy

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INTRODUCTION

It is not oblivion that a company⁷¹ might have substantial operations in number of countries such as Apple Inc., Reliance Ltd., P&G or Alphabet Inc.⁷² which has its presence in almost all the countries on the map of the world. Their customers, suppliers and creditors are spread in complex labyrinth in different states and their provinces. They have provided employment to huge populations and religiously follow the regime of Employee Stock option policy and corporate social responsibility. They are Transnational Corporations and exemplify globalization in true sense; and crash of these firms would trigger calamity across the globe. This complex labyrinth of the jurisdictions where these transnational corporations have their processes in raises two pertinent questions: Firstly, which Jurisdiction would be a feasible one to represent the interests of their widely distributed creditors in different jurisdiction. Secondly, which jurisdiction would be able to cater to the rights of the stakeholders such as creditors without compromising with the interests of the diverse employee base?

The regimes which govern such instances of transnational bankruptcies are convoluted arena of law which is immature and incoherent.⁷³ The numbers of reported transnational bankruptcies cases have increased drastically.⁷⁴ There is a vast incoherency in the structure governing the bankruptcy in different states around the world, but states have endeavored to unify the bankruptcy regimen.⁷⁵ The Phenomenon of transnational bankruptcy is not a novelty but it is now that newfangled efforts have been made towards collaborated mechanism for dealing with bankruptcies.⁷⁶

⁷¹ The terms company, corporation, firm along with their plural forms have been used interchangeably all throughout this paper.

⁷² Parent company which owns Google.

⁷³ See generally, Mike Perry, Lining-Up at the Border: Renewing the Call for a Canada—U.S. Insolvency Convention in the 21st Century, 10 DUKE J. COMP. & INT'L L. 469, 473 (2000).

⁷⁴ See, for the increasing number of bankruptcy case, Paul L. C. Torremans, Cross Border Insolvencies In Eu, English and Belgian Law 218 (K.J.M. Mortelmans ed., 2002).

⁷⁵ Joseph Bellissimo, Proposed Insolvency Legislation Fosters Cross-Border Cooperation, THE LAWYER'S WEEKLY CANADA (Aug. 31, 2007)

⁷⁶ Leif M. Clark & Karen Goldstein, Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies, 46 TEX. INT'L L.J.



MANAGING TRANSNATIONAL BANKRUPTCIES

Legal systems majorly implement concerted gratification existing claims from residual assets belonging to debtor if it fails to do away with its liabilities.⁷⁷ The ways of mitigating the defaulter's fiscal issues lies in voluntary restructuring negotiations,⁷⁸ insolvency proceedings,⁷⁹ and administrative processes.⁸⁰ The structure of dealing with the bankruptcy all throughout various jurisdictions vary drastically and happen to be paradoxical to each other. Further, the legal order for reestablishment in various jurisdictions might not be benign.⁸¹ Beyond contradistinctive outlook on the objective of bankruptcy, a labyrinth of discord and disunity exists among jurisdictions on the ways bankruptcies should be managed. These factors lead to totally imperceptible outcome probabilities momentous on the manner each jurisdiction chooses to interpret its laws. The Transnational corporations affecting plethora of jurisdictions with different laws substantially increments the price of doing business.

As the bankruptcy laws vary in their innate objectives and application to the cases in different jurisdiction,⁸² yet they can be clustered under two heads i.e. *Territoriality* and *Universality*, with each having their own sets of pros and cons.

TERRITORIALITY

Territoriality is one of the major evils to transnational bankruptcy.⁸³ The notion of territoriality in International law is based upon the sovereign rights of a state to administer disputes within its borders. It is a 'Grab Rule' of insolvency disputes.⁸⁴ In relevance to law of bankruptcy of transnational companies, territoriality indicates that the bankruptcy courts of a country have command over those portions of the company that are within its limits and not those segment that

⁷⁷See generally, U. N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 9, U.N. Sales No. E.05.V10 (2005)

⁷⁸ *Supra* note 8, at 21.

⁷⁹ *Supra* note 8, at 26.

⁸⁰ *Supra* note 8, at 21-29.

⁸¹ E. Bruce Leonard, Co-ordinating Cross-Border Insolvency Cases, Cassels Brock & Blackwell LLP Toronto, Canada, June 11 - 12, 2001

⁸² *Supra* note 7, at 517.

⁸³ See Generally, John A.E. Pottow, The Myth (And Realities) Of Forum Shopping in Transnational Insolvency, BROOK. J. INT'L LAW, VOL. 32(2), PP. 785-817, 2007

⁸⁴ Leah Barteld, Cross-Border Bankruptcy and the Cooperative Solution, Brigham Young University International Law & Management Review, Volume 9 | Issue 1, Article 3.



are exterior to them.⁸⁵ States can essentially implement laws against individuals within their own boundaries save as there is a treaty obligation to the contrary.⁸⁶ There are no such international agreements accessible at present. The law of insolvency is to a great extent dealt by the territoriality rule of Public International law.⁸⁷ If a company is in receivership, there is an acceptable conviction that it will only be subject to local laws and procedures.⁸⁸ There are no extra-territorial jurisdictions in such an issue. The home creditor can be advantageous in this framework. The assets and resources are dispensed and distributed in accordance with the laws of the home country where the holdings exist. This is also economical for the creditor. The defaulter on the contrary may find it favorable if the assets are located in a dissimilar jurisdiction from where it acquired the liability. The creditors therefore frustrate the defaulters' interest by offering collateral within the local jurisdiction.

But this has now become challenging for the transnational businesses spreading their network beyond the territorial borders. The facet of international cooperation within territoriality is robust but the psychological restraint of favoritism is also inevitable.⁸⁹

UNIVERSALITY

In cases where the corporations initiate bankruptcy suit in a jurisdiction with universality structure, the outcome would be disparate. Under universality structure bankruptcy is an unified doings that may aggrandize to all assets and every one with a vested interest and the settlement should commensurate to the debtor's market.⁹⁰ The epicenter of the issue becomes that there should be one single process for every stakeholder;⁹¹ all the assets of the debtor from its homeland is brought

⁸⁵ See Generally, Gary Lawson, Territorial Governments and the Limits of Formalism, *California Law Review* Vol. 78, No. 4 (Jul., 1990), pp. 853-911

⁸⁶ *Infra* Note 18.

⁸⁷ See generally, Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests, Penn Law: Legal Scholarship Repository, University of Pennsylvania Law School

⁸⁸ *Supra* Note 18.

⁸⁹ *Supra* Note 15.

⁹⁰ Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Text, Cases and Problems* 841 (6th ed. 2009).

⁹¹ *Supra* Note 18.



in one jurisdiction, with no qualms about other jurisdiction for the purpose of resolution of the bankruptcy.⁹² The Universality structure proves to be cheaper, swift and result oriented.⁹³

The cons are in sphere of both the assets and the interests of the stakeholders globally. It is true that universality eradicate the issue of the impugned tangible properties falling under different jurisdictions but the dilemma continues for intangible properties,⁹⁴ this lead to development of adapted universality which subscribes equal weight on both the sides of scales consisting universality on one and territoriality on other. The adapted universality has body and soul of universality but habits of territoriality.⁹⁵ This structure though is capable of one fixed forum, creates the problem of forum shopping. The adapted universality structure provides the forum as the one of corporations home jurisdiction which is also its epicenter of main interests,⁹⁶ the issue of forum shopping one solved, the next pertinent question arises of the choice of law, which at occasions be a different issue altogether, under the adapted universality structure it is the courts discretion to choose a la for application to the transnational bankruptcy cases.⁹⁷

EXPERIENCE OF COOPERATION

To curtail the menace created by transnational bankruptcies lawyers, jurists and authors have developed fixes to curtail the cacophony with ingenuity. Various states have successfully concluded contracts to cooperate in the cases of transnational bankruptcies to provide a predictable outcome of the bankruptcy litigation; unfortunately, these advents have been region centric and failed to garner appeal globally.

⁹² Charles Hendren, Judicial and Administrative Approaches to Bank Resolution: Prospects for International Harmonization, Huntsman Program, University of Pennsylvania.

⁹³ Paul L. C. Torremans, Cross Border Insolvencies In Eu, English And Belgian Law 218 (K.J.M. Mortelmans ed., 2002)

⁹⁴ Alexander M. Kipnis, Beyond UNCITRAL: Alternatives To Universality In Transnational Insolvency, DENV. J. INT'L L. & POL'Y, VOL. 36:2

⁹⁵ Heinonline, Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated in America, 17 B.U. Int'l L. J. 367 (1999)

⁹⁶ Lynn M. LoPucki, Cooperation In International Bankruptcy: A Post-Universalist Approach, Cornell Law Review, Vol. 84:696.

⁹⁷ Hannah L. Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory, Maurer School of Law: Indiana University, 2000.



CONTRACTUALISM

Another scheme towards transnational bankruptcy is to ascertain and choose a country whose law will be applicable by entering into an agreement.⁹⁸ Many transnational corporations decide on the applicable laws in the contracts which can be fitting for both the parties. Autonomy to contract forms the basis of this framework. However, in the essence of international law the independence to enter into a contract may be subject to certain limitations.⁹⁹ A defaulter may not be in a position to haggle an economically favoring contract due to the creditors' dominant position. The domino effect is a facsimile dispersion of jurisdictional tragedy favoring the creditor.¹⁰⁰

TREATY

International treaty law encompasses rights and obligation states explicitly and willingly recognize among themselves.¹⁰¹ A treaty can have multiple state parties to it. One of the foremost amicable endeavors towards bankruptcy proceedings that crossed the geographical frontier was the operation of treaties in such disputes. The adoption of treaty law in various territories is the basis and expanse of its jurisdictional application.¹⁰² This scheme of cooperation between states although significant, was ineffective in cases where the treaty was entered into only between an insignificant number of states confining its effect to limited territorial application. Thus, treaties did not result in an efficient way of solving the existing dilemma.

UNCITRAL

UNCITRAL Model Law on Cross-Border Insolvency (Model Law) adopted in the year 1997 is the most efficient mechanisms for dealing with cases of transnational insolvency at present.¹⁰³ The Model Law is aimed at adequate and proficient administration of transnational bankruptcy to

⁹⁸ Robert B. Kovacs, A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration, available at: <https://www.iiiglobal.org/sites/default/files/transnationalapproachtothe Arbitrability of Insolvency Proceedings in International Arbitration.pdf>

⁹⁹ Kent Anderson, The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience, *U.Pa.J.Int'l Econ.L.* 679(2000)

¹⁰⁰ Irit Mevorach, Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Volume 9 | Issue 1, Article 6.

¹⁰¹ See generally, https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf [Last accessed: 10th August, 2016].

¹⁰² See generally, <https://www.bis.org/publ/gten06c.pdf> [Last accessed: 10th August, 2016].

¹⁰³ http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html [Last accessed: 10th August, 2016].



safeguard the interests of all creditors and other concerned persons, including the default. It was devised to solve the concerns of the increasing network and globalization of transnational corporations. The Model Law encompasses a number of sizeable solutions to the complexity in dealing with such disputes.¹⁰⁴ The problem of national jurisdiction although still prevalent, the law encourages cooperation and coordination between states extensively.¹⁰⁵ At present, 23 states have adopted the Model Law. It covers numerous fiscal hurdles faced by the businesses that deter investment. 'The Centre of main interest' approach towards solving a jurisdictional issue has been widely accepted but it negates the supposition of a creditor having the centre of main interest, which is more or less the tight spot of all other arrangements.¹⁰⁶ The progress of bankruptcy administration has not kept swift with the necessity and demands of such administration. Confronting the problem of jurisdiction, the Model Laws have in a procedural and substantive manner covered the scope of such problems. However, it leaves scope for uncertainty towards issues such as the law applicable and hence is inept and not comprehensively dependable.

CONCLUSION

Transnational Insolvency has remained an unsettled question in law. There have been concordant efforts through various frameworks to resolve this debate. However, none of them have broadly been able to cover all the aspects related to it. The co-operation and coordination of states towards closing the obstacles of jurisdiction such as in treaty of friendship and comity have resulted in an agreement between states that are suitable to an extent in promoting investment and transnational business but it fails at accomplishing the much desired outcome of a uniform law. Objection to jurisdiction apart, the procedural law applicable is also disputed.

The improved transnational cooperation by virtue of better financial arrangements has enhanced international relations but the burden of solving transnational bankruptcy dispute favoring any particular state may result in sour political and business relations. There is, thus, a need to lessen

¹⁰⁴ MOHAN, S. Chandra. Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer? (2012). *International Insolvency Review.*, 21(3), 199. Research Collection School of Law

¹⁰⁵ Steven J. Arsenault, *Leaping Over the Great Wall: Examining Cross-Border Insolvency in China Under the Chinese Corporate Bankruptcy Law*, *IND. INT'L & COMP. L. REV.*, Vol. 2 1:1

¹⁰⁶ Morshed Mannan, *The Prospects and Challenges of Adopting the UNCITRAL Model Law on Cross Border Insolvency in South Asia (Bangladesh, India and Pakistan)*, Master of Laws Thesis submitted in partial fulfillment of the requirements for the degree of LLM in Advanced Studies in International Civil and Commercial Law, 27 July 2015



the growing tension of transnational disputes with a uniform legal system promoting the interest of all the interested parties in the present-day commerce.



CYBER WOLF IN SHEEP'S CLOTHING: PHISHING¹⁰⁷

ABSTRACT

We cannot imagine a day without internet. Earlier, in 90's less than 1, 00,000 people were present in cyber space and now, 500 million people are hooked up to surf the net around the globe.

Success in the field of human activity results in crime and, where there is crime, one needs the mechanism to control such crime. As such crimes are no more bound by space, time or to a particular group of people and cyberspace is one such place where one can express criminal tendencies.

Cybercrimes as defined by United Nations in a broader sense is an illegal behavior committed by computer system or network: including crimes like illegal possession and distributing data by means of computer system or network.

And, phishing is one such form of identity theft which is done online with the aim of stealing sensitive information like online banking passwords and credit card information from users. Phishing scams are on a great rise and are able to grab great attention of public as, such attacks are escalating in number and sophistication. According to study by Gartner, about 57 million US internet users are able to identify the receipts of e-mail lined with phishing scams out of which about one million have been estimated to have tricked giving sensitive information. And, email phishing is one common way of phishing with which one can become the prey of phishers. As, now-a-days mostly the communication around the globe is done through e-mail and cyber criminals crafts such e-mails to look convincing, sending them to millions of people around the globe with no particular target in mind thus, causing finical loss of billions of dollars both to the consumers and e-commerce companies.

¹⁰⁷ Advocate Sonal Chaujar and Advocate Madhuri Bakshi



The need of the hour, is to enact new laws that paves balance with the crimes of the new technological era with the help of well qualified IT professionals and law enforcement personnel as each has half of the key to defeat the cyber criminals

And, this paper introduces you to the new yet common kind of crime in the cyber world called phishing along with ways in which it is committed, to what extent it is prevalent along with the reasons for its growth, legislation in India, US and UK governing such crime with the magnitude of problem including recent case studies both Indian and International and suggesting ways in which such crimes may be prevented.

Keywords: Cybercrimes, Identity theft, Phishing, Sensitive information



INTRODUCTION

With the passage of time Internet has been transformed to a marketplace where, businesses and consumers have come together to interact. Unfortunately, it also gave people new means to carry out unscrupulous activities and provided the world with the new genre of criminals called as cyber criminals. And, it is more evident with the emergence and growth of phenomena known as “phishing”.

Phishing is a type of social engineering attack where hackers use spoofed emails to trick people so that they show their sensitive information or compel them to install malware on their computer. And, people perceive such mails to be associated with the original brand while, in reality it is the deed of cyber con artists. Instead of targeting directly these cyber criminals target the people using these systems. It doesn't really matter how many security measures one has taken until one doesn't fall for a phish.

The word phishing developed around 1995, when scammers in the cyberspace were using e-mails to “fish” for passwords and sensitive information from the users of cyberspace. Earlier Phishers used to copy codes from the AOL¹⁰⁸ website and designed pages that look similar to the actual webpage to mislead people and send spoofed mails with the a link to this deceptively similar page asking the user to disclose his password.

It may simply look as a spam but, it has resulted into damaging consequences in terms of loss of sensitive information, identity theft, loss of national security secrets, loss of sensitive intellectual property etc. Such attacks are not just limited to emails rather it has become more pervasive and sophisticated spreading to SMS, instant messaging, multiplayer games and social networking sites. Some major categories of phishing include:

SPEAR PHISHING

Such attacks target a particular group. In such kind of attacks, instead of sending random mails to thousands of people, spear phishers attack a particular group having something common in them like belonging to same organization. Spear phishers when attack high level targets, they call such

¹⁰⁸ American Online Services



attack as whaling. In late 2010 and early 2011 Australian Prime Minister's office, the Canadian government, HB Gary Federal and Oak Ridge Natural Lab became the prey of spear phishers.

PHONE PHISHING

Such attacks are done from phone in the form of sending messages to the people claiming it to be from the bank asking the user to dial phone number for the problem they are facing with their bank accounts. And, as traditional phone equipment have dedicated lines, so, VOIP¹⁰⁹ is easily manipulated by the phisher. Once, the victim dials the number provided by VOIP service and owned by the phisher, voice prompts that direct the victim to enter his bank account number and PIN¹¹⁰. And, since spoofing of caller ID is not prohibited by law, it can be easily used to deceive the victim to be from a trusted one.

CLONE PHISHING

Cloned email is created by phisher by getting information in the form of content and recipient addresses from a legitimate email that was earlier delivered then; he replaces the original one with the links directing the person to the malicious one. The phisher even spoofs the addresses depicting it to be from the original source. And, the modified email appears to be the updated version as a trapping strategy.

REASONS FOR GROWTH

- **Unawareness amongst People:**

According to the experts, the main reason behind the increasing cases of phishing, is the lack of awareness amongst public especially in the rural areas. The users are unaware of the fact that the phishers are targeting their personal information and so they don't take due precautions while conducting online transactions.

- **Lack of Awareness about the Policies of Banks and Financial Institutions:**

The phishers count on the lack of awareness among the consumers about the policies and procedures used by the banks and other financial institutions for contacting them for issues related to account maintenance and fraud investigation.

¹⁰⁹ Voice Over Internet Protocol

¹¹⁰ Personal Identification Number



- **Technical Sophistication:**

The phishers make the use of advance technology which has already been used successfully for activities like spam, electronic surveillance etc. The phishers are developing new techniques to counter the awareness among the customers. These new techniques involve URL obfuscation which is used to make phishing e-mails and so that the websites appear to be more legitimate, and take the advantage of vulnerabilities in web browsers that allows downloading and executing malicious code from a hostile website.

ANATOMY OF PHISHING ATTACKS

Phishers perform three roles for attacking the victims. Firstly, mailers send large number of fake e-mails through botnets which directs the victim to fake websites. Secondly, collectors set up fake websites that directs the victim to disclose his confidential information. And finally, cashers using such information achieve payouts.

SPOOFED EMAILS

One of the most commonly used techniques on internet is e-mail. Not only, have we used it for our official communication but also to keep ourselves in touch with our relatives and friends. And, social techniques are used by hackers for sending phishing mails rather than technical tricks. Like, pretending to create administrator's warning about the new attack and compelling the user to install the attached malware. Another instance is by notifying the user that there had been multiple failed logins for their accounts and they should verify their accounts or bear the consequences. Even appealing to the greedy nature of people is an ancient technique to the cyber world. The most common of them is scam of getting rich quickly transmuting into e-mail accounts these days.

Here are few warning signs that your email is an attack:

- If your email creates for you a sense of urgency. Be careful as this is the most common of all techniques used by hackers
- Be careful about spelling mistakes as most businesses proofread their mails before forwarding them.



- Never click on the link. Instead, one should copy the URL¹¹¹ from the mail and paste it on the browser or simply type the destination name on the browser.
- Be careful on opening any attachments. One should open those attachments which he is expecting.
- Be careful of emails with salutations addressed as “Dear Customer”. If it is from the original source or bank they will address you with your name.
- If you place your mouse over the link then your mouse will show you the destination where you would go if you click that link but, if it doesn’t show you the destination then, it is clear indication of fraud.
- If you receive any suspicious email from your known contacts, you should first call and ask them about it instead of opening such mail send to you from their account as it might be possible that their account is hacked and they have no idea about it.

DESIGNING FAKE WEBSITES

Scammers often use free web space, register a new domain name. And, while registering new domains criminals by getting names similar to the site they are impersonating. Like for instance, if impersonating Flipkart, phisher might register it as flipkart-login.com. Even, homograph attacks are being done by criminals that exploit the visual similarity of characters. The most common of all techniques is putting the domain name in front. And, relying on the lack of understanding of common man of URLs they make no attempt to disguise the destination site.

In the beginning when such attacks just started, the scammers created web pages by hand which were poor in quality, having misspellings and hotlinks to images similar to original sites. But, now phishing has become more advanced and, now phishing sites use toolkits which help phisher specify as to what legitimate site he should copy and when to direct the stolen data that helps in generating the needed content.

When such attacks started, the law enforcement and industry were not able enough to knob such attacks. However, countermeasures in the form of blacklisting were employed but, criminals

¹¹¹ Universal Resource Locator



introduced new technique known as fast flux which were large pool of proxies and domain names to hide the location of the phisher. And, with fast flux it became very difficult to blacklist the site.

MONETIZING STOLEN INFORMATION

Another phase of phishing is stealing the information. Sometimes information is stolen directly and sometimes cyber criminals follow convoluted path like social networking sites.

For instance, in online games, the criminals transfer the virtual gold of the victim to accomplice and then, for real money they sell the stolen gold. Such attacks are very common. However, in terms of social networking sites such attacks are indirect. For instance, attack maybe in the form of notification from victim's friends that he is in trouble and needs money.

Another form of attack is to steal one's password and break into victim's other accounts as people often reuse the old passwords.

Earlier, the information was stolen directly by criminals but, now-a-days they work underground. Another instance is about the jobs that involve working from home such jobs involve money transfer to the mule's account, with funds coming from a hacked account. The mule wires money from a different account coming in other country, keeping small commission for him. Such activities are illegal and people around the world are indicted about it.

INDIAN AND INTERNATIONAL CASE STUDIES

India

In India, phishing is a new concept which stayed unheard in the past years. Banks like ICICI, UTI, HDFC¹¹² etc have suffered phishing attacks where the modus operandi used was similar. Some of the recent phishing scams in India are as follows:

UTI¹¹³

In the case of UTI, the change of the bank's name from UTI to Axis Bank was taken as an undue advantage by the perpetrators by informing the email users that the bank's name has been changed

¹¹² The Housing Development Finance Corporation Limited

¹¹³ Unit Trust of India



and hence the customers need to provide their financial information so that it could be updated in the new server. It was revealed by the investigation reports that these fake emails have been sent from Lagos, Nigeria and the logo of UTI's site was used by the phishers to deceive the customers.

RBI¹¹⁴

The phishers didn't even spare RBI. A fictitious e-mail disguised as originating from RBI was sent to the customers, promising its recipients prize money of Rs 10 lakhs within 48 hours by providing them a link which directed the user to a website that appeared to be identical to the website of RBI and had the same logo and web address. The users were asked to reveal their personal information like password, I- pin number and savings account number. However, a public notice was issued by RBI clarifying that it was a phishing attempt to defraud the customers.

ICC¹¹⁵ **World Cup**

One of the biggest sporting events also underwent a phishing attack. The phishers had specifically targeted the internet users of India, Bangladesh and Sri Lanka, which were the host countries of world cup. India was their main target and the Modus Operandi was the same as was being used in banking scams. The fraudsters lured the victims by designing a fake website which looked similar to the original one and displayed special offers and packages for the grand finale of the event. The site asked for credit card details for booking tickets and packages along with their personal information which was used to operate the victim's online banking account and led to huge financial losses to the victim.

In the ICICI bank case¹¹⁶, the adjudicating officer directed the bank to pay compensation to the customer for the unauthorized withdrawal from his account. According to the bank, the incident was a phishing attack and the customer had fallen prey to a phishing fraud by providing sensitive information to the phishers. However, the bank was held liable under Section-85 of the Information and Technology Act, 2000 for not exercising due diligence. It was highlighted in the judgment that the bank failed to appropriately authenticate its e-mails to its customers in the form of Digital

¹¹⁴ Reserve Bank of India

¹¹⁵ International Cricket Council

¹¹⁶ *Umashankar Sivasubramanian v. ICICI Bank*, Civil jurisdiction Petition No. 2462 of 2008, Tamil Nadu



Signatures, special attention was also drawn towards the procedures and systems of the bank before and after the commission of the bank and the lack of KYC duty of the bank was also highlighted.

US Phishing Scams

In 2013, a huge data breach affecting 110 million customers is thought to have originated from a phishing attack.

The breach has been initiated from Fazio Mechanical Services, which is a heating ventilation and air conditioner contractor in Pittsburgh. The systems of target were said to be connected to the firm's systems for providing contract submissions, project management services and electronic billing services.

The target firm suffered a loss of million dollars and it fired its CEO and CIO as both of them took computer security too lightly and did a little to minimize the risks.

Phish Phry

Around 100 people were charged by US and Egyptian authorities for making the use of phishing scams for stealing the bank account details from thousands of people and transferring about \$ 1.5 million into fake accounts.

Operation Phish Phry involved a two-year investigation which resulted in the discovery of a group of phishers who targeted the US bank holders. The charges were so grave that the bank charges alone could land them in jail for 20 years. It was called the largest international phishing case ever conducted by the FBI.

UK

In 2015, it was reported by 1,00,000 people in UK alone, that they were receiving phishing e-mails which means that around 8,000 phishing mails were received by people per day and half of the time, phishing attacks apparently work, which is shocking.

Amongst the people who reported a phishing scam, the majority said that it came in the form of an e-mail while the others were contacted by calls, texts and other ways.



The Action Fraud team said that the most common phishing scam came from phishers who purported themselves to be a bank with the Self-Assessment tax deadline in January end which was followed by online payment merchants including PayPal, utility companies etc. According to the police, out of all the reported scams, 31 percent contained a malicious hyperlink, which if clicked, would install a malware into the victim's phone or computer or ask him to provide sensitive information.

It was estimated by the Met Police's Action Fraud Unit that a fraud worth € 59 m had been prevented in the United Kingdom after convicting three men who launched sophisticated phishing scams for being able to access the bank account of customers in 14 countries.

Around 2,600 phished pages mimicking bank websites were identified by the MET Police Central e-Crime Unit, the Serious Organized Crime Agency and the US Secret Service.

The phishers were traced in the UK, where they were staying in luxurious hotels in London while still continuing to scam victims. They were caught red handedly in the hotel itself, using their laptops for logging into servers which were storing compromised banking data.

The officers later discovered that the servers had details of 30,000 bank customers, out of which 12,500 were in UK and around 70 million customer's e-mail id's had to be used in phishing scams.

The phishers were convicted for a term of 20 years. According to the investigating officer, it was the biggest case that the PCeCU had dealt with to date and was apparently the biggest phishing scam so far in the UK.

REGULATIONS IN INDIA AND INTERNATIONAL

Indian Legislation

Phishing being a cybercrime attracts penal provisions under the Information Technology Act, 2000 as amended in 2008 by introducing new provisions to deal with phishing activity. The following sections are applied to phishing under the IT Act, 2000



Section 66

Victim's account is compromised by phisher by fraudulently effecting some changes by either deleting or altering the data electronically in the victim's account residing in the bank server. Thus, making it punishable with an imprisonment which may extend to three years along with the fine of five lakh rupees or both.

Section 66A

The camouflaged e-mail containing the fraudulent link of the organization or bank to mislead the recipient about origin of such e-mail clearly attracts this section with an imprisonment which may extend to three years and with fine.

Section 66C

However, in e-mail phishing, the imposter disguises himself as the banker by using the logo or trademark of the organization or bank. Thus, attracting this section with an imprisonment which may extend to three years and with the fine which may extend to one lakh rupees

Section 66D

The imposter through e-mail phishing containing link to fake website of bank impersonates the bank to cheat on innocent people. Thus, attracting this section with an imprisonment which may extend to three years and with the fine which may extend to one lakh rupees

However, the phishing scam is made bailable under section 77B of the IT Act, 2000 as there is always an identity conflict as to the correctness of identity to know who is behind the alleged scam.

US Legislation

The US Congress has enacted statute for phishing attacks named The Anti- Phishing Act, 2005.

The Act introduced two crimes to the present federal laws:

Criminalizing the act of sending phishing e-mail whether or not the recipient has suffered the actual loss



Secondly, by criminalizing the act of forming phishing website whether any visitor suffered any actual damage.

If anyone is convicted under the law of phishing then, he is liable for an imprisonment up to five years with the fine of \$250,000. So, in this way the act helps in fighting against phishing attacks by prosecuting phishers without showing any specific loss and also, permitting businesses to carry forward easily.

UK Legislation

Fraud laws are being reformed by UK government for an offence covering the perpetrators of such attacks. The provision is push of measures to clarify existing laws in the new fraud Bill introduced by House of Lords.

The main feature of the bill is to strengthen the existing law and to ease the prosecution process. The offence can be committed in three ways by false representation, abuse of position and failing to disclose information. Judges will be able to impose sentence up to ten years for any of the three offences which means imposter committing phishing attacks could be subject to extradition laws.

COUNTER MEASURES

Someone rightly said that prevention is better than cure. As experts consider it more of a user problem than technical problem and the responsibility lies with the user as to where they are browsing and what information they are giving and to whom. So, now the question arises what can organization and individuals do to protect themselves from the risk of phishing attack? The first line of defence is:

Make it Invisible

To prevent an attack done to end user is filtering phishing e-mails, blocking fake websites and taking down fake websites. Fette et al developed the first e-mail phishing filter in 2007 that was able to identify URLs using different domain names.

Education



The most important component to win battle against phishing and online scams. And, such education should start from primary level as the technology is rapidly spreading. So, the future generation should be made aware of such risks which they might face in cyberspace. One should follow the SLC Rule which means:

- Stop: Don't react to phish ploys of "upsetting" or "exciting" information.
- Look: Look closely at the claims in emails along with the lines and web addresses
- Call: Call or e-mail the company in question to verify whether that mail is authentic or not.

Anti-Virus Technology

Though such scams are not usually considered as "virus problem" if a worm infects the user, in them, installs Trojan horse that captures the period dates, the antivirus technologies are effectuated. One should implement the best security practices.

Browser Enhancements

Latest versions of Chrome, Internet Explorer, Mozilla Firefox, Netscape and Opera offer security features aimed at controlling phishing attacks and other online fraud.

Communication

Companies should communicate with their customers to keep them informed about scams and other threats. They should make clear policies and inform customers about how information is gathered and disseminated.

Stringent Penal Punishments

Earlier, the laws were not effective enough to deal with such advanced crimes in cyberspace. But, now the government from various parts of the world have implemented statutes that deal with such problem and have enforced strict punishments to the cyber criminals.

Two factor Authentication

The most promising of all technologies to prevent phishing scams is two factor authentications. It is an encrusted approach which uses two ways to verify the user. This technology use OTP which is the One Time Password that expires with the single use. Such passwords are generated between



the user and the bank. Login is authenticated by not only the user credentials but also with the One Time Password. However, if password is stolen it doesn't matter since it expires with the single use.

CONCLUSION

Phishing is the fastest growing internet crimes in India and the techniques used by the fraudsters are becoming sophisticated day by day. In spite of the growing number of phishing cases, most of the internet users are unaware of the concept of phishing, many of them are even unaware of the word phishing!

There is no silver bullet which could be used for preventing phishing attacks. No single technology can be used to secure our personal information by keeping it away from these phishers. However, by observing most of the phishing scams in India and other countries, it could be concluded that the fraudsters succeed in phishing attempts because of uninformed and credulous customers who without realizing that they are being trapped, innocently pass on the information asked by the phishers.

Strategies could be adopted to make phishing more difficult to be executed but a well-crafted phishing attack has a greater chance of being successful. A lot of efforts need to be taken to stop the spread of phishing attacks and make them non profitable and less appealing for the new phishers.

By conducting more research and developing anti-fraud technologies, educating computer users and prosecuting the phishers, this threat could be curbed but this will have a little impact in the number of schemes. There is a need to educate the consumers about the online threats and vulnerabilities. The companies should make sure that they report the online frauds and scams and educate their customers about scams which may affect them.

Although many technological solutions are available which could be used for protecting oneself from phishing but the best and easiest way is to increase user awareness. Definitely, a person who is familiar with the phishing and possible intentions of the phisher is less likely to fall prey to the attack.



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CYBER STALKING LEGISLATIONS IN INDIA¹¹⁷

ABSTRACT

Crimes have increased to a large extent throughout the world. This keeps governments, police departments and intelligence units on their toes to curb this distress. But while these disturbing occurrences take place around the globe. Imagine you are in your house, the doors are locked, the windows are shut and the curtains are drawn, but, you feel that you are not alone. You run into the same dead ends, where you are being watched time and again. The feeling of helplessness and terror shadows you.

Technology around the world has grown over the years but has also introduced new insecurities, which may make you feel exposed within the secured four walls of your house. Your online data on various forums is not only viewed and scrutinized, but leads to people snooping around your life making it uncomfortable for you. This is known as cyber stalking. Where the stalker has no fear of being physically touched whether he or she may be your neighbor or may be half way across the world, as the convenience of the internet allows the stalker to harass his or her target without having to leave their respective niche.

This article aims to project the presence of cyber-stalking throughout India, alongside the laws that have been introduced to curb the practice with a glimpse into the past and the outlook of present cases within the country.

Keywords: Cyber-crimes, Cyber harassment, Cyber stalking, India, Legislations

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INTRODUCTION

When your morning paper's headlines read as, "A 35-year-old man will serve three months in jail for sending obscene pictures and videos via email to a woman he met on a social networking site"¹¹⁸, you wonder how safe are you? What has the world come to? Whether it is safe for your loved ones to access social media sites?

Yogesh Prabhu's case was one of Maharashtra's first conviction under cyber-stalking by the additional chief metropolitan magistrate MR Natu, under section 509¹¹⁹ of the Indian Penal Code and section 66 (E) (punishment for violation of privacy) of the Information Technology Act, 2008.¹²⁰

How did this happen? Like any social forum that provides for online chatting, the two parties in this case also started chatting online. But due to certain suspicious behavior and disturbing occurrences the lady stopped talking and blocked him. However, this did not stop here, Prabhu, continued to keep an eye on her profile and her whereabouts, which in simple words is called as cyber stalking.

The internet over the years has surged into businesses, communities, and the lives of individuals, altering the way that people communicate, study, work, and interact. People throughout the world can communicate in real time on a variety of devices such as cell phones, tablets, or computers. A photo, video, text message, or email may be viewed by a single individual, shared with another or "go viral" and spread to hundreds of thousands of users in a matter of minutes.

Technology is constantly improving, which in turn instigates the way that people interact by promoting global communication and allowing individuals to connect with others more readily. However, the Internet and related technology have also become mediums for misconduct, where some conveniently without using any physical means take advantage of easy communications via

¹¹⁸ <http://www.hindustantimes.com/mumbai/35-yr-old-first-convict-in-a-cyber-stalking-case-in-state/story-sjIiVKJOGxwwUdr4UYyz6O.html>

¹¹⁹ Section 509 of the Indian Penal Code, 'Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

¹²⁰ C.C. No. 686/PS/2009 JUDG



the Internet as well as the personal information available online can to threaten, harass, intimidate, and cause harm to others.

1. Cyber Stalking

In its most basic definition, cyber stalking entails “the repeated pursuit of an individual using electronic or Internet- capable devices”.¹²¹ It is the repeated pursuit that may include any unwanted electronic communications, which may be threatening, coercive, or intimidating. It is ultimately a crime that creates a sense of fear, terror, discomfort, stress or anxiety in the victim. Cyber stalking of being repetitive in nature may cause in the victim to lose a sense of control over his or her own life, never knowing as to when the stalker may appear or contact again. The capability of the stalker to contact the victim at any time from any distance undermines the victim’s sense of security and can lead the victim to be in constant experience of fear. The fact that cyber stalking does not involve any sort of physical contact may create a misconception that it is more benign than physical stalking. But this may not necessarily be true, online harassment and threats may be a prelude to more serious behavior, including physical violence.

1.1. Identifying Cyber Stalking

The evolution of technology has given the power of being anonymous on the internet which allows a stalker to tamper with his or her victims. These manipulative personnel’s first try to gather information upon “easy victims” through various means, and monitor their victim’s activities. Once the stalker finds a loophole for him or her to pursue, they may create false online accounts on social networking and dating sites to establish contact, or post messages to online bulletin boards and discussion groups with victim’s personal information, such posts may be lewd or controversial. These personnel’s may also attack by hacking into their victim’s online account and create a menace.

Cyber stalking can be a onetime affair or something that the stalker derives pleasure from performing repeatedly. It may occur due to obsessive problems, where he or she can either not

¹²¹ Reyns, B. W., Henson, B., & Fisher, B. S. (2011). Being pursued online: Applying cyber lifestyle – routine activities theory to cyberstalking victimization. *Criminal Justice and Behavior*, 38(11), 1149-1169.



take rejection in a relationship¹²² or enjoy upsetting people through heart breaks. Some stalkers may also be delusional in nature and could be suffering from mental illness like schizophrenia, due to which they suffer from having false beliefs that keeps them tied to their victims, and in certain cases idolize their victims as well. It is not uncommon for stalkers to have revenge as their vendetta while they harass the other person.

Earlier, there was a certain profile of cyber harassers—mostly in the age group 11-25 years, and educated. Now, more and more people who are not very educated, but are mobile-literate are getting involved in such crimes. Some are so tech-savvy that they demand money in bitcoins now. This is converging into a phenomenon of social media extortion.¹²³

1.2.Cyber Stalking in India

The first cyber stalking case registered in India was as early as 2001. The Delhi Police had registered the case under cyber stalking, where a lady named Ritu Kohli, came forward to express her distress regarding some person who was using her identity to chat over the internet, and was also deliberately giving her telephone number to other chatters encouraging them to call Ritu Kohli at odd hours on a website with the URL www.mirc.com. As a result of which, Mrs. Kohli received an estimate of 40 calls, national as well as international, during odd hours within 3 days. This case was registered under Section 509 of the Indian Penal Code.

Cyber stalking had not been categorically specified in words of law. But while the Indian Information Technology Act, 2000 did not directly address stalking, the prevalent occurrences were dealt as an ‘intrusion on to the privacy of individual’, through Sections 72¹²⁴ (breach of confidentiality and privacy) and 72A¹²⁵ (punishment for disclosure of information in breach of

¹²² State of Tamil Nadu v. Suhas Katti

¹²³ Pavan Duggal, Supreme Court Advocate, <http://www.livemint.com/Politics/St93190XdGvpiclGWwnX0I/For-victims-of-cyber-stalking-justice-is-elusive.html>

¹²⁴ Section 72 of Information Technology Act 2000 (amended 2008), ‘Penalty for breach of confidentiality and privacy.-Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.’

¹²⁵ Section 72 A of Information Technology Act 2000 (amended 2008), ‘Punishment for disclosure of information in breach of lawful contract. -Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in



lawful contract) read with Section 441 of the Indian Penal Code, which deals with offences related to criminal trespass. Along with the Information Technology Act, 2000, the Indian Evidence Act as well as the Indian Penal Code was used for legislating such crimes, a few Sections that were often used were Section 507, 508 and 509.

According to National Crime Records Bureau data, the number of cases for obscene publication and transmission in electronic form under the Information Technology Act, 2000, had risen since 2007, when 99 cases were reported. The number rose to 105 in 2008, 139 in 2009, 328 in 2010, 496 in 2011 and 589 in 2012. The figure more than doubled to 1,203 in 2013.¹²⁶ In 2014, 758 crimes were reported, in which 491 people were arrested.¹²⁷ Online harassment and cyber-crimes had not been given the kind of priority in India that was required, until 2013.

2. Amends Made in 2013 in India

There had been no direct laws pertaining to regulating cyber stalking in India, prior to February 2013. The Information Technology Act of 2000 was used to regulate the cyberspace; as the mere focus of the country was only on financial crimes and had neglected interpersonal criminal behavior such as cyber stalking.

It was in 2013 that the Indian Parliament made amendments, as suggested by the Verma Committee to the Indian Penal Code. They introduced cyber stalking and voyeurism as criminal offences along with other offences, after 2012 Delhi gang rape case¹²⁸ that generated international coverage and was condemned by the United Nations Entity for Gender Equality and the Empowerment of Women, who called on the Government of India “to do everything in their power to take up radical reforms, ensure justice and reach out robust public services to make women’s lives more safe and secure.”¹²⁹

breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.’

¹²⁶ <http://www.assochem.org/newsdetail.php?id=4821>

¹²⁷ <http://www.livemint.com/Politics/St93190XdGvpicIGWwnX0I/For-victims-of-cyber-stalking-justice-is-elusive.html>

¹²⁸ *State v. Ram Singh and Another*, 114 SC 2013

¹²⁹ Stenhammer, Anne F. (20 December 2012). “UN Women condemns gang rape of Delhi student” (Press release). UN Women. Retrieved 21 December 2012



Now, the Indian Penal Code defines stalking under Section 354 D as:

1. Any man who—
 - i. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
 - ii. monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking;

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

- i. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
 - ii. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
 - iii. In the particular circumstances such conduct was reasonable and justified.
2. Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.¹³⁰

2.1. What has the new law brought?

Prior to 2013, cyber stalking was not explicitly recognized by any law in the country, whether in physical or electronic form. Cases were legislated mainly via the Information Technology Act, 2000, as well as the Indian Penal Code and the Indian Evidence Act.

The Ordinance of 2013, defined stalking as, ‘Whoever follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such person, or whoever monitors the use by a person of the internet, email or any other form of electronic communication, or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such

¹³⁰ <http://indiacode.nic.in/acts-in-pdf/132013.pdf>



person, or interferes with the mental peace of such person.’¹³¹ The person if convicted as guilty shall be imprisoned for not less than one to three years.

Previously, cyber stalking practiced only to annoy the victim without it resulting in any serious offence like severe defamation, sexual crimes or identity theft, was treated as a bailable offence. But the present law, disregards the reason or intent for stalking by clearly defining the elements of the offence and making stalking itself a punishable offence. But the offence has not remained gender neutral. The clause, “or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking”, that was given in the ordinance has been omitted from the Act.

The punishment for those liable is imprisonment up to three years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to five years along with fine.

2.2.How is Cyber Stalking to be reported?

To tackle the issue of cyber-crimes, the Criminal Investigation Departments of various cities have opened up Cyber Crime Cells at different locations all over India. The Information Technology Act of India clearly states that when a cyber-crime is committed, there is global jurisdiction over it; hence, a complaint can be filed at any of these Cyber Cells.

The complainant is required to provide certain information as asked for along with an application addressed to the head of any cyber-crime investigation cell while filing their complaint.¹³²

If not through Cyber Cells, one can also file complaints by filing a F.I.R. in the local police station. In case of non- acceptance of complaint, one may always refer the complaint to the commissioner or judicial magistrate of the city.

Mandatory legal assistance is to be provided to a woman who approaches a police station with an allegation regarding cyber stalking. The complainant’s statement is taken down in private, to respect her privacy.

¹³¹ <http://indiacode.nic.in/acts-in-pdf/132013.pdf>

¹³² <http://www.thanepolice.org>



3. Applicability of Cyber Laws in India

While cases like Yogesh Prabhu, Infinity e-Search BPO, SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra and many others have been reported and taken to court. But there are still dozens of online harassment cases that go unreported.

People most of the times suffer in silence. It is important for a victim to have a strong support system while going through something so disturbing in life. Social media as a platform for shaming is like standing on a crowded public street being jeered at by all, except on a public street, people are not continuously posted, while the same cannot be said for online as it is a continuous space growing bigger by the second. Earlier this year, a case was brought up in the state of Tamil Nadu, where a 21-year-old girl was being continuously harassed by a man on Facebook. The reason being that she had rejected his proposal for marriage. The continuous embarrassment without support, led her to hang herself as she could not take the shame and injustice anymore.

Taking another example of a recent situation, this was also cited by the BBC news¹³³, about an activist Kavita Krishna who had tweeted some remarks over a feud that involved the Prime Minister of the country. Following her tweet, she was attacked online with graphic threats on Facebook. Upon her showing these threats to the police, they showed little or no encouragement towards finding out the culprits.

In most cases the police are not able to either collect the electronic evidence or preserve it or produce it or prove it. Many a times cases that are brought up are not registered because the police are unsure as to whether they will be able to crack it. According to a study, *Cyber Law and Information Technology*, by Talwant Singh, additional district and sessions judge, Delhi, as published in delhicourts.nic.in, a survey indicates that for every 500 cyber-crime incidents that take place, only 50 are reported to the police and out of that, only one is actually registered.

4. Shortcomings in Indian Cyber Laws

India is a diverse country which is evolving at a fast pace. Even the not so educated are mobile literate. With technology democratizing the social media; India has now around one billion mobile subscribers and an estimated 500 million Internet users. But it is surprising to see how laws in a country which provides equal rights to all, has failed to do so by sanctioning gender

¹³³ <http://www.bbc.com/news/world-asia-india-33532706>



biased laws in the amendments made in 2013 to the Indian Penal Code. Where they have segregated crimes that can only be committed by a man against a woman.

Even after the amendments made to recognize cyber stalking, most of such cases go unreported, either by police or by families themselves, because of the belief that these acts of harassment are regrettable but not really punishable. It is in the implementation of these laws where the problem lies.

CONCLUSION

When used properly, new technologies, social networking sites, and electronic devices are beneficial tools. However, in the hands of a potential criminal, these tools can be used to exploit and cause harm. While the Indian legal system is trying its best to protect its citizen and make amendments, it is necessary that people themselves must also adhere to some safety measures that can help avoid them from being the victim. Firstly, with awareness comes caution, therefore it is required to be vigilant about what is happening around you. Your personal information shared online should be to the minimum limit. It is of utmost importance that privacy setting and security setting which are provided for is utilized. Interaction with strangers must not be encouraged without taking necessary cautions. The option of parent control should be applied for young teenagers as well, to reduce unfortunate accidents taking place. People must report any suspicious activities as soon as possible to the authorities. It is high time that the country gives cyber stalking the attention it requires in order to reduce the harm it causes to our society.



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**MISREPRESENTATION IN PROSPECTUS: AN ANALYSIS OF THE PROVISIONS IN THE
COMPANIES ACT, 2013¹³⁴**

ABSTRACT

This paper mentions about the various developments in Company legislation in India which ultimately led to the enactment of Companies Act 2013. Prospectus is the sole of every Company. Based on this document which is contractual in nature, the public decides whether to subscribe for the shares or not. Hence, it is of utmost importance that the prospectus must show a clear and an honest picture about the Company. However, if there are mis representations in the Prospectus, then stringent actions must be taken against those responsible for it and the interests of the shareholders must be protected. This paper attempts to delineate various aspects of mis – representations in Prospectus under Part I of the Act. This paper focuses on the wide applicability of liability provisions in respect of any mis statement made in the prospectus issued by the Company in order to invite public to subscribe for the share capital. The Companies Act, 2013 provides those responsible for the drafting and issue of the Prospectus can have civil liability as well as criminal liability. The last part involves critical analysis of the Act of 2013 and the recommendations by the Companies Law Committee. The paper is concluded with the author's views that 2013 Act is a step to make the governance in India transparent, accountable and one that safeguards the interest of the stakeholders and other legal professional.

Keywords: Liability, Mis-representation, Prospectus, recommendations, SEBI.

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INTRODUCTION

The enactment of the Companies Act, 2013 is one of the most significant reforms in India. The aim of enactment of the Company Act was to bring Indian Company Law as per the global standards. The Act went through rigorous review processes in the Parliament during which extensive public consultations were held. The Act incorporated recommendations from various Committees like the Naresh Chandra Committee, Dr. J.J Irani Committee¹³⁵ etc. the Act introduced significant changes in relation to accountability, disclosures, corporate governance etc. The Ministry of Corporate Affairs constituted the Companies Law Committee (the 'CLC') under the Chairmanship of the Secretary, Ministry of Corporate Affairs which subsequently led to the enactment of Companies Act, 2013. The 2013 Act has introduced significant changes in the provisions relating to governance, disclosure norms, acquisitions, merger norms etc. This Act also includes corporate social responsibility particularly when there is mis- representation in Prospectus.

The issue of a prospectus has been regarded as the most practical and important matter connected with the formation of a company because it is the means by which the necessary capital to work the company is acquired.¹³⁶ Thus, a prospectus is an offer to the public to subscribe to a Company's share capital. Any offer by the promoter to his relatives and friends is not an offer to the public.¹³⁷ To determine whether an offer is made to the public, the test is not to whom the offer is made but who can accept the offer.

WHO CAN ISSUE A PROSPECTUS?

The prospects of a company must be truthfully presented. Exaggerated claims must not be made. It should present full, accurate and fair picture of the state and prospects of the Company.¹³⁸

Section 23 explicitly provides the ways in which a public company or a private company can issue securities through a Prospectus; through private investment or through rights issue or bonus issue.¹³⁹ A Public Company can issue a prospectus in order to invite the subscription of his shares

¹³⁵ *Dr. J. J. Irani Committee Report on Company Law*, (2005)

¹³⁶ LECTURE V: PROSPECTUS, LECTURES ON COMPANY LAW (17th ed. 1975)

¹³⁷ *Sherwell v. Combined Incandescent Mantles Syndicate*, (1907) W.N. 110.

¹³⁸ H.C JOHRI, COMMENTARIES ON COMPANIES ACT, 1956 (Vol. 1, 2006)

¹³⁹ Section 23 of the Companies Act, 2013.



and debentures. Also a Private Company who intends to convert into a public company can intend to offer shares and debentures of the Company to the public can issue prospectus. **Section 26** provides that every prospectus issued on behalf of a public company or on behalf of any other person who has been engaged in formation of a public company shall be dated and signed.¹⁴⁰

POWERS OF THE SECURITIES AND EXCHANGE BOARD

The Securities and Exchange Board of India (SEBI) has the powers relating to matters in the prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act. The matters must relate to the issue and transfer of securities and non-payment of dividend, by listed companies or those companies which intend to get their securities listed in any recognized stock exchange in India. In *Kalpna Bhandari v. SEBI*, SEBI denied its jurisdiction where one of the two Companies was not listed in any recognized stock Exchange.¹⁴¹

PROSPECTUS AS THE BASIS OF CONTRACT

Prospectus is the basis of contract between the Company and the person who invests in the Company's shares and debentures.¹⁴² The issue of prospectus is an offer to the general public to be accepted by it. Thus, when offer is accepted it becomes a contract. The general principle of law is that a contract to take shares is voidable if it was induced by misrepresentation, whether fraudulent or innocent. If there is a material misstatement in the prospectus which induced the shareholder to take shares, he can if he applies within a reasonable time, get his contract rescinded.

¹⁴³Earlier, the relief of recession was available when the following conditions were satisfied:

- (a) The statement which induced the shareholder to take the shares must be a fact and not just an expression of opinion.
- (b) The statement so inducing is misleading in the form and context in which it is included.
- (c) The statement in question must have been actually relied upon by the shareholder.

¹⁴⁰ Section 26, the Companies Act, 2013.

¹⁴¹ *Kalpna Bhandari v. SEBI*, (2005) 125 Comp Cas 804 (Bom DB).

¹⁴² Abhinav K. Mishra, *Prospectus in Company Law*, (July 15, 2016), <http://lawmanblog.blogspot.in/2012/03/prospectus-in-company-law.html>.

¹⁴³ *Shiromani Sugar Mills v. Debi Prasad*, A.I.R. 1950 All 508



- (d) The shareholder must start proceedings for the rescission within a reasonable time and before the company goes into liquidation.¹⁴⁴

The right of rescission is lost when the parties cannot be relegated to their original position. The ground for rescission is that a contract for shares is rescinded ab initio.

The Supreme Court in *N. Parthasarathy v. Controller of Capital Issues*¹⁴⁵ two directors mentioned in the Prospectus retired before allotment, but the applicants were not put on notice of this change, held, the contract could be repudiated.

MIS-REPRESENTATIONS IN PROSPECTUS

The term 'misrepresentation' is not defined anywhere in the Company Act, 2013. The term 'misrepresentation' has been defined under Section 18 of the Indian Contract Act, 1872 as

- (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true.
- (2) Any breach of duty which without an intend to deceive, gains an advantage to the person committing it, or any one claiming under him by misleading another to his prejudice or to the principle of anyone claiming under him;
- (3) Causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. When there is misrepresentation the contract may be avoided.

In *Hindustan General Insurance v. Punam Chand Chajjar*¹⁴⁶, it was held that there is no reason why a subscriber should not be allowed to opt out of the contract and seek 'setting aside of allotment', it goes without saying that the right to rescind the contract must be exercised promptly on discovering that the statement contained in the prospectus was untrue. In *Venkataramaya v. Indian Indus Bank Ltd*¹⁴⁷ held the contract could be repudiated because the directors mentioned

¹⁴⁴ SHANTILAL MOHANLAL SHAH, LECTURES ON COMPANY LAW 83 (17th ed. 1975).

¹⁴⁵ *N. Parthasarathy v. Controller of Capital Issues*, (1992) 72 Comp Cas 651

¹⁴⁶ *Hindustan General Insurance v. Punam Chand Chajjar*, AIR 1971 Cal 285

¹⁴⁷ *Venkataramaya v. Indian Indus Bank, Ltd* AIR 1930 Mad. 325



in the Prospectus retired before the allotment, but the applicants were not put on notice of this change.

Section 28 (2) defines prospectus as any document issued by the Company by which the offer of sale to the public is made shall for all purposes be deemed to be a prospectus and all laws and rules made there under as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus otherwise relating to prospectus shall apply as if this is a document issued by the Company.¹⁴⁸

PENALTY AND FINE

Section 36 of the Act provides for punishment for fraudulently inducing persons to invest money. Any person who knowingly or recklessly makes statement, promises or forecast which is false, deceptive or misleading, or conceals the facts to induce the person to enter into an offer shall be liable under **Section 447**.

Section 447 punishes any person who is found to be guilty of fraud shall be punished with imprisonment for a term not less than six months and can extend to a period of ten years. He can also be involved in crime which is not less than that involved in fraud. The amount can extend to three times the amount involved in fraud. The Companies Act, 2013 explicitly defines 'fraud' as *fraud in relation to affairs of a company or a body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from or to injure the interests of the company or its shareholders or its creditors or any other person, whether or not there is a wrongful gain or a wrongful loss.*¹⁴⁹

Under this Section, the **penalties** are as follows:

1. Imprisonment for a period of not less than six months which may extend to ten years.
2. Fine not less than the amount involved in fraud, which may extend to three times that amount.

¹⁴⁸ Section 28(2) of the Companies Act, 2013.

¹⁴⁹ Chapter XXIX, Section 447 of Punishment for Fraud, Companies Act, 2013.



3. When the fraud in question involves public interest then the imprisonment shall not be less than three years.

LIABILITY OF A DIRECTOR

The Companies Act, 2013 defines ‘director’ as director appointed to the Board of a company.¹⁵⁰ The Board of company consists of the directors of the company. Every director, promoter and every other person who authorizes the issue of prospectus incurs liability towards those who subscribe for the shares in good faith. Generally, the liability is to pay for the damages to the aggrieved party. The new Act has enhanced the liabilities of the directors and imposes stringent punishment in breach of any punishment. As observed by Halsbury, L.C. in *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*¹⁵¹ - a corporation is an abstraction with no mind of its own, so there must be an agent who is the directing mind and will of the corporation’. The director need not see the prospectus but he must authorize the issue.¹⁵² The new Companies Act, 2013 provides for the duties and responsibility of director of a public company. A director is the mainspring of the Company and vitally concerned with its management. The position of directors is difficult to define, to some extent they are agents and to some extent they are trustees of the company. There are different types of directors: independent director, alternate director, women director etc.

Section 166 of the Act provides that the Director of the Company should act in good faith in order to promote the objects of the company, for the benefit of the Company and the best interest of the stakeholders of the company. The liability of the director towards the company arises when (a) they have acted in an ultra vires manner, e.g. they apply funds to the company to objects not sanctioned to the company’s memorandum. The directors are also liable when in good faith they have misinterpreted the memorandum which is ambiguous in nature.¹⁵³(b) when they are guilty of negligence, (c) from the breach of trust and (d) from misfeasance.¹⁵⁴ The Company has a right to initiate legal action against the director in case of breach of their duties.

¹⁵⁰ Section 2(34) of Companies Act, 2013.

¹⁵¹ 1915 A.C. 705, at pp. 713-714

¹⁵² *Shanmugam v. Ranga*, A.I.R. 1934 Mad. 641

¹⁵³ *London Financial Association v. Kelk*, 26 Ch. D. 107.

¹⁵⁴ SHANTILAL MOHANLAL SHAH, LECTURES ON COMPANY LAW 253 (17th ed. 1975).



This Act imposes strict penalty upon the directors for omitting to comply or contravene with the provisions of the Act. The person contravening such provisions is described as ‘officer who is in default’ under Section 2(60) of the Act which penalizes or punishes the whole time directors, key managerial personnel, any person under immediate authority of the board, transfer agents, merchant bankers and all those mentioned under the Section.

LIABILITY OF THE DIRECTOR UNDER OTHER STATUTES

Under **Section 141 of the Negotiable Instruments Act, 1881**¹⁵⁵ the person committing any offence under Section 138 is a Company and is liable to be proceeded against and punished accordingly. Under the **Consumer Protection Act**,¹⁵⁶ in *Ravi Kant v. National Consumer Disputes*¹⁵⁷, Under Section 27 of the Act, the State Commission imposed a sentence of one year simple imprisonment and fine to the directors and the Company. In *Byford leasing ltd v. Union of India*,¹⁵⁸ the Court held that under Section 27, the Board of Directors can be proceeded against they being the in charge of operations of the Company.

CIVIL LIABILITY FOR MIS-STATEMENTS FOR PROSPECTUS

Section 35 of the Act prescribes civil liability on the directors, promoters and other persons who issue mis-leading statements in the prospectus. A Promoter maybe liable for providing mis-statements in the Prospectus. In *Phosphate Sewage Co. v. Hartmound*¹⁵⁹ and *Offl. Receiver v. Lewis*, a promoter is a person who as principal procures and aides in procuring incorporation in a company. In *Vali Pattambirama v. Sri Ramanuja Ginning Factory (P) Ltd* ,¹⁶⁰ the Court observed that the word promoter has not been defined in the Companies Act. It is said it is not a term of law but of business. This Section 35 (1) states that any person who subscribes for the securities based on any statement which is misleading in the prospectus and has sustained any loss or damage as a consequence thereof , the Company, the director, any person who has authorized

¹⁵⁵Negotiable Instruments Act, 1881, Chapter XVII

¹⁵⁶ Consumer Protection Act, 1986

¹⁵⁷ AIR 1997 Delhi 182, 1997 89 Comp Cas.471.

¹⁵⁸ AIR 1972 Delhi ILR

¹⁵⁹ *Phosphate Sewage Co. v. Hartmound*, (1876) 5 Ch D 394

¹⁶⁰ 1986 60 Comp. Cas 568 (AP)(DB)



himself to be named in the prospectus, the promoter, is an expert¹⁶¹ are liable to pay compensation to any person who has suffered loss or damage.

In *Ali Jawad Ammer Hasan Indo v. French Biotech Enterprise Ltd.*¹⁶² six attractive and convenient schemes with incredible returns were offered to invite the public to subscribe to the capital. The Petitioner filed a writ petition under Article 226 of the Constitution¹⁶³ for investigating into the affairs of the company because large funds approx. 35 Crores of company's funds had disappeared. The Court accepted the petition – under Article 226, the court can issue appropriate directions for not only enforcing any of the rights conferred by Part III but for purpose dealing in public interest where a large number of investors are defrauded. Thus, for unreasonable hopes held out in the Prospectus, Writ Petition was accepted for direction.

However, **a statement of mere promise of future likelihood is not misrepresentation of 'facts'.**

In *Shiromani Sugar Mills Ltd. v. Debi Prasad*,¹⁶⁴ the statement that the MDs and the promoters and their Directors have already promised to subscribe share. "the Company would start its work soon". These statements did not imply the existence of facts which were really non-existent, there was therefore no fraudulent misrepresentation. There can also be instances when there is incomplete picture in the statements by omitting to state what ought to have been stated. Sub-section (a) of Section 26 requires statement in the Prospectus such matters and setting out reports as may be prescribed.

In *Mrs. Bhupinder Kaur Singh v. Registrar of Companies*¹⁶⁵, the Prospectus mentioned that money that would be used shall be used in leasing business. However, the funds were not used in leasing activities. So it was alleged in the criminal complaint that false statements were made. The Court however held that there is no criminal liability but civil liability on the part of the Company to compensate those who on good faith applied for the shares.

¹⁶¹ Section 26 (5) of the Companies Act, 2013

¹⁶² *Ali Jawad Anwer Hasan Indo v. French Biotech Enterprise Ltd.*, (1999)96 Comp Cas373 (Bom)

¹⁶³ Article 226 of the Indian Constitution

¹⁶⁴ (1950) 20 Comp Cas 296(All)

¹⁶⁵ *Mrs. Bhupinder Kaur Singh v. Registrar of Companies*, [1010] 159 Comp Cas 92 (Delhi)



If the Prospectus omits such statements or reports, the Prospectus being incomplete may make it untrue. In *David v. Britannic Coal Co.*¹⁶⁶ it was stated that omission of matters which the Promoters are duly bound to disclose is equivalent to mis-statements and the Promoters should be liable to pay damages.

Inaccurate statement would be an ‘untrue statement’ - Inaccurate quotation from reports would be an ‘untrue statement’.¹⁶⁷

In *R. v. Kylsant (Royal Mail’s case)*¹⁶⁸, the statement that dividends had been paid was in itself true. The fact that the dividends had been maintained only by drawing out of secret reserves and not out of profits was not disclosed. Held, the Prospectus gave false impression of the Company’s position.

In *Smith v. Chandwick*¹⁶⁹, the House of Lords held that when the statement has two separate meanings and the applicant happens to go by the wrong meaning, the Director will not be heard to say that he should put the other meaning.

In *Karberg’s Case*¹⁷⁰ the Court observed that- A statement that something will be done is not a statement of an existing fact so as to amount to ‘promise’ in a contract.

In *Bentley v. Black*¹⁷¹ the Court observed that there must be mis-statement of an existent fact. A calculation of future profits is not a statement of facts.

In *Aaron’s Reers v. Twiss*¹⁷², Lord Halsbury stated that ‘If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.’

¹⁶⁶ *David v. Britannic Coal Co.*, (1909) 2 KB 157.

¹⁶⁷ *Re Reese River Mining Co.*, (1867) LR 2 Ch, 604

¹⁶⁸ *R v. Kylsant*, (1932) 1 KB 442 CA.

¹⁶⁹ *Smith v. Chandwick*, (1881 – 85) All ER Rep 242: (1884)9 App Cas 187.

¹⁷⁰ *Karberg’s Case*, (1892) 32 Ch 1

¹⁷¹ *Bentley v. Black*, (1893) 9 TLR 580

¹⁷² *Aaron’s Reers v. Twiss*, 1896 AC 273 HL



VICARIOUS LIABILITY OF THE COMPANY

In addition to the contractual and statutory liabilities, directors are liable if they are parties to a fraud or to the commission of any other tort causing injury to any person. This is based on the principle of vicarious liability. The company is vicariously liable for the torts committed by its agents or servants in course of their employment.¹⁷³ However, the principal cannot be held responsible for every act done by an agent. In *Patang Rao v. Prithviraj*¹⁷⁴ it was held that the principal will not be liable for the unlawful acts of the agent.

LIABILITY OF FOREIGN COMPANIES

Chapter XXII of the Act, applies to Foreign Companies. Criminal liability – under Section 391(1) of the Act 2013 foreign companies will in addition to the punishment set out in Section 392 also be subject to criminal liability as provided in Section 34 and 36 as are applicable to Indian companies.

Civil liability- in so far as the civil liability is concerned, Section 391 of the Act follows the provision of Section 35 of the Act, regarding misstatements in Prospectus applicable to companies incorporated under the 2013 Act. The provision shall apply to a foreign company, whether incorporated or to be incorporated outside India.

TEST OF WHETHER A STATEMENT IS MATERIAL

In *M.K Srinivasan Re*¹⁷⁵, the intention of making the issue was to employ the money for taking over the Promoter's own business. Concealment of fact was considered dishonest. Criminal Prosecution was allowed. Mere non-disclosure of material facts would not be a ground for action for misrepresentation.

In *R. v. Kysant*¹⁷⁶, Lord Kysant was prosecuted for showing false profitability. The Company was incurring losses and the dividends were paid from other sources. The prospectus only showed payment of dividend for the past few years. The Prospectus contained false impression to intending

¹⁷⁴ *Patang Rao v. Prithviraj*, (2001) 3 SCC 594

¹⁷⁵ *M.K Srinivasan Re*, (1944) 14 Comp Cas 193: AIR 1944 Mad 410

¹⁷⁶ *R. v. Kysant*, (1932) 1 KB 442



investors of materials upon which they can exercise judgment about existing position of the Company.

In *Progressive Aluminum Ltd v. Registrar*¹⁷⁷ the Progressive Ltd was promoted by two promoters and Company. In the Prospectus it was stated that PCL is a large construction company engaged in construction activity for two and a half decades. Although the truth was that it was the persons who were manning the firm and not the Partnership firm that had the experience. The Registrar gave a notice to the Ltd alleging that the statement made in the Prospectus is untrue. The Court held that there was no such false representation by the Ltd Company. There was no mala fide intention luring the public for subscribing to shares of the Company under any false representation.

Effect of approval of offer document by SEBI, RBI and by Stock Exchange -In *Yugantar v. UOI*¹⁷⁸ the offer document was approved by SEBI, the Court held that Bank's statement in the Prospectus was not misleading or deceptive.

EXCEPTIONS TO THE LIABILITY

There may be cases wherein a person is induced to purchase shares, not by the statements in prospectus but by an oral statement of fact made by an authorized agent of the company. In such a case, the person must show that the statement was made by the director or an agent of the company while acting within the scope of his authority.¹⁷⁹

Every person who is a Director of a Company at the time of issue of the Prospectus; has authorized himself to be named and is named in the Prospectus as the director; is promoter of the company; has authorized the issue of the prospectus; - shall be liable to pay any compensation to that person who has suffered loss due to subscribing for the securities of the Company acting on any statement included or omitted in the Prospectus which is misleading. But a such a person will not be liable if the prospectus is issued without his consent or knowledge or authority.

Section 34 provides an exception that the person will not be criminally liable if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to

¹⁷⁷ *Progressive Aluminum Ltd v. Registrar*, (1997)89 Comp Cas 147 (AP)

¹⁷⁸ *Yugantar v. UOI*, (1997) 27 Corp. Law Ad. 132(Del)

¹⁷⁹ *Hilo Manufacturing Co. v. Williamson*, (1911) 28 T.I.R. 164; *Mair v. Rio Grande Rubber Estates* (1913) A.C 853, at pg. 872



the time of issue of the prospectus believe that the statement was true or the inclusion or omission was necessary.

Section 35(2) provides that no person shall be have criminal liability for mis- statements in prospectus if he proves that

1. No consent to issue the prospectus

If the person proves that he withdrew his consent before the issue of prospectus which was issued without his consent.

2. Notice issued within reasonable time

He must prove that the prospectus was issued without his consent and must give a reasonable public notice that it was issued without his consent or knowledge. In *Person v. Simpson*¹⁸⁰, it was held that the notice advertised in some of the principal newspapers in which the Prospectus was advertised would be reasonable public notice.

In *Diwan Chand v. Gujranwal Sugar Mills Co. Ltd*¹⁸¹, misrepresentation was alleged to have been made by the Company Secretary. Since he was not authorized to make representations, it was held that the inducement was caused by a person not authorized to make representations.

ACTIONS BY THE AFFECTED PERSONS

The liability to compensation is to every person who subscribes for any securities on the faith of the Prospectus. **Section 37** provides aid to the aggrieved persons affected by the misleading statements or inclusion or omission of any matter in the prospectus. They may file a suit or can take any other action under Section 34, Section 35 or Section 36. It must be noted that the nature of liability is to pay compensation. Generally the amount of compensation is the difference between the Shares which would have had but for the untrue statement and the true value of the Shares at the time of allotment.¹⁸² In *Peek v. Derry*¹⁸³, the amount of compensation was the difference between price paid for the shares and their real value on the date of purchase. If the

¹⁸⁰ *Pearson v. Simpson*, (1903) 2 KB 197

¹⁸¹ *Diwan Chand v. Gujranwal Sugar Mills Co. Ltd.*, 19370 7 Comp Cas 203 (Lah)

¹⁸² SHANTILAL MOHANLAL SHAH: LECTURES ON COMPANY LAW (1975).

¹⁸³ *Peek v. Derry*, (1887) 37 Ch D 541



market value is the result of fraudulent representation itself, then the intrinsic value of the share may be taken as the measure of damages.¹⁸⁴

CLASS ACTION SUITS

This is a new concept under Section 245 of the Companies Act, 2013. Under this Section, a group of shareholders can together bring an action against the Director and the Company for their fraudulent and wrongful act or omission on behalf of the affected parties.¹⁸⁵

ENTITLEMENT TO COMPENSATION

Only such persons who apply for the allotment of the securities on the faith of the prospectus purporting to contain an untrue statement are entitled to be compensated for the loss or damage sustained by reason of untrue statement. In *Kisan Mehta v. Universal Luggage Mfg. Co. Ltd.*¹⁸⁶, M filed for suit for injunction to restrain the Company from issuing the Prospectus alleging that it contained false statements. The suit was dismissed holding that ‘only a person who has suffered loss or damage on the faith of the Prospectus is entitled to a remedy.

CRITICAL ANALYSIS AND RECOMMENDATIONS

The Companies Law Committee (CLC) believes that the recommendations made by it are effective and necessary for proper and effective implementation of the Companies Act, 2013. Taking the suggestions of all groups, the Committee has made suggestions relating to declaration of dividend, **changes to the provisions relating to accounts and audit to improve transparency and the quality of information in relation to the financial position of the Company**, recommendations on corporate governance, recommendations to encourage a positive environment for the new start-ups.

1. **Matters to be stated in a prospectus-** The Author is of the view that the offer documents i.e. the Prospectus being too long, too detailed, repetitive is difficult to comprehend. It must be noted that SEBI is in the process of simplifying the contents of the document of the prospectus by amending the provisions of SEBI (ICDR) Regulations, 2009. **The**

¹⁸⁴ *S. Chatterjee v. Dr. K.L. Bhave*, AIR 1960 M.P. 323

¹⁸⁵ Section 245, Companies Act, 2013.

¹⁸⁶ *Kisan Mehta v. Universal Luggage Mfg. Co. Ltd.*, (1988)63 Comp Cas 398.



Committee is of the view that Section 26(1) of the Companies Act, 2013, should be modified to empower SEBI to prescribe the contents in consultation with Ministry of Corporate Affairs. The MCA and SEBI must work out the minimum disclosures to be included in the prospectus so that the objective of reducing the size of the prospectus to be achieved.

2. **Civil liability for misstatements in prospectus**- The Committee is of the view that the experts (who can be identified in the prospectus) who prepare misleading statements and on which the directors are relied upon must also be liable. **Thus, Section 35 of the Act must be amended.**
3. **Punishment for fraud**- Section 447 of the Act lays down the punishment for any person found guilty of fraud. The frauds which includes only one percent of the company's turnover or an amount of ten shall come under the ambit of Section 447. The Author is of the view that Section 447 is too broad and has provisions for severe punishments for minor infractions. Thus, this Section must be amended. **The Committee has recommended that this section has a lot of potential to be misused and may have a negative impact on attracting the professionals in the post of directors.**
4. **National Company Law Tribunal**- The New Act proposes to set up a National Company Law Tribunal in order to ensure speedier and effective remedy to the aggrieved party. Furthermore, Section 245 gives the right to the shareholders to take action to restrain the company from conducting its affairs if they find it prejudicial to the interests of the Company.
5. **The concept of class action suits** - considering the best interest of the shareholders, this is a welcome provision but there are chances that this provision might be misused. Furthermore, India is a developing country and may find it difficult to implement this provision successfully.¹⁸⁷

¹⁸⁷ *Companies Act, 2013, Key Highlights and Analysis*,
<https://www.pwc.in/assets/pdfs/publications/2013/companies-act-2013-key-highlights-and-analysis.pdf>.



CONCLUSION

The Companies Act, 2013 is one of the most significant legislations in the history of Indian legislation. This Act seeks to make governance efficient, transparent, accountable and beneficial to the stakeholders through the duties and liabilities of the directors. The changes brought in the form the Act are evolutionary rather than revolutionary. The Companies Act, 2013 has no doubt a very innovative legislation with respect to the director's duties. The new Act has brought a number of positive changes like greater clarity on director's duties, greater freedom to negotiate liability agreements with auditors, greater engagement with the shareholders etc. with respect to director's liability, the new Act quite explicitly lays down the director's duties and liability when they act ultra vires or do not perform their duties properly. In India, there are very few cases dealing with the director's duties hence some developments are hoped for in the future. From the above features of the new Act, the Author won't be wrong in saying that 2013 Act is a step to make the governance in India transparent, accountable and one that safeguards the interest of the stakeholders and other legal professional. *"Law leaves no one if the law is proved against him."*



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UNDERSTANDING CORPORATE SOCIAL RESPONSIBILITY¹⁸⁸

ABSTRACT

The law for corporate social responsibility or CSR law came into effect on April 1, 2014. In the very scope of such a short interval, the entire landscape of CSR in India has acquired a life of its own. Companies eligible under section 135 of the Companies Act 2013 have embraced the law and initiated a variety of CSR projects across the entire spectrum as defined within schedule VII of the Act. This paper seeks to study the scheme of CSR in its current framework with respect to similar international provisions, the effect of this legislation on the corporate sector and the effectiveness of this provision. The author also suggests ways to address the issues pertinent to this legislation without causing industrial concerns.

¹⁸⁸ Govind Abhijith, Graduate (NUALS) National University of Advanced Legal Studies



INTRODUCTION

The concept of CSR originated in the 1950's in the USA but it became prevalent in early 1970s. During this period the US had lots of social problems like poverty, unemployment and pollution. This in turn led to a fall in the price of the dollar. During this upheaval various companies decided to step in and take responsibility for the problems. This phenomenon would reach its peak during the 1980's when Corporate Social Responsibility became a matter of utmost importance for diverse groups demanding change in the business. During the 1980's to 2000, corporations recognized and started accepting a responsibility towards society. The ultimate aim of Corporate social responsibility (CSR) focuses on the wealth creation for the optimal benefit of all stakeholders – including shareholders, employees, customers, environment and society.

There are some models which describe the evolution and scope of social orientation of companies. Notably Carroll's model.

CARROLL'S MODEL

Carroll has defined CSR as the complete range of duties business has towards the society. He has proposed a 3-d conceptual model of corporate performance. According to Carroll, a firm has the following four categories of obligations of corporate performance. -

- **Economic**: The firm being an economic entity, its primary responsibility is to satisfy economic needs of the society and generation of surplus for rewarding the investors and further expansion and diversification.
- **Legal**: The laws of the land and international laws of trade and commerce has to be followed and complied with.
- **Ethical**: Ethical responsibilities are norms which the society expects the business to observe like not resorting to hoarding and other malpractices.
- **Discretionary**: Discretionary responsibilities refer to the voluntary contribution of the business to the social cause like involvement in community development or other social projects pertaining to health and awareness of the masses.



The definition of CSR however depends summarily on who is asked. For example, The EC defines CSR as “the responsibility of enterprises for their impacts on society”. To completely meet their social responsibility, enterprises “should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders”¹⁸⁹. The WBCSD defines CSR as “the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.”¹⁹⁰

INDIAN PERSPECTIVE

Indian corporations, like those in other countries, have had a long tradition of being engaged in social activities that have gone beyond meeting a corporation’s immediate financial objectives. However, since the late nineties, CSR activities have increasingly come under the lens both of policy makers as well as of corporations’ stakeholders as governance issues acquired increasing prominence. At the policy level, the formal focus on CSR started in India with the issuance of the Corporate Social Responsibility Voluntary Guidelines in 2009 by the Ministry of Corporate Affairs (MCA, 2009) that culminated in the enactment of Section 135 of the Companies Act 2013 (MCA, 2013)¹⁹¹ making CSR spending as well as CSR disclosure mandatory for specific types of companies. Significantly while CSR issues have been gaining in prominence across countries, India became the first country, and at the time this article is written, the only country to have made CSR activity mandatory for large and profitable companies incorporated into law. In all other countries CSR efforts by corporations have been kept largely voluntary, with only a select number of countries mandating corporations to disclose such activities.

Not surprisingly, therefore, Section 135 in India has generated largely polarized opinions among policy makers, corporates, industry associations, social sector organizations, and last but not the least, academicians. On one hand, the institution of mandatory CSR has been lauded in policy circles as a “historical opportunity” that could be a “game changer” for India where corporates would work hand in hand with the government and civil society to bring about “national regeneration” through sustainable development. Unorthodox as it may seem, some have argued

¹⁸⁹ http://ec.europa.eu/enterprise/policies/sustainablebusiness/corporate-social-responsibility/index_en.htm

¹⁹⁰ <http://www.wbcsd.org/work-program/businessrole/previous-work/corporate-social-responsibility.aspx>

¹⁹¹ <http://www.mca.gov.in/SearchableActs/Section135.htm>



that for a developing country like India, mandatory CSR may be an instrument to pursue a “middle path” between a liberal and a regulatory state so as to balance growth with social stability. On the other hand, critics of mandatory CSR, primarily corporates and business associations have pointed out that making CSR activities mandatory is essentially an exercise in outsourcing government social responsibility to the private sector and making the latter pay for the failures of the former. Further, when such activities are not clearly defined, mandatory CSR will create perverse incentives for corporates to camouflage activities to meet mandatory requirements or find ways to bypass the law.

The first formal attempt by the Government of India to put the CSR issue on the table was in the issuance of Corporate Social Responsibility Voluntary Guidelines in 2009 by the Ministry of Corporate Affairs (MCA, 2009). Prior to this, the importance of CSR was discussed in the context of corporate governance reforms, such as in the Report of the Task Force on Corporate Excellence by the Ministry of Corporate Affairs (MCA, 2000). While the report made a business case for CSR as well as highlighted the social benefits stemming from it, the discussion was recommendatory in nature and there were little actionable points. It is in the Voluntary Guidelines of 2009 that the core elements of a CSR policy were spelt out that included care for all stakeholders, ethical functioning, respect for workers’ rights and welfare, respect for human rights, respect for the environment and activities to promote social and inclusive development. The Guidelines specifically drew a distinction between philanthropy and CSR activities, and highlighted the voluntary nature of CSR activities that go beyond any statutory or legal 3 obligations. The Guidelines of 2009 were followed in 2011 by the National Voluntary Guidelines of Social, Environmental & Economic Responsibilities of Business, also issued by the MCA (MCA, 2011).

These guidelines were reportedly based on the inputs received from ‘vital stakeholders’ across the country and laid down nine principles for businesses to function in a responsible manner to promote inclusive economic growth at the national level. As in the case of the 2009 Guidelines, the 2011 Guidelines were voluntary in scope wherein corporates were urged to adopt all the nine principles, and to report their adherence to the guidelines based on an ‘apply-or-explain’ principle. Interestingly, while one of the implementation strategies suggested in the 2009 Guidelines was to earmark “specific amount related to profits after tax, cost of planned CSR activities, or any other suitable parameter,” no such suggestion was included in the 2011 Guidelines.



With the enactment of Section 135 of the Companies Act, 2013, as observed by the Ministry of Corporate Affairs in the Report on the Standing Committee on Finance (LSS, 2010), India became the first country to include provisions on CSR in Company Law and make CSR expenditure mandatory for corporates based on pre-specified criteria. In the rest of the world, however, CSR is still a voluntary exercise left to the discretion of the corporates. What is mandatory at most is the compulsory reporting of CSR activities undertaken by corporates in a growing number of countries, although this too is not the case across all countries. Thus, in countries such as Sweden, Norway, the Netherlands, Denmark, France, Australia and China, either government regulations or stock exchange regulations or both require corporates to disclose their CSR activities through sustainability reporting.¹⁹² The distinguishing feature of Section 135 is that it not only makes the reporting of CSR activities mandatory, but goes a step further to mandate CSR activities in the first place.

DEFINING CSR

The dilemma on the relevance of CSR in corporate activity is inextricably linked with defining the scope of CSR for a corporation. A review of the existing literature on CSR reveals that there is a diversity of opinions and ambiguity on the elements that constitute socially responsible behavior on the part of corporates.² Arriving at an agreed-upon definitional construct for CSR is important, first from the point of view of the entity which is responsible for CSR, i.e., the corporation, and second from the point of view of the entity that is impacted by CSR, i.e., the society at large, and finally from point of view of the entity that seeks to connect the firm and society, i.e., the regulator. In any national context, the debate on the extent to which CSR activities should be regulated should at least begin with a consensus among these three entities on what constitutes CSR.

Further, as Amaeshi et al. (2006)¹⁹³ point out in the context of Nigeria, CSR in low income countries are predominantly focused on socio-economic issues of poverty alleviation, health-care provision, promoting education and infrastructure development, in contrast to the CSR priorities in Western countries such as issues related to business ethics, fair trade, green marketing, climate

¹⁹² For details of relevant reporting requirements for thirty countries, see KPMG- UNEP (2010).

¹⁹³ Amaeshi, K. M., B.C. Adi, C. Ogbechie and O. Olufemi, 2006. "Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?" *Journal of Corporate Citizenship*, 24 winter, pp. 83-99



change and socially responsible investments. Likewise, the domain of CSR in India as outlined in several public policy documents as well as in the initiatives of corporates and various industry associations is defined around socioeconomic activities geared towards meeting the development goals of the country, while not necessarily sacrificing the economic objectives of the corporates.

The definitions of CSR as presented in the literature and the theories of CSR that underline the rationale for corporates to act in a socially responsible manner, howsoever conceptualized, largely views CSR as voluntary in nature. A corporation decides its optimal CSR as part of its business strategy and subject to market pressures. Such market pressures can emanate from market players, namely, consumers and investors, and from stakeholders and civil society organizations. The government's role in such a scenario is seen to be only limited to endorsing, facilitating and partnering socially responsible behavior of corporates through policy instruments such as tax exemptions for CSR activities, through award schemes and facilitating information dissemination and training, guiding corporates to adopt and implement CSR best practices through standard setting, issuance of voluntary guidelines and certification systems, and forging partnerships with the private sector to promote and execute the CSR agenda including public good provisioning to meet developmental objectives.

Economists and policy analysts have been generally cautious on the issue of whether companies should be mandated to spend resources on CSR activities. At the very basic, economic efficiency dictates that CSR should be kept voluntary and companies would undertake it if the perceived benefits at the margin outweigh the opportunity cost and thereby adds value to the company. It is in this spirit, that countries in general have avoided regulating CSR through mandated spending, and instead have chosen to influence CSR activity through mandatory reporting of such activities, leaving the decision to engage in socially responsible activities to the discretion of the corporation and the forces of the market.

Mandated CSR spending is also seen as an implicit corporate tax which would add to the already high tax burden on corporates and reduce the global competitiveness of Indian companies, and that companies for which CSR makes good business sense would undertake such expenditure anyway, mandated or. With regard to the latter, similar in spirit to the debate between voluntary and mandatory disclosure that if CSR makes good business sense and the market values it, then



managers would build in the optimal level of CSR in their business strategy to signal to the market the social contribution of their companies in line with shareholder expectations. Further, if all firms, efficient and inefficient were undertaking CSR to the same extent, the information content of CSR will become weak and the market will be unable to distinguish the efficient firms from the inefficient ones. Mandated CSR, rather than been seen as filling in governance gaps, is also seen as the abdication of government's responsibility in providing public goods to meet development goals based on "democratically determined priorities". Since the year 2008, in a span of just five years, India has transited from a regime of CSR being a purely voluntary activity with voluntary reporting, to a CSR regime of voluntary activity with mandatory reporting (years 2012) to a regime of mandatory activity with mandatory reporting (year 2013). In the earlier years' firm level CSR decisions were primarily determined by market pressures from consumers, investors, stakeholders and civil society organizations with the government playing the role of a facilitator through information dissemination, issuance of CSR guidelines, encouraging dialogue and fostering public-private partnerships. In the latter years, pursuant to Section 135, the Government has assumed a more proactive and direct role by making CSR reporting and CSR spending mandatory for all firms. The latter role of the government is increasingly in line with the more involved role that states are taking in guiding CSR in emerging economies such as China.

BUSINESS SENSE

Examining the empirical evidence on the relationship between corporate social performance and corporate financial performance, a meta-analysis of 122 empirical studies conducted up to 2001, mostly with respect to the US, concludes that there is predominant evidence of a positive association between a company's social performance and its financial performance. With regard to developing countries, the number of empirical studies is too few to derive any definitive conclusions. A couple of existing studies with respect to Thailand and India does, however, show that CSR has a positive effect on firm valuation.

The results make intuitive sense. CSR activities may lead to temporary reduction in short term accounting profit, but may create market value in the long run. The stock market may reward companies with virtue and ethics leading to lowering of cost of capital and ultimately to higher valuation of the company. Admittedly, these regression results need to be further tested within a



more elaborately specified empirical model, but the initial statistical tests do suggest a strong link between CSR and company performance, both in accounting and market measures.

While the new provisions of Section 135 will certainly lead to an increase in the amount of CSR spending by Indian companies' manifold compared to their existing level, it does recognize that mandated CSR may impose some economic costs on these companies and its shareholders. Accordingly, the provisions of section 135 try to provide a number of flexibilities to ensure that these costs CSR do not hurt the companies and their shareholders disproportionately to substantially reduce the net social welfare gain.

Most economists would like to view the mandated CSR provisions of Section 135 as an implicit tax on the companies. While this is true to a large extent, there is one key difference namely that the current CSR provisions work like a centralized tax with decentralized utilization with project implementation undertaken by private parties. Under explicit taxation there is no guarantee that the money collected by the government will be spent on CSR and not be appropriated for other uses. The implicit tax in contrast, gives companies control over the disbursement over their own funds in a directed manner, with greater incentives to choose the right projects that have synergies with their lines of business operation (which the rules allow for), and greater incentives to monitor its efficient utilization. The upside of such a decentralized mechanism of social spending is that it can lead to better project delivery and reduced fund leakages that are widely perceived to be challenges for the large scale government welfare schemes.

CHANGES INCORPORATED

To formulate and monitor the CSR policy of a company, a CSR Committee of the Board needs to be constituted. Section 135 of the 2013 Act requires the CSR Committee to consist of at least three directors, including an independent director. However, CSR Rules exempts unlisted public companies and private companies that are not required to appoint an independent director from having an independent director as a part of their CSR Committee and stipulates that the Committee for a private company and a foreign company need to have a minimum of two members that must be constituted within the purview.



A company can undertake its CSR activities through a registered trust or society, a company established by its holding, subsidiary or associate company or otherwise, provided that the company has specified the activities to be undertaken, the modalities for utilization of funds as well as the reporting and monitoring mechanism. If the entity through which the CSR activities are being undertaken is not established by the company or its holding, subsidiary or associate company, such entity would need to have an established track record so to say of three years of activities which are necessary to adhere to the stipulations. Companies can also collaborate with each other for jointly undertaking CSR activities. A company can build CSR capabilities of its personnel or implementation agencies through institutions with established track records of at least three years, provided that the expenditure for such activities does not exceed 5% of the total CSR expenditure of the company in a single financial year.

The CSR Rules specify that a company which does not satisfy the specified criteria for a consecutive period of three financial years is not required to comply with the CSR obligations, implying that a company not satisfying any of the specified criteria in a subsequent financial year would still need to undertake CSR activities unless it ceases to satisfy the specified criteria for a continuous period of three years. This could increase the burden on small companies which do not continue to make significant profits.

The report of the Board of Directors attached to the financial statements of the Company would also need to include an annual report on the CSR activities of the company in the format prescribed in the CSR Rules setting out inter alia a brief outline of the CSR policy, the composition of the CSR Committee, the average net profit for the last three financial years and the prescribed CSR expenditure. If the company has been unable to spend the minimum required on its CSR initiatives, the reasons for not are to be specifically addressed. Where a company has a website, the CSR policy of the company would need to be disclosed on such website.

The company can implement these CSR activities on its own, through its non-profit foundation or through independently registered non-profit organizations that have a record of at least three years in similar activities. This provision has led to a boom in the number of NGOs that can implement these CSR activities. A recent article in the Times of India reported that there are over 2m operational NGOs in India.



Choosing the right one from such a large number of NGOs won't be easy. Some organizations such as Samhita Social Ventures are trying to facilitate this process by setting up online portals to assist. These portals group the NGOs across different sectors such as education, sanitation, women's welfare, water, livelihood, and children and also seek to provide a qualitative evaluation of the NGOs.

While the larger companies typically have CSR teams to carry out evaluations and monitor the spends, the SMEs without a specialist team assigned for this activity might find it difficult to plan and monitor the spends. The government regulations allow such SMEs to pool their CSR funds with other companies to achieve scale and share a collective implementation process.

NGO evaluation portals and the pooling of resources by SMEs could help to streamline the CSR investments, and questions will continue to be asked about the government's role in mandating such investments. Even as this debate continues, the more important question that the Indian businesses need to answer is how do we align these governments mandated CSR activities to handle India's socio-environmental challenges while enabling better long term profits for the business?

INDIA AND THE WORLD

Globalization has influenced trade all over the world; companies have looked for new opportunities in doing business outside their home country. In recent years Corporate Social Responsibility (CSR) has gained growing recognition as a new and emerging form of governance in business. It is already established in a global context, with international reference standards set by the United Nations, Organization for Economic Co-operation and Development (OECD) guidelines and International Labour Organization (ILO) conventions. With brand value and reputation increasingly being seen as one of a company's most valuable assets, CSR is now seen as building loyalty and trust amongst shareholders, employees and customers

The purpose of the OECD MNE Guidelines is to offer a balanced, multilaterally-endorsed, and comprehensive Code that expresses the shared values of adhering governments. They are "recommendations jointly addressed by governments to multinational enterprises" that provide "principles and standards of good practice consistent with applicable laws". By providing a clear



set of expectations, the Guidelines seek to encourage the positive contributions multinational companies can make to economic, environmental and social progress

The Guidelines comprise a set of voluntary recommendations in all the major areas of corporate citizenship, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. They form part of a broader OECD investment instrument, the Declaration on International Investment and Multinational Enterprises, which is designed to promote direct investment and international economic development and growth. Implementation of the Guidelines involves a unique combination of binding and voluntary elements. Adhering governments commit to promote them among multinational enterprises operating in or from their territories.

The instrument's distinctive implementation mechanisms include the operations of National Contact Points (NCP), which are government offices charged with advancing the Guidelines and handling enquiries in the national context. NCPs also support a unique mediation and conciliation procedure – called “specific instances” – involving claims that the Guidelines have not been respected. Since 2000, some 160 such specific instances have been considered by the NCPs. This process may be engaged whether or not a company has recognized the Guidelines.

The Guidelines were expressly designed to strengthen the existing international normative framework. Among other norms, they reference the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21, and the Copenhagen Declaration for Social Development. The Guidelines can readily be used in conjunction with other instruments⁹. Explanatory materials have been developed to outline their relationship with the UN Global Compact, the Principles for Responsible Investment, and with the GRI Guidelines.

The UN Global Compact is directed primarily to the business sector, but is a multi-stakeholder initiative and engages all kinds of societal actors, including public agencies, labour and civil society organizations. Companies participating in the Compact initiate their involvement by expressing their support in writing at CEO level. Among other things, each participant commits to integrate the principles into organizational strategy, culture and operations; to publicly advocate



the UN Global Compact and its principles; and to publish annually a “communication on progress”, a description of the ways in which it is supporting the Global Compact and its ten principles. Since its launch in July 2000, the initiative has grown to over 5, 000 participants, including over 3,600 businesses in 120 countries around the world. It is widely regarded as the world’s largest global corporate citizenship initiative.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS:

The Universal Declaration of Human Rights states that “every individual and organ of society” has the responsibility to strive “to promote respect for these rights and freedoms” and “by progressive measures, national and international, to secure their universal and effective recognition and observance”¹¹. As important “organs” of society, businesses have a responsibility to promote worldwide respect for human rights. The ILO Conventions establish norms covering all aspects of working conditions and industrial relations. Some of the most important cover¹² core labour standards (i.e. basic human rights in the workplace). These include the right to freedom of association, the right to organize and to collective bargaining, and freedom from forced labour. ILO conventions are binding on all countries that have ratified them.

THE ILO TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY:

It is a global instrument designed to provide guidance to government, employer and worker organizations in areas of employment, training, conditions of work and industrial relations. All core labour standards are covered. Although it is a non-binding instrument, its implementation is nevertheless the object of regular reviews.

THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK:

It is based on the core labour standards outline in the ILO Conventions. The Declaration is not binding but applies to all ILO member states. As part of a strategy to help countries to have well-functioning labour markets, it provides for a mechanism for annual review of the efforts made by member states that have not yet ratified the core labour standards. The Declaration also reinforces the application of core labour standards in private voluntary instruments. The 1992 Rio Declaration sets out 27 principles defining the rights and responsibilities of states in relation to human



development and well-being. The Agenda 21 agreement provides guidance for governments, business and individuals on how to contribute to efforts to make development socially, economically and environmentally sustainable. Its Chapter 30 recognizes the value of promoting “responsible entrepreneurship”.

THE MILLENNIUM DEVELOPMENT GOALS

It identifies a series of government-agreed targets and timetables in relation to issues such as poverty reduction, improvement of child health care and education, and the promotion of gender equality.

THE JOHANNESBURG DECLARATION ON SUSTAINABLE DEVELOPMENT (2002)

It says that the private sector has “a duty to contribute to the evolution of equitable and sustainable communities and societies”, and that “there is a need for private sector corporations to enforce corporate accountability”. Its Plan of Implementation notes the need to “enhance corporate environmental and social responsibility and accountability”. The UN Framework Convention on Climate Change and Convention on Biodiversity were also signed by a majority of governments.

THE 2005 WORLD SUMMIT OUTCOME

It reiterated the importance of full respect for existing labour, human rights and environmental commitments and encouraged “responsible business practices, such as those promoted by the Global Compact”.

UN CONVENTION AGAINST CORRUPTION (2003)

It ratifies countries undertook to criminalize an array of corrupt practices; develop national institutions to prevent corrupt practices and to prosecute offenders; co-operate with other governments to recover stolen assets; and help each other to fight corruption.

CONCLUSION

In India, till very recently, the focus was on charity, which is not really CSR. Sustainable CSR programmes mean a cohesive mix of economic, legal, ethical and philanthropic tenets. In today’s changed business scenario, there is an increased focus on giving back to society and creating a



model which works long term and is sustainable and it is imperative that the best practices for inclusive growth are shared with the stakeholders. Getting multinationals to comply with local laws is not an easy task. Many countries, north and south, do not direct sufficient resources to enforcement. Management practices that evade regulations persist. Furthermore, labor laws can indeed be difficult to interpret. But suppliers, companies, and countries can't point to these difficulties to elude legal accountability. Legal compliance will be hard to achieve, whether within the CSR rubric or not, but extracting legal compliance from CSR has the advantage of bringing to light a range of workplace and wage issues that companies are required by law to attend to. Finally, the author of this paper hopes that the companies' attitude towards CSR is more on transformation rather than giving information in web sites. CSR has gone through many phases in India. The ability to make a significant difference in the society and improve the overall quality of life has clearly been proven by the corporates. Not one but all corporates should try and bring about a change in the current social situation in India in order to have an effective and lasting solution to the social woes. Partnerships between companies, NGOs and the government should be facilitated so that a combination of their skills such as expertise, strategic thinking, manpower and money to initiate extensive social change will put the socio-economic development of India on a fast track.

The most enlightening is the recent corporate takeover in Kizhakkambalam where an Indian garment manufacturing company called Kitex has taken over the administration of a small village called Kizhakkambalam by winning the local body elections held in November, 2015. Mainstream political leaders and environmental activists feel that this can lead to a dangerous precedent because corporate body can have a hidden agenda in taking over the administration of political bodies. Former Indian MP Sebastian Paul says that "the company was at loggerheads with the former panchayat on issues like environmental pollution so we don't know what their vested interest is in taking over the panchayat. They also employ a big segment of the population there and also give out dole to locals." Environmentalists like C.R. Neelakantan point out that the Kitex group has become active in social service only after they were involved in court cases connected with water and land pollution.

Thus the way forward is one that must be taken after proper deliberation and conduct.



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COMPANY LAW: ITS ORIGIN AND CURRENT STATUS IN INDIA¹⁹⁴

ABSTRACT

The purpose of this article is to give the reader a complete overview of the origin of company in India and its current status. The author has briefly summarized how codified company law came into effect. After summarizing its origin, the author has given a brief insight in the latest Companies (Amendment) Bill tabled in the parliament after the recommendations of the Company Law Committee.

Keywords: Companies Law, Meaning of Company, Origin of Company Law.

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“I don’t believe in a law to prevent a man from getting rich; it would do more harm than good. So while we do not propose any war upon capital, we do wish to allow the humblest man an equal chance to get rich with everybody else”

~ Abraham Lincoln.

The word ‘**Company**’ is an amalgamation of the Latin word ‘Com’ meaning “with or together” and ‘Pains’ meaning “bread”. Originally, it referred to a group of persons who took their meals together. A company is nothing but a group of persons who have come together or who have contributed money for some common person and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose.¹⁹⁵

At first, incorporation seems to have been used only in connection with ecclesiastical and public bodies, such as chapters, monasteries, and boroughs, which had corporate personality conferred upon them by a charter from the crown or were deemed by prescription to have received such a grant. At the same time in the commercial sphere the principal medieval associations were the guilds of merchants, organizations that had few resemblances to modern companies but corresponded roughly to the trade protection associations. The first type of English organization to which the name company was applied was merchant adventures for trading overseas. Royal charters conferring privileges on such companies are found as early as the fourteenth century, but it was not until the expansion of foreign trade and settlement in the sixteenth century that they become common. The earliest types were the so called regulated companies which were virtually extensions of the guild principles into the foreign sphere and which retained much of the ceremonial and freemasonry of the domestic guilds. This process can be traced in the development of the famous East India Company, which received its first charter in 1600, granting it a monopoly of trade with the Indies. But even after that until the second half of the seventeenth century differentiation between the two types of company (unincorporated partnerships and incorporated companies) was not firmly established.¹⁹⁶

¹⁹⁵See: <http://www.legalserviceindia.com/company%20law/companylaw.htm> (Accessed on July 7, 2016).

¹⁹⁶Singh Kumar Rahul, *Origin and Evolution of the Modern Company Law*, Available at: <http://www.legalserviceindia.com/articles/eocindia.htm> (Accessed on July 7, 2016).



The concept of corporate form was brought in for the first time in United Kingdom wherein the body corporate could be brought into existence either by a Royal Charter or by a special Act of Parliament. Both these methods were very expensive and dilatory. Consequently, to meet the growing commercial needs of the nation, large unincorporated partnerships came into existence, trading, however, in corporate form. Rules of law were not being developed by that time which gave a chance to fraudulent promoters to exploit the public money. The English parliament, therefore, passed an act known as the Bubbles Act of 1720, which, instead of prohibiting the formation of fraudulent companies, made the very business of companies illegal. This Act made no attempt to put joint stock companies on a proper basis so as to promote the interest of the industry and trade and also to protect the investors. An almost frenetic boom in company floatation's, which led to the famous South Sea Bubble, marked the first and second decades of the eighteenth century. Most company promoters were not particularly fussy about whether they obtained charters (an expensive and dilatory process), and those who felt it desirable to give their projects this hallmark of respectability found it simpler and cheaper to acquire charters from moribund companies, which were able to do a brisk trade therein.¹⁹⁷

The history of modern company law in England began in 1844 when the Joint Stock Companies Act was passed. The Act provided for the first time that a company could be incorporated by registration without obtaining a Royal Charter or sanction by a special Act of Parliament. The office of the Registrar of Joint Stock Companies was also created. But the Act denied to the members the facility of limited liability. The English Parliament in 1855 passed the Limited Liability Act providing for limited liability to the members of a registered company. The act of 1844 was superseded by a comprehensive Act of 1856, which marked the beginning of a new era in company law in England. This Act introduced the modern mode of creating companies by means of memorandum and articles of associations.¹⁹⁸

India has got the independence from British control 1947 but the process of making & strengthening corporate laws had already begun before that. With the advent of various enactments in England various laws were getting enacted in India too that resulted in acts such as Joint Stock

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*



Companies Act, 1850 of India, Joint Stock Companies Act, 1857 of India, Companies Act, 1866 of India, Indian Companies Act, 1913 but the biggest of all procedural act of independent India came into being in 1956 to be called as Companies Act, 1956.¹⁹⁹

A brief historical background of Companies Act is given below:

Joint Stock Companies Act, 1850: Based on the premises of Joint Stock Companies Act, 1844 of England this act provided for registration of joint stock companies in India & the three Supreme Courts (Madras, Bombay, and Calcutta) were authorized to give order for registration.

Joint Stock Companies Act, 1857: The act introduced the concept of limited liability but the benefits were not extended to banking & insurance companies. The right was afterwards granted through an amendment act.

Indian Companies Act, 1913: Based on the Companies Act, 1908 Of England the concept of Private Limited Company was materialized. This act went through many amendments.

Companies Act, 1956: Based on the recommendations of H.C. Bhabha Committee the biggest of all procedural laws in country was enacted on April 1. 1956 divided into XIII parts with 658 sections, 6 tales & 15 schedules. Companies Act, 1956 repealed all earlier Companies Acts.

Companies Act, 2013: Based on the recommendations of J. J. Irani committee companies bill came into existence in the year 2008 that went through critical evaluations & after due considerations took the shape of Companies Act, 2013. The bill was passed on 18th of December, 2013 by Lok Sabha & Rajya Sabha passed the same bill on 8th of August, 2013. The bill then got presidential assent & was gazetted to become an act. Companies Act, 2013 (the 'Act') not only repealed the Companies Act 1956 but also provides for so many unheard concepts. The act comprises of 29 chapters, 470 clauses & 7 schedules.²⁰⁰ Remarkable changes were introduced in company law in India by the Companies Act, 2013. Major changes were made in relation to accountability, investor protection, corporate governance and disclosures.

¹⁹⁹ Dang Ruchita and Sharma Nishant, *Analyzing Companies Act: A move towards better Governance*, Available at: <http://iosrjournals.org/iosr-jbm/papers/Vol16-issue5/Version-4/D016542632.pdf> (Accessed on July 13, 2016).

²⁰⁰ *Ibid.*



The Act introduced significant changes in the company law in India, especially in relation to accountability, disclosures, investor protection and corporate governance. In view of the extent and scope of changes, the stakeholders took some time to come to terms with the new regime with the new provisions, and encountered some difficulties in the process. Several representations were made to the Government on the practical difficulties faced during implementation. Though a few immediate amendments were made in May, 2015, the Government continued to receive representations that the Act needed further review. The Hon'ble Minister of Corporate Affairs, at the time of consideration of the amendments in the Rajya Sabha in May 2015, also underscored some of these concerns and committed to constitute a '*Committee in which we have the representatives of the Company Secretary institute, the CA institute or some Chambers, plus somebody from the Department, a broad-based Committee, will be constituted to go into this whole question for the next few months as to where the shoe pinches*'. In view thereof, the Ministry of Corporate Affairs (the "MCA") constituted the Companies Law Committee (the "CLC" or the "Committee") under the chairmanship of the Secretary, Ministry of Corporate Affairs vide an office order dated 4th June, 2015.²⁰¹

After extensive consultations with stakeholders and exhaustive deliberations, the Committee on February 1, 2016 issued a report²⁰² proposing changes in 78 Sections of the Act which along with consequential changes, would result in about 100 amendments to the Act and approximately 50 amendments to the Rules. The Committee has endeavored to reconcile the competing interest of the various stakeholders keeping in mind the difficulties and challenges expressed by them and also being mindful of the government's objectives of furthering the ease of doing business. The Report prepared by the Committee recommends several changes to the Act which are necessary for its proper and effective implementation. While some of the changes suggested are for the purpose of removing ambiguities in the provisions, other recommendations are more substantial in nature.

In relation to definitions of certain terms used in the Act, the Committee recommended changes/improvements to the definitions of Associate Company, Debentures, Financial Year,

²⁰¹ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016.

²⁰² *Ibid.*



Holding Company, Interested Director, Key managerial personnel, Net worth, Related Party, Small Company, Subsidiary Company and Turnover amongst others. These modifications have been proposed to remove ambiguities and make the definitions more objective. The amendments proposed to the provisions relating to incorporation of companies relate to allowing unrestricted object clause in the memorandum of association, and certain filing and registration related requirements. These amendments have been proposed to make the process of incorporation simpler and provide greater flexibility for carrying out business.

While the changes proposed in relation to these provisions are expected to help businesses in raising capital, they also take into account the interests of all stakeholders by ensuring that adequate disclosures and appropriate safeguards against misuse are retained. The amendments relating to provisions dealing with registration of charges are aimed at providing some relaxations so as to facilitate the ease of doing business. The recommendations of the Committee relating to declaration and payment of dividend are aimed at harmonizing the provisions in the Act and Rules to provide correct interpretation and for addressing some loopholes to ensure that businesses do not misuse the provisions to pay out dividend out of the company's capital. The Committee has also suggested changes to the provisions relating to accounts and audit to improve transparency and the quality of information in relation to the financial position of the company. These recommendations also address ambiguities in relation to calculation of profits for determination of a company's 'corporate social responsibility' obligations.²⁰³

Based on the recommendations of the Committee Report and suggestions from various ministries and departments, the Government of India on March 16, 2016 proposed the Companies (Amendment) Bill, 2016, (the "Bill") in the Lok Sabha to amend the Companies Act, 2013. The Bill covers all major changes recommended by the Committee.

²⁰³ *Ibid.*



MAJOR CHANGES PROPOSED IN THE COMPANIES (AMENDMENT) BILL, 2016:

1. **Simplification of the private placement process discarding the filing requirement of offer letter details of the offer:**²⁰⁴

As per the recommendation of the CLC, the Bill proposes to carry on private placement based on the Board's resolution. For issue non-convertible debentures, a prior special resolution only once in a year has been prescribed. They are pure debt instruments and if issued within the prescribed limit of the Board's power, there should be no requirement for the shareholder's approval. Accordingly, the proviso to Rule 14(2) of Companies (Prospectus and Allotment of Securities) Rules, 2014, many be amended.

The Bill has proposed in the improvement in the process by discarding the filing requirement of offer letter and details of the offer. The Committee recommended discarding filing of the Private Placement Offer Letter in Form PAS-4 with the Registrar. The Registrar is informed by the virtue of the filing of the Board's resolution under Section 117 of the Act. Private Companies are exempted from filing the Board's resolution with the Registrar. However, Board's resolution relating to the private placement of non-convertible debentures shall be filed with the Registrar. This is to sort out the information gap arising out of the proposal to dispense with the requirement to file copy of details of the offer along with Form PAS-4. However, the return on allotment in Form PAS-3 shall be filed within the prescribed time of 30 days of allotment in Form PAS-3.²⁰⁵

2. **Authentication of documents by any employee of the company authorized by the Board in place of present requirement of authentication by key managerial personnel or officer authorized by the Board:**

The term "*officer*"²⁰⁶ under the Act is defined as "*Officer* includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one more of the directors is or are accustomed to act."

It is an inclusive definition. It is possible to rank employees other than director, manager or key managerial personnel as officer. The Company Law Committee recommended in favour

²⁰⁴ See: Section 42 of Companies Act, 2013.

²⁰⁵ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016

²⁰⁶ See: Section 2(59) of Companies Act, 2013.



of diluting the rigidity of Section 21²⁰⁷ that requires key managerial or officer of the company to authenticate the documents may be done by ‘any employee of the company authorized by the Board’.²⁰⁸ The spirit of Section 21 of the Act, on the contrary, is to improve corporate governance by ensuring senior level employee in the organizational hierarchy to authenticate documents, proceedings, and agreements/contracts. The relaxation of the requirements would encourage the Board go down the organizational hierarchy to by-pass the penal provisions of the Companies Act, 2013. The Bill has accepted this recommendation and proposed to substitute the words “an officer of the company” in Section 21 of the Act, with “an officer or employee of the company”.

3. Incorporation of companies with unspecified object clause to carry out lawful activities:

Section 4(1)(c)²⁰⁹ and Schedule I of the Act require the Memorandum of every company to state “*the Objects for which the Company is proposed to be incorporated and any matter considered necessary in furtherance thereof.*” The Committee observed difficulties in the approval of name of a company and the allotment of Corporate Identity Number for a company with multiple objects. The UK Companies Act, 2006 provides that a company’s objects will be unrestricted, unless the articles specifically restrict them. In view of these, the Company Law Committee recommended for incorporation of companies with generic object clause. Therefore the Bill proposed to substitute Section 4(1)(c) with the following text, “*that the company may engage in any lawful act or activity or business, or any act or activity or business to pursue any specific object or objects, as per the law for the time being in force*”²¹⁰.

4. Amending definitions of Associates and Subsidiary:

Section 2(6) of the Act defines the term “associate company”, in relation to another company, to mean a company in which the other company has a significant influence, but is not a subsidiary company of the company having such influence, and also includes a joint venture company. The Explanation²¹¹ to Section 2(6) defines the phrase “significant influence” to mean

²⁰⁷ See: Section 21 of Companies Act, 2013

²⁰⁸ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016

²⁰⁹ See: Section 4(1)(c) of Companies Act, 2013.

²¹⁰ Companies (Amendment) Bill, 2016, Available at:

<http://www.prsindia.org/uploads/media/Companies,%202016/Companies%20bill,%202016.pdf> (Accessed on July 20, 2016)

²¹¹ See: Explanation to Section 2(6) of Companies Act, 2013.



control of at least twenty per cent of the total share capital, or of business decisions under an agreement. The term “total share capital” has been defined in Rule 2(1)(r) of the Companies (Specification of Definitions Details) Rules, 2014, to mean the aggregate of (a) paid-up equity share capital; and (b) convertible preference share capital. The term “significant influence”, in the Explanation to Section 2(6), refers to ‘total share capital’ which includes preference share capital. Replacing ‘total share capital’ with ‘total voting power’ would be consistent with accepted principles. The Committee, therefore, recommended that the Explanation to Section 2(6) should read as “For the purposes of this clause, ‘significant influence’ means control of at least twenty per cent of the total voting power, or control of or participation in taking business decisions under an agreement.”

Further, even though the Act makes references to the term “joint venture” as an inclusive part in the definition of the term “associate company”, it would be appropriate to define the term. Definition of ‘joint venture’ as contained in the Indian Accounting Standard (IndAS) 28 was considered as a comprehensive definition for the purpose. The Committee, therefore, recommended that the term “joint venture” may be assigned the same meaning as under Indian Accounting Standard (IndAS) 28 as part of the Explanation to Section 2(6) itself.²¹²

The Bill accepted the recommendation of the CLC and has proposed to modify the definition of associate company, subsidiary and joint venture.

5. Relaxation of auditors’ independence norm in respect of financially independent relatives:

Section 141(3)(d) of the Companies Act, 2013²¹³, states that a person is not be eligible for appointment as an auditor of a company, if he, his relative or partner holds any security, gives a guarantee or is indebted to the company for specified amounts. The Committee received suggestions expressing the difficulty in the applicability of the provisions of Section 141(3)(d) as the auditors do not have any control over the financial matters of the relatives who are not

²¹² Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016

²¹³ See: Section 141 of Companies Act, 2013.



financially dependent on the auditor. Therefore the Committee recommended that the term “relative” be restricted to only financially dependent relatives.²¹⁴

Accordingly, the Bill proposed to add the following Explanation to Section 141(3)(d) of the Companies Act, 2013. “For the purposes of this clause, the term “relative” means the spouse of a person; and includes a parent, sibling or child of such person or of the spouse, financially dependent on such person, or who consults such person in taking decisions in relation to his investments.”²¹⁵

6. Dispensing with the annual ratification of the appointment of auditors:

Section 139(1)²¹⁶ provides that the shareholders at the ‘Annual General Meeting’ (AGM) shall appoint an auditor of a company, for a consecutive period of five years, and that his appointment shall be ratified every year at the AGM. The first proviso to the said sub-section requires the company to place the matter relating to such appointment, for ratification by the members in each AGM. During the consultation, clarity was sought for cases where the shareholders choose not to ratify the auditor’s appointment as per Section 139 (1). A clarification was also sought for cases where the auditor was unwilling to continue at any stage before the completion of his five-year term; whether this would be treated as a casual vacancy. The Committee felt that the objective of Section 139(1) is to ensure independence of auditors and any decision taken by the shareholders not to ratify any appointment during the period of five-years would be akin to removal of the auditor and provisions of Section 140(1) should come into play. Explanation to Rule 3 of Companies (Audit and Auditors) Rules, 2014, provides for such a situation and requires that the Board shall appoint another individual or firm as the auditor (s) after following the procedure laid down in this behalf under the Act. There is an inconsistency due to the two provisions, wherein removal would require a special resolution and approval of the Central Government while removal through non-ratification would need a resolution. The Committee felt that it would be advisable to omit the provisions with respect to ratification, as it defeats the objective of giving five-year term to the auditors. This would also remove the inconsistency in the Act.

²¹⁴ *Ibid.*

²¹⁵ Companies (Amendment) Bill, 2016, Available at: <http://www.prsindia.org/uploads/media/Companies,%202016/Companies%20bill,%202016.pdf> (Accessed on July 20, 2016)

²¹⁶ See: Section 139 of Companies Act, 2013.



This recommendation was accepted and accordingly it is proposed in the Bill to omit Section 139(1) from the Companies Act, 2013.

7. Investment made in a company through an investment company:

The Committee felt that the layering restrictions on investment companies under Section 186(1) of the Act may become too obtrusive and impractical in the modern business world. Regulatory concerns arising out of earlier scams were also noted. The Committee noted that while companies that became a subsidiary of another investment company due to any corporate action such as the non-subscription of a rights issue from the layering requirements, etc. could be exempted, it would not address the core issue that there may be several legitimate business justifications for use of a multi layered structure, and such restriction hampers the ability of a company to structure its business. The Committee felt that sufficient safeguards have been built into the oversight mechanism of SEBI and Stock Exchanges, and the recommendations on Beneficial Ownership register requirements should dispel the regulatory concerns. Keeping this in mind, the Committee recommended that the restrictions on layering as contained in the section be omitted.²¹⁷

8. Prohibition on forward dealing and insider trading of securities:

The Companies Act 2013 vide Sections 194 and 195 restrict forward dealing by directors and KMPs and insider trading by any person including directors and KMPs respectively. The aforesaid provisions are seemingly applicable in respect of both private and public companies. Prima facie, Section 195 seems to be applicable to private companies and restricts insider trading. However, it can be argued that since the securities in private companies would not be marketable, as a market in securities in the absence of an alternative market platform would mean a stock market on which securities of different companies are listed for the purpose of trade, they would not qualify as securities within the meaning of Section 195, and thus would exclude private companies from the ambit of the said provision. On the same basis, it would be unjustified to apply the insider trading regulations to private companies. It can also be argued, on the basis of legislation in some jurisdictions, that there are valid reasons for including the insider trading prohibitions in company law in addition to securities law, and these flow from the fiduciary responsibilities of the directors who may abuse their position and

²¹⁷ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016



use confidential information, which have come to them through their position, for personal profit and not act in the best interests of the company. However, insider trading prohibitions can be problematic in the context of the rights of first refusal that are frequently contained in the shareholders' agreements of private companies. The Committee deliberated on the issues involved and noted that SEBI regulations are comprehensive in the matter (and also apply to companies intending to get listed), and in view of the practical difficulties expressed by stakeholders, recommended to omit the relevant provisions of the Act.²¹⁸ Accordingly the Bill has accepted the recommendation and has proposed to omit Section 194 and 195 of the Act.

9. Relief from unspent CSR contribution:

Section 135 (1) requires every company having a net worth of Rupees Five Hundred Crore or more; or a turnover of Rupees One Thousand Crore or more; or a net profit of Rupees Five Crore or more, during any financial year, to constitute a 'Corporate Social Responsibility Committee' of the Board, consisting of three or more directors, out of which at least one director has to be an independent director. Rule 5(1) of CSR Policy Rules, 2014, allows unlisted companies, private companies, and foreign companies, to have the Committee with less than three directors, and without Independent Directors, where they were not required to be appointed. In this regard, the Committee recommended that, the composition of CSR Committee for companies not required to appoint Independent Directors be prescribed as 'having two or more Directors'.

The High Level CSR Committee, in its report²¹⁹ have suggested clarity to be brought in with regard to 'any financial year' as used in Section 135(1) for determining whether the threshold of specified net worth or turnover or net profit is met to constitute the CSR Committee. The Committee recommended that the words "any financial year" be replaced by the words 'preceding financial year'.

Rule 2(1)(f) of CSRP Rules, 2014, requires dividend income, etc. to be excluded while calculating the net profit for the purposes of CSR spending. This would lead to an incongruous situation, wherein companies which were not required to spend on CSR, would nevertheless, be required to constitute CSR Committees. Thus, the Committee recommended for this

²¹⁸ *Ibid.*

²¹⁹ Ministry of Corporate Affairs, Government of India, *Report of the High Level Committee*, September 2015



inconsistency to be removed by providing prescriptive powers to exclude certain sums from net profit in Section 135(1) itself.²²⁰ The Bill therefore proposed to add the following explanation to Section 135(5) of Companies Act, 2013. ‘For the purposes of this section “net profit” shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.’²²¹

10. Relaxation of the punishment for fraud:

Section 447²²² of the Act lays down the punishment for any person found guilty of fraud to imprisonment not less than six months but which may extend to ten years and fine not less than the amount involved in fraud but which may extend to three times the amount involved. Further, in case the fraud involves public interest, the minimum imprisonment shall be not less than three years.

Section 447 of the Act lays down the punishment for any person found guilty of fraud to imprisonment not less than six months but which may extend to ten years and fine not less than the amount involved in fraud but which may extend to three times the amount involved. Further, in case the fraud involves public interest, the minimum imprisonment shall be not less than three years.²²³ The Bill therefore proposed the following amendments to Section 447. After the words “guilty of fraud”, the words “involving an amount of at least ten lakh rupees or one percent of the turnover of the company, whichever is lower” shall be inserted. After the proviso, the following proviso shall be inserted, “Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.”²²⁴

²²⁰ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016

²²¹ Companies (Amendment) Bill, 2016, Available at:

<http://www.prsindia.org/uploads/media/Companies,%202016/Companies%20bill,%202016.pdf> (Accessed on July 26, 2016)

²²² See: Section 447 of Companies Act, 2013.

²²³ Ministry of Corporate Affairs, Government of India, *Report of the Companies Law Committee*, February 2016

²²⁴ Companies (Amendment) Bill, 2016, Available at:

<http://www.prsindia.org/uploads/media/Companies,%202016/Companies%20bill,%202016.pdf> (Accessed on July 26, 2016)



The Bill has been proposed in accordance with concept of ‘ease of doing business in India’ and to bring Indian Company Law in sync with the global standards. These proposals indicate that the authorities continue to address the practice challenges being faced by the companies while implementing the Act. If the proposed Bill is passed and is enacted as Law, there will be a massive change in way the corporate world works in India.



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E-COURTS IN INDIA²²⁵

ABSTRACT

Indian judicial system was set-up by the British in mid-19th century, that is, based on English Legal System²²⁶. Since there has been a modification with respect to powers, but no such amendment to the judicial system is able to reduce the pendency of cases at all the three levels of the Indian Judiciary. Consequently, the cases are delayed and justice is existing for name sake only in a number of cases (not in all cases), especially in criminal cases where the rape victims or the family of the victims have to wait for donkey's years for justice²²⁷. A major reason is dearth of judicial officers, that is to say, poor judge population ratio. Apart from this other reasons are sluggish staff, delay in filings, bribery to the staff of court, poor support to court by police authorities and other state authorities etc. One of the main remedy to reduce pendency and some of the reasons increasing such pendency is to make the processes available online. This has been considered as a major judicial reform by the central government and the courts as well. Thus, like all other organs of democracy, Judiciary is also endeavoring and persevering earnestly to transform itself by implementing tools and means of Information and Communication Technology (ICT)²²⁸. Now as the technology is improving and the size of equipment is shrunk, experimentation in some American Courts (e-courts) provide to be fruitful, therefore the same has been adopted in India. In India the ICT in subordinate judiciary (courts below district and sessions court) is facing resistance as the lawyers and judges there are not computer friendly. Thus, E-Courts help in reducing burden on judges, lawyers, leading to decline in the pendency of cases.

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²²⁶ http://www.supremecourtindia.nic.in/speeches/speeches_2008/abu_dhabi__as_delivered.pdf.

²²⁷ <http://lawcommissionofindia.nic.in/51-100/report77.pdf>; Law commission 's seventy seventh report gives a brief glance to the problem

²²⁸ http://interscience.in/IJIC_Vol1Iss2/paper4.pdf



HISTORY/TIMELINE

The 35th Chief Justice of India (CJI), Justice Ramesh Chandra Lahoti, made a proposal to the Central Government under the letter dated 05.07.2004 addressed to the Minister of Law and Justice for constitution of an E-Committee to assist him in formulating a National Policy on computerization of Indian Judiciary and advise technological, communication and management related changes. Assent to the committee was given by union cabinet in 28.12.2004. Accordingly, the committee was constituted and the first chairman of the committee was G.C. Bharuka, former Judge of High Court of Karnataka. The committee had other three members which were member-judicial (rank of a district and sessions judge), member- technical (rank of Director General, Technical, minimum qualification, M.Tech) and member-management/Human Resource (Joint secretary of Government of India) and other support staff like stenographer, clerks etc²²⁹. The committee begun to work and is now also working on computerization of courts in the country. The main tasks of the committee involve formulate, implement and monitor the computerization policy of the Indian judiciary. Also, the support work of the committee includes training of judges; ensure means for smooth running of the computer systems and to work on any other matter as suggested by CJI. The computerization was started with the Supreme Court of India, followed by all the 24 High Courts and later done in district and sessions court, but some courts subordinate to district and sessions courts are yet to be computerized. Still none of the court in the country can be called as an E-Court as all the elements of e-courts are not covered.

Dr. APJ Abdul Kalam Azad (2007), the former President of India, initiated the e-Judiciary system as a national policy and an action plan for the embedding, and implementation, of ICT within the entirety of India's judiciary. Also Dr. Pranab Mukherjee said —In order to speed up delivery of justice, the Plan provision for Department of Justice for 2011-12 has been increased three-fold to 1,000 crore for e-courts²³⁰. The Government approved the computerization of 14,249 district & subordinate Courts under the project by March 2014 with a total budget of Rs. 935 crores. Current chairman of the e-committee is Justice Madan B. Lokar and Mr. Ashok T. Ukrani, Member

²²⁹ <http://supremecourtsofindia.nic.in/ecommittee/ecommittee%20officeorder.pdf>

²³⁰ <http://www.hcidhaka.gov.in/pages.php?id=488>; High Commission of India



(Judicial), Dr. H. K. Suhas, Member (Technical), Mr.A.Ramesh Babu, Member (Management / Human Resources)²³¹.

NEED/REQUIREMENT

E-courts project was initiated with the main object to reduce the pendency of cases. Apart from this to conserve environment as a lot of paper is used in the courts in filing of petitions, recording of evidence, rejoinders, giving copies thereof etc. Also, to streamline the day-to-day activities of the courts, ICT in court will be helpful. To make the system more transparent for litigants is another object of e-courts. To provide access to legal and judicial databases to the judges (magistrates as well) makes the requirement of e-courts all the more evident. Furthermore, such nexus of courts at the three levels can improve the efficiency and communication. Thus, e-court project was launched and is now considered as an important part of e-governance (initiated by National e-governance, the department of IT, Ministry of communication and IT, Government of India) division, government project²³².

POLICY AND ACTION PLAN

National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary (NPAPICT) prepared by the e-Committee of Supreme Court of India in 2005 and approved by the Chief Justice of India. The whole project implementation has been divided into three phases for the implementation purposes for which phase I has been completed; phase II is continuing and phase III will start soon. All the 3 phases involve certain set of activities which are to be followed to make the existing courts, e-courts in the true sense. The policy and action plan is a five year project²³³. In Phase I of the policy and action plan (e-court integrated mission mode project), basically involves preliminary steps for computerizing courts, and also steps essential for next two phases like training of judicial officers in the use of Ubuntu-Linux Operating System (for their laptops). This has been achieved by training 218 judicial officers from all over the country as Master Trainers in different locations around the country²³⁴. The

²³¹ <http://doj.gov.in/e-book.pdf>; Short report on e-courts by ministry of Law and Justice

²³² http://arc.gov.in/11threp/arc_11threport_ch4.pdf; Indian Government 's report on e-governance

²³³ http://supremecourtindia.nic.in/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf

²³⁴ <http://karnatakajudiciary.kar.nic.in/noticeBoard/e-Newsletter-V1.pdf>; Karnataka Judiciary Official sites



phase also involves setting up of Judicial Service Centre at all computerized courts which would serve as a single window for filing petitions by lawyers and litigants, as also obtaining information on ongoing cases and copies of orders and judgments etc. E-committee has also initiated the process re-engineering in High Courts to give a fresh and simplified look to procedures and rules which would also help in ironing out creases and easy implementation of the phase II. One of the most of important of phase is creating National Judicial Data Grid which was created on 7th August 2013 (launched by the CJI) and this will be further improved in a phased manner²³⁵.

Phase II of the policy and action plan started on 16th July 2015 after receiving assent from the union cabinet and the duration for its completion is 2 years but which may extend to 3 years as well²³⁶, which as per the initial plan had to be launched on April 1, 2014²³⁷. The phase involves enhancement of computer infrastructure in courts as compared to phase I. The thrust in Phase II of the Project will be on software applications (including mobile phone applications) and will be citizen-centric. FOSS without any licensing / subscription charges will only be considered for adoption for which the complete source code with build and installation procedures can be made available to the courts. Further it involves hardware implementation of computer to District and Taluka courts, and District Level Legal Services Authorities and their software integration with the courts under which they fall, that is to say their information to be available online on the respective courts' website. The phase for maintain and enhancing the ICT involves setting up of computer laboratory in state level judicial academies. Other activities to be implemented the phase involve computerization in library which involve availability of law e-journals, Integrated Library Software Management is there to cater to all functions of a library that is acquisition, circulation, catalogue generation; solar energy for power back-up so that e-courts are not only effective but also efficient in terms of use of electricity; discontinuation of manual registers; scanning and digitization of records; court record room management automation, e-payment of court fees etc²³⁸. The main point is 1670 crore rupees (only for phase II) have been allotted which is more than the

²³⁵ <http://164.100.47.132/LssNew/psearch/QResult16.aspx?qref=5570>; Site of National Judicial Data grid

²³⁶ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=123318>; Official Press Release of the phase II

²³⁷ http://supremecourtindia.nic.in/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf; Phase II of the plan

²³⁸ <http://proudtechnologies.com/E-courtupdatedetail.aspx?var1=26>; Only the Phase II of the article is to be considered in this context



earlier limit of the plan²³⁹. Phase III would of 1 year of the year project and would include use of advanced ICT tools, intensive training, warehousing and mining tool customization to crystallize change management, Biometric facilities, Gateway interface with other agencies. Up gradation of centralized facility Digital Archive and also other activities to computerize courts expected to come by 2017 (as per the initial plan)²⁴⁰. The phase will soon come into its manifestation stage and is the advanced stage of the project. The inconsistencies which exist in the legal system of the country exist in the five-year plan as well, evidenced by the delay in the implementation of the plan. Also, one of the root causes of the delay is resistance shown by the judges and lawyers²⁴¹. Political turbulences (change in government) are also major reason for the long and torturous delay. The change can be witnessed as a result of May 2014 election.²⁴²

COMPONENTS

E-CCMS Web 1.0 (Web Based Court Cases Monitoring System): The Web-based Court Cases Monitoring System (E-CCMS Web) facilitates the monitoring of court cases of any type pending in different courts. It can provide the latest information about any pending case. It assists officers to track cases, prepare cause-lists in advance, and maintain a complete history of cases including follow-up action taken.

E-Litigation -This project was started to help the Law & Judicial Department in India to monitor the court cases that were being handled by the various government department in Delhi. It offers a facility for the online process of engagement of counsels for court cases. The SMS facility to Government Counsels has been incorporated into the system.

Integrated Software for Judicial Functions of High Courts: This project provides a complete workflow solution for High Court, including filing, refiling, and scrutiny, detailed entry of the case, case grouping, cause list allocation, generation, and case status. Besides this, case status, cause list & judgments on the website <http://highcourthd.gov.in> can be accessed. Litigants and

²³⁹ 4 <http://www.networkedindia.com/2015/07/20/courts-set-to-be-ict-enabled-as-ecourts-pha-se-ii-is-approved/>

²⁴⁰ <http://pib.nic.in/newsite/erelecontent.aspx?reid=12506>; Inauguration notice of the said five-year programmer and ibid. footnote 12

²⁴¹ <http://www.governancenow.com/news/regular-story/spot-e-missing-e-courts-come-soonhopefully>;

²⁴² <http://www.theguardian.com/world/2014/jul/03/india-pm-modi-sweeping-changes-gover-nment-offices-cleanup>; the change in government in 2014



lawyers can also access the status of their cases through 6 touch screens installed in the High Court building.

E-Filing system- The High Court of Punjab and Haryana, in Chandigarh is the first high court to start the e-Filing system. Previously, the Supreme Court of India had also started e-filing through which lawyers can file litigation after submitting the petition in soft copy in compact disc (along with e-payment of court fee, if any).

E-Cause List Cause lists are the scheduling of cases to be heard by the Courts on the following day. The National Information Centre Division in the courts maintains the Cause lists of the Supreme Court and 24 High Courts. With the help of e-Cause lists advocates are able to download their cause list as soon as lists are generated every evening. E-cause lists have had a significant impact by (a). helping to prepare the case, (b) advocates can generate a customized cause list with their own case list, (c) the general public can check the listing of a case. (d) it saves money, time and effort of advocates and parties²⁴³.

Case status This service allows both the advocates and the people to know the status of a case whether pending or disposed of. It provides daily orders and gives the latest information which includes party names, subject category, disposed of details, advocate, the waiting position, the date of the next hearing and the last date of listing.

Kiosks -Kiosks can be there in facilitation centers in courts which would also be helpful in remote areas and villages. This can be done with the help of tie-up with Bank-ATMs. Litigants can save their time and cost.

E-mail communication systems- Installing e-mail communication systems would help inter and intro court communication, thereby saving the time of judges like the order form superior court can reach to the subordinate court easily. This is already being carries out in Delhi District courts. Judges are required to fill an application form to get the court's e-mail id and allotment of the digital signature.

²⁴³ For details see <http://ecourts.gov.in/rudraprayag/e-court-project>



IVRS systems and SMS facility- Progress and status of pending cases can be made available on IVRS for enquiry. This facility is already operational in the Apex Court. Automated SMS response system to give details of cases on the basis of case ID This is tested in Delhi District Courts. This would save time of people, accurate information would be available, no need to come to court complexes to enquire about a case. Europe and US are lagging behind in this field.

Dictation Capturing System -There should be dictation capturing systems for judges in the courts like dragon natural speaking software, Dictaphones etc.

Recoding of evidence- Though the court admits electronic evidence and the provisions for the same have been made in the Indian Evidence Act, 1872, like sections 22A, 34, 35, 39, 65A, 65B, 81A etc. of the act. IT Act, 2000 has provisions for it (like sections 92, 93 etc). In *Anvar versus Basheer Ahmed*²⁴⁴, latest rule of admissibility of electronic evidence was laid. However, admissibility of electronic evidence is something different from making the whole procedure of recording any evidence electronically; which sends the copies thereof to the parties²⁴⁵.

CONSTITUTIONAL BASIS OF E-COURTS

E-courts helps in reducing the burden on courts, thereby giving them more time to deal with cases of greater importance and expeditious trial is one of the main principles of a fair trial²⁴⁶ and not providing an expeditious trial challenges the fundamental right to life²⁴⁷ as enshrined in Article 21 of the Constitution of India, 1950²⁴⁸. Speedy trial is an essential ingredient of 'reasonable, just and fair' procedure guaranteed by article 21 and it is the constitutional obligation of the state to set up such a procedure as would ensure speedy trial to the accused. The state cannot avoid its constitutional obligation by pleading financial or administrative inadequacy. Inordinate delays violates article 21 of the constitution for more than 11 yrs. the trial is pending without any progress for no faults of the accused-petitioner. Expeditious rights are a basic right to everybody and cannot be trampled upon unless any of the parties can be accused of the delay. Delay in trial unnecessarily

²⁴⁴ AIR 2015 SC 180

²⁴⁵ <http://www.nic.in/state/Punjab?page=1&qt-states=1>

²⁴⁶ https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf

²⁴⁷ *Motilal Saraf v. State of J & K*, (2006) 10 SCC 560

²⁴⁸ Article 21- Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law



confers a right upon the accused to apply for bail. Under sections 482 read with 483, Code of Criminal Procedure, 1973 lays that every possible measure to be taken to dispose off the case within 6 months from today. No adjournments to be granted until n unless circumstances are beyond the control of judiciary. It is the responsibility of the judiciary to keep a check on under trial prisoners and bring them to trial. Overcrowded courts, inadequate resources, fiscal deficiency cannot be the reasons for deprivation of a person²⁴⁹ .

Therefore, as part of it, the procedure of bring about technology was introduced. It is one of the magnificent aspect of the transformation of the judicial system.

VIDEOGRAPHY/VIDEO-RECORDING

When motion picture cameras came into vogue, the cost of recording proceedings was prohibitive and outweighed the utility. Moreover, the sheer size of equipment, the glaring lights and the cables were nuisance, and the objection of the judges and lawyers (as to disturbance on that account) was justified. Many members of the legal community thought it would interfere with the decorum of court proceedings. This is how, till early 1990s, still cameras, microphones and tape recorders and motion pictures and television are kept out of courtrooms, the world over. Now the size of technology has shrunk, one can see video recording by the way of cameras everywhere, except in the courts. There are numerous of uses of video coverage in courts like use of excerpts from trials from news programming, use the recording to aid judicial proceedings and processes, sending picture by closed circuit to another room where people can watch without causing disturbance in the courtroom, the tapes can be material for the use of criminologists to study the behavior of the accused at a later stage etc. The two main objectives it will serve are, first, give a more accurate record and second, prevent improper conduct before the courts. In criminal courts, in particular, the accuracy in recording the spoken word of the witnesses assumes greater importance. The cameras should be place throughout the court complex (which is being done) and in the court rooms at all the four corners. The existing wooden witness box should be replaced by new ones, equipped with two cameras on each of the side focusing on statements of the witnesses. Statements of witnesses are lifelines of the case and cameras proximate to witnesses would ensure clear and proper recording of statements without any disruption. The cases can be presented in a lucid

²⁴⁹ *Hussainara Khatoon (IV) v. State of Bihar*, (1980) 1 SCC 98 at 107



manner and it can be easily identified how much time of the court is wasted and in what process of the proceeding, if the proceedings are recorded leading to better case and litigation management. Also, the general ambiance of the court complex will be improved in terms of cleanliness and discipline as the courts' staff and employees would know that they are being observed by the cameras, though it may not be the primary purpose for their installation. Installation of cameras and video cameras is one of the important steps that need to be taken to achieve the object of e-courts. Currently this issue is under debate and various dignitaries (CJI, CJ of High Courts, and Chairman- Law Commission of India) had a discussion on it²⁵⁰ .

E-ALTERNATIVE DISPUTE RESOLUTION (ADRS)

Online arbitration is similar to traditional arbitration. However, online arbitration basically relies on information technologies to carry out the arbitral processes. The arbitrator or arbitrators are usually appointed electronically by the parties or by an institution chosen by the parties. The hearing and submission of relevant arguments and evidence as well as the rendering of an arbitral award is done electronically. Online mediation is the online form of traditional mediation. Just like in traditional or offline mediation, a neutral third party with no powers to impose a binding decision on the parties assists the parties to reach an amicable settlement of their dispute. However, the only difference is that communication between the parties and the neutral third party in the dispute resolution process is carried out with the aid of information communication technologies. Most times, the entire mediation proceedings may not require the physical meeting of the parties. Negotiation is a dispute resolution mechanism that involves direct communication between disputants with the aim of arriving at a mutually- accepted agreement without the assistance of a third party. In an online negotiation, information technologies are adopted to aid parties reach a mutual settlement of their dispute without any form of third-party interference. Courts can integrate these ADRs to take follow up after giving (by court) or choosing (by parties) of the particular ADR mechanisms and give the update of such proceedings on their respective site.

²⁵⁰ 5 <http://timesofindia.indiatimes.com/india/No-video-recording-of-court-proceedings-Supreme-Court/articleshow/45771221.cms>, Indian Supreme Court denied for videography in courts



E-POLICE STATION

Recently a few police stations became online functional as well. Delhi Police station was the first to come online and others police stations are coming as well, but they only relate to theft of vehicles as of now. The police stations should start an online registration of FIR system and the FIRs so registered should reach the magistrate's desktop or laptop (e-mail ID allotted to him, for which he has to fill a particular form), and presence of accused can be obtained within 24 hours of his arrest (As per article 22 of the constitution of India, 1950) and section 57 of the CrPC, 1973. This would improve the present scenario and would reduce to large extent extra-judicial killings. Therefore, support of police stations is indispensable for the appropriate functioning of the e-courts.

DRAWBACKS

There are quite a few drawbacks of e-courts which cannot be overlooked, but the benefits of such courts can outweigh them to a great extent. Some of these drawbacks include low personal touch of the judge with cases, loses of jobs to the courts' staff as replaced by the machines, lawyers who are not computer friendly face difficulties, chances of hacking are always there when computers are involved, costs involved are exorbitant, in case of e-ADR processes people may not agree as not having faith on the online appointed arbitrator, mediation may not be successful as making it online would reduce personal skill application of the mediator as he tries that the parties reach a compromise etc.

UNITED STATES OF AMERICA (USA)

USA has been working on the e-courts project for past 30 years and is a way ahead of India. Comparatively USA has more online services available in context of court related matters juxtapose appointment of legal counsel, string of arguments, information about the bankruptcy laws, pretrial and probation services etc. India is in the infancy stage of the development. USA has now lately developed in October 2015 revised opinion columns where revised opinions. Internet sources cited in opinions etc have been introduced. There is a need to provide the arguments



available online in order to reduce paper wastage in India. Transition in USA was slow and gradual one²⁵¹ .

UNITED KINGDOM (UK)

UK's e-court system is not a purely governmental set up but involves partnerships with lawyers, barristers etc. and is a kind of private court which offers speedy justice in case of civil disputes within a period six weeks after the notification of the case. It is more like a private court as UK refers it so, unlike the e-courts in India. There is a full online procedure to guide the litigant to a file case online addressing all possible queries²⁵². Therefore, UK is much advanced and different in its functioning as compared to India.

FUTURE PROSPECTS

The e-courts in future will have better speed, low pendency and increase number of judges will help in achieving this. In the near future the phase III of the National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary will be implemented ensuring that all the flaws of phase I and Phase II are rectified or completed, as the case may be. India is a country which is modernizing at a very fast pace in terms of transport, communication and so in courts. This would help in creating a paperless (reduce wastage of paper) environment. All Supreme Court judges including the CJI and CJs of all 24 High Courts held a three-day long conference starting from 4th April 2015, on how to improve the judicial system of the country and reduce the pendency. Hence this shows the judicial activism would definitely improve the judiciary's performance and make it more effective and efficient. Such steps have often proved to be helpful as seen from past performance.

Also, the changes made in the Supreme Court of India and High Courts of the respective states, which are successfully implemented and yielded desired results, will be soon implemented in the district and sessions court and courts subordinate thereto. Bringing all the activities in line would take some time as implementing such a system took almost 30 years in U.S.A. Thus, the process

²⁵¹ <http://www.supremecourt.gov/> - official site of US Supreme Court

²⁵² E-courts website of UK <https://e-court.uk.com/about/index.php>



of the judicial transition from traditional form to the e-form would take time. Present is a good prologue to the future of judiciary in India.



OVERCOMING CHALLENGES IN THE TAXATION OF DIGITAL ECONOMY: DOES EQUALIZATION LEVY HELP EQUALIZE THE BURDEN?²⁵³

ABSTRACT

*This research paper explores the fundamentality of the International Tax Legislations in the light of the first of its kind Digital Economy Tax provisions introduced in India, with effect from 1st June, 2016. This work is divided into **five** sections.*

*Recently, major companies like Facebook, Apple and Google were in the news for being involved in a major tax avoidance situation, commonly known as the “**Double Irish Arrangement.**” The first section of the paper gives a basic introduction as to the tax avoidance tactics adopted by small or major enterprises and the need to have a balanced and reformed Digital Economy Tax machinery.*

*The second section of the paper discusses the **Base Erosion and Profit Shifting (BEPS)** report introduced by the OECD, in compliance with the G-20 economies. Action 1 of the Agenda is specifically discussed in detail, in this section.*

The third section of the Paper introduces the concept of ‘Equalization Levy’ that was adopted by India in February, 2016. Introduced in the form of Chapter VIII in the new Finance Bill, 2016, the regulations have been framed in line with the Report on Action 1 of BEPS Project. With the constantly evolving digital economy and e-commerce businesses running nationwide, Equalization Levy aims to complete the lacunae that the already existing direct tax legislations fail to address.

The fourth section of the paper discusses the drawbacks of this levy in terms of its constitutional validity being a major question in the minds of several taxonomists. The literal interpretation and unqualified language used in Chapter VIII has given rise to various doubts and an ambiguity

²⁵³ Lipi Sarin, IV Year, BA.LLB(Hons.), Hidayatullah National Law University, Raipur



regarding the nature of the Equalization Levy itself. Concepts like the 'doctrine of pith and substance' and 'double taxation avoidance rule' are discussed here.

The paper concludes the discussion on whether Equalization Levy, along with its drawbacks and shortcomings, is a good move on the part of the Finance Ministry to undertake and whether it would help overcome the challenges that are posed almost on a regular basis in the digital service sector.

Keywords: Base Erosion and Profit Shifting (BEPS), Doctrine of Pith and Substance, Double Irish Arrangement, Double Taxation Avoidance Rule



INTRODUCTION

Often known as the Internet Economy, the digital economy refers to the economical service sector which is related to digital computation of technologies. It is a “widespread and transformative process” that has been established by the Information and Communication Technology.²⁵⁴ The development of the digital service sector is such that over the last half a decade, the expanding business of mobile application enterprises has contributed towards the employment of about 500,000 people in the United States of America.²⁵⁵ Furthermore, the digital economy has managed to incur a contribution of almost 8 percent of the GDP of certain major economies of the G-20 countries.²⁵⁶ This service sector has managed to incur a technological innovation with every new digital business model and networking scenario. The growth rate of digital economy has consistently been approximately 10% a year, which is greater than the progressive growth of the global economy as a whole. In 2014 alone, the business incurred due to internet advertising was calculated to be approximately \$135.4 billion. According to a report given by the Boston Consultancy group, digital economy can be referred to as the driver of innovation.

Recently, major companies like Facebook, Apple and Google were in the news for being involved in a major tax avoidance situation, commonly known as the “Double Irish Arrangement.” One of the most exploited International Taxation Avoidance schemes, this arrangement allows the companies to invest their intellectual property rights in an Irish registered company that is under the control of a country that levies tax at a very low rate. Usually, these Irish companies are located in tax havens such as Bermuda, Bahamas or the Cayman Islands. After that, this company transfers over the patents right license to a third company, which is also a subsidiary based in Ireland. The royalty paid to the first Irish Company is a deductible expense and since no tax is levied on them, when that company transfers the income to the licensee company, the tax that has to be paid on it is very low. Therefore, the Parent company is not required to pay income tax from the other two companies since the income was earned overseas. The companies based in the United States more often than not, take advantage of the flexible tax law provisions in this regard, under which they

²⁵⁴ Centre for Tax Policy and Administration, BEPS, <http://www.oecd.org/ctp/bepsfrequentlyaskedquestions.htm>

²⁵⁵ The importance of the Digital Economy, European Commission, https://ec.europa.eu/growth/sectors/digital-economy/importance_en

²⁵⁶ Ibid



can avoid paying withholding tax as long as the income is earned outside the country since the location of the Parent company is irrelevant, as per the US Tax Code.

As per a study conducted by the European Parliamentary Research Service in 2014, the European Union incurs an estimated loss between \$54.5 billion - \$76.4 billion, during the course of a year.²⁵⁷ This was primarily because of the shifting of profits by major companies, incurred in Europe, to countries like Luxembourg, Monaco and Ireland. In early 2014, there were reports of Google shifting approximately \$12 billion to its Irish registered subsidiary company, Google Ireland Holdings, costing its parent company 'Alphabet' just to pay 6% on its foreign profits.²⁵⁸

It is situations like these that call for a reform in the international standard of taxation and fill the gaps that exist within the system. To achieve this objective, it is pertinent to strike a balance between a country's domestic tax code with the internationally accepted regulations. In pursuance of this goal, the Organization for Economic Co-operation and Development (hereinafter called as OECD) along with the G20 countries launched the Base Erosion and Profit Shifting (hereinafter called as BEPS) project in order to address this lacuna.

CHALLENGES FACED IN TAXING OF DIGITAL ECONOMY: THE BEPS AGENDA

The objective of this initiative was to prevent profits from "disappearing" for the purposes of tax and to avoid the "shifting" of such profits to low or no-tax paying countries. Even though the BEPS Agenda does not include challenges faced by the digital economy in particular, the services related to this sector certainly "exacerbate" the already existing exist.²⁵⁹ The Action plan on BEPS established 15 significant actions that would contribute towards eradication of tax avoidance measures, especially by major businesses, by identifying parity and a level of coherent balance between domestic and international taxation laws.²⁶⁰

Action plan 1 of the BEPS Agenda specifically focused on the OECD's establishment of a machinery for the taxation of digital economy. The plan studied the potential challenges that could

²⁵⁷ European Commission proposes tax transparency rules, European Commission http://europa.eu/rapid/press-release_IP-16-1349_en.htm

²⁵⁸ "7 Corporate Giants Accused of Evading Billions in Taxes" Fortune, <http://fortune.com/2016/03/11/apple-google-taxes-eu/>

²⁵⁹ Centre for Tax Policy and Administration, BEPS, <http://www.oecd.org/ctp/bepsfrequentlyaskedquestions.htm>

²⁶⁰ Action Plan on Base Erosion and Profit Shifting, OECD, <https://www.oecd.org/ctp/BEPSActionPlan.pdf>



be faced by businesses in the digital economical service centre and tried to incorporate a universally balanced mechanism that could help overcome taxation issues, with the help of the task force established by the OECD. The plan tried to shift more importance and focus towards Value Added Tax/Goods and Service Tax categories of taxation.

In its report, the committee suggested three broad opinions through which challenges faced during the course of taxing digital economy could be overcome. First, the traditional concept of “Physical Presence” is no longer applicable when it comes to taxing services related to digital economy. According to the Action Plan, taxation must occur where the consumption of services takes place. For this reason, the definition of Permanent Establishment was amended to mean “Significant Economic Presence.” Under the test laid down to determine the economic presence of a business, the enterprise is required to incur a significant amount of revenue from the “in country customers.” The digital service sector requires the enterprises to have a “substantial interaction with users” of that particular country to be considered as to be having a “taxable presence” in that country.²⁶¹ Therefore, to ascertain the business’s market jurisdiction, there has to be a technological interaction between the enterprise and the targeted country, be it through the use of a local domain name, local website, etc. This test manages to create a sufficient nexus between such foreign companies and the taxing jurisdiction. Another reason why the concept of a significant digital presence is essential is because in its absence, the market jurisdiction would consider the income incurred from foreign goods and services to be foreign source income but taxing similar services online would still fall under the ambit of the traditional taxing provisions not specifically pertaining to the digital sector.

The task force established under OECD therefore laid down three broad options related to the “Permanent Establishment” concept. a) It proposed for alterations to be made regarding such Permanent Establishment exemption, b) There has to be a “significant digital presence,” and c) there must be a “variety of virtual presence” under the Physical Establishment.

²⁶¹ Ibid



Another way to tax digital economy could be by introducing withholding tax on every transaction incurred. The third option was the introduction of the concept of Equalization levy which is also known as an “Expenditure Tax.”

The Indian tax authorities took the initiative of adopting and integrating the third option within the Indian taxing legislation, primarily because, in their opinion, the first two options were not feasible in terms of India’s bilateral treaty obligations.

WHAT IS EQUALIZATION LEVY?

With the expansion of the digital economy within the Indian subcontinent itself, the evolution of several new and upcoming business models comes with its own set of challenges. They broadly fall under three categories, namely “nexus, characterization and valuation of data and user contribution.”²⁶²

Since the Agenda gained wide recognition, especially amongst the OECD and G-20 economies, the Central Board of Direct Taxes (hereinafter called as CBDT) published a report in September, 2015. The Finance Minister introduced the levy to be integrated within the budget proposals, in an unexpected move, on 29th February, 2016.²⁶³ A committee on Taxation of e-commerce was constituted by the Central Board of Direct Taxes in order to review the taxation issues related to e-commerce business models.²⁶⁴ Consequently a report was prepared and several provisions were integrated within the Finance Bill, 2016 in the form of the concept of ‘Equalization Levy.’ As per the report of the committee, the Equalization levy would not be computed to be a tax on income and therefore would not be under purview of the Income Tax Act, 1961. The transactional income upon which the levy is paid is exempted from income tax. Equalization Levy was effected from 1st June, 2016 and it serves the purpose of taxing transactions involved in digital economy, thereby, making our foreign competitors equally liable under direct tax provisions, as much as the rest.

²⁶²Proposal for Equalization Levy on specified transactions, Report of committee on taxation of e-commerce, <http://www.incometaxindia.gov.in/news/report-of-committee-on-taxation-of-e-commerce-feb-2016.pdf>

²⁶³ “Equalization levy of 6% on digital ad: Government finds a way to tax companies like Google, Facebook”, etTech, <http://tech.economicstimes.indiatimes.com/news/internet/equalisation-levy-of-6-on-digital-ad-government-finds-a-way-to-tax-companies-like-google-facebook/51218305>

²⁶⁴www.incometaxindia.gov.in



The concept originated from the BEPS Action plan 1, labelled as “Addressing tax Challenges in Digital Economy.” Even though the model originally suggests the “wait and watch approach”²⁶⁵ which is supposed to be followed, Indian tax authorities have taken a drastic measure to tax digital economy. As per the report issued by the committee, the findings and the conclusions that were reached on the concept of Equalization Levy, were “heavily relied upon” the BEPS Action Plan 1, all the while keeping the Indian context in mind.²⁶⁶ The primary objective of the report was to establish a “simple, predictable and certain taxation of digital economy.”²⁶⁷

As per the provisions, the applicability of Equalization levy would be limited to Business- to-Business transactions (hereinafter called as B2B transactions). The scope of the ‘specified services’ is not necessarily limited to online advertisements and may expand as per the notifications issued by the CBDT in the future.²⁶⁸ This ‘specified service’ is referred to the “online advertisements any provision for digital advertising space or any other facility or service for the purpose of online advertisement.”²⁶⁹ Here, ‘Online’ refers to the facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network.”²⁷⁰ Such facilities or services may include “online marketing and advertisements, cloud computing, website designing hosting and maintenance, digital space, digital platforms for sale of goods and services and online use or download of software and applications.”²⁷¹ In this regard, the levy’s objective is to make the foreign competitors investing in India, liable. This however is limited to only those e-commerce companies that incur a business of 1 lakh per annum in the previous year.

In the opinion of the committee, subjected to the market response, the levy could even be increased up to an 8% or even more. However, there are certain exemptions that need to be kept in mind.

²⁶⁵ “Equalization levy: India’s action under the BEPS agenda for the digital economy”, India Tax Insights, [http://www.ey.com/Publication/vwLUAssets/ey-india-tax-insights-magazine-issue-7/\\$FILE/ey-india-tax-insights-magazine-issue-7.pdf](http://www.ey.com/Publication/vwLUAssets/ey-india-tax-insights-magazine-issue-7/$FILE/ey-india-tax-insights-magazine-issue-7.pdf)

²⁶⁶ Proposal for Equalization Levy on specified transactions, Report of committee on taxation of e-commerce, <http://www.incometaxindia.gov.in/news/report-of-committee-on-taxation-of-e-commerce-feb-2016.pdf>

²⁶⁷ Ibid

²⁶⁸ Finance Act, 2016

²⁶⁹ Section 164(i), Chapter VIII, Finance Act, 2016

²⁷⁰ Section 164(f), Chapter VIII, Finance Act, 2016

²⁷¹ Proposal for Equalization Levy on specified transactions, Report of committee on taxation of e-commerce, <http://www.incometaxindia.gov.in/news/report-of-committee-on-taxation-of-e-commerce-feb-2016.pdf>



First, no levy will be charged if the Non-resident has a permanent establishment in India and the specified service that is being provided by the non-resident is in some way or the other related to that permanent establishment. Second, no levy will be charged if the consideration for the specified services is not paid strictly for the objective of carrying out business or profession within India.

DRAWBACKS OF EQUALIZATION LEVY

Even though the Committee on Taxation of e-commerce established that the Equalization Levy would not be considered to be at par with 'Income Tax' and therefore formulated a separate chapter based on it in the Finance Bill, 2016, instead of integrating it with the Income Tax Act, 1961, a certain amount of ambiguity still exists as to the nature of this levy.

The Constitution of India provides for the division of legislative power into three categories. Schedule VII read with Article 245 of the constitution gives provisions related to necessary compliance of the power with any one of the three lists, the Union List, the State List or the Concurrent List. The doctrine of Pith and Substance²⁷² helps in determining as to which category of the abovementioned lists does a particular legislation fall under.

According to Section 161(d) of the Finance Act, 2016, Equalization Levy can be defined as "tax leviable on consideration received or receivable for any specified service under the provisions of this Chapter."²⁷³ Since the term 'Tax' has not been defined in Chapter VIII of the Act, it is taken to be the same meaning in consonance with 'Tax' as has been defined in Income Tax Act, 1961,²⁷⁴ "Tax in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under Section 115WA"²⁷⁵

²⁷² *Prafulla Vs. Bank of Commerce, AIR 1946 PC 60*

²⁷³ Section 161(d), Chapter VIII, Finance Act, 2016

²⁷⁴ Section 161(j), Chapter VIII, Finance Act, 2016

²⁷⁵ Section 2(43), Income Tax Act, 2009



Therefore, the meaning of the term 'Tax' in the Finance Act, 2016 has to be borrowed from the Income Tax Act, causing an ambiguity as to whether the Levy is in nature of "Income Tax" or not. As per the literal interpretation of the text, Equalization Levy would be considered to be an "Income Tax", which goes against what has been stated by the committee in its report. Further, since both Equalization Levy and Income Tax have the same dispute settlement and appellate authorities, the unqualified language used in the Finance Act makes the distinction between the two even more vague.

Further, double taxation is a tax concept which refers to the taxing of the same income twice within the ambit of the same statute. As per the memorandum of the Finance Bill, 2016, *"In order to avoid double taxation, it is proposed to provide exemption under Section 10 of the Act for any income arising from providing specified services on which Equalization Levy is chargeable."*²⁷⁶ According to section 10(50) of the Finance Act, 2016 "Any income from any specified services and which is chargeable to Equalization Levy is exempt from tax." This means that if Equalization Levy is charged on any consideration received or receivable for the 'specified services' as explained in the previous section, such consideration would only be restricted to the charge of said levy and not be subjected to be charged on Income.

This means that exemption from being charged as 'Income Tax' as opposed to the Equalization Levy negates or eliminates the Double Taxation. On one hand they are considered to be "mutually exclusive" and on the other hand, the point that needs to be taken into consideration is that if the nature of both the charges is different, double taxation would not be considered at all. This also makes the line of distinction between Income Tax and Equalization Levy, very vague.

CONCLUSION

With the ever expanding digital economy, it has become pertinent for nations to follow an internationally accepted standard of taxation in order to be justifiable and non-discriminatory in their approach. Since the digital economy is growing at an even faster rate than the global economy, there needs to be specific regulations targeting that sector and therefore to overcome

²⁷⁶ Memorandum, Finance Bill, 2016



challenges that are sometimes posed by big enterprises and the measures they take to avoid hefty taxes.

India is the first country to adopt and integrate the concept 'Equalization Levy' within its domestic tax law provisions. Being termed as 'Google Tax', this levy, even though there is still some ambiguity regarding its nature, manages to address the lacuna in the Indian Taxation system by making big foreign companies liable and thereby creating equal opportunities in the digital market. It is not directly taken from the BEPS report since the provisions were formulated keeping the Indian context and market in mind. Equalization Levy may be limited in terms that it only takes into account a limited set of 'specified services' and excludes aspects such as online trading of goods, for instance, but this first digital economy legislation of its kind in India, certainly promises to open doors to be more inclusive in the future.

A certain amount of clarity is however required as to the ambiguous distinction between the nature of the Income tax and Equalization Levy to avoid a spur of litigations. The provisions related to Equalization Levy in Chapter VIII still manage to form a protective blanket and promise an unbiased and competitive approach that would be undertaken by the India Taxation Law in the future.



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1. Income Tax Act, 1961
2. Finance Act, 2016



ONE PERSON COMPANY (OPC)

HAVING GROUP OF PEOPLE TO INITIATE A COMPANY IS NOT MANDATORY²⁷⁷

ABSTRACT:

One-person company is a new feature added in the companies' act of 2013. It is very helpful as it will not step down the passion of the small enterprisers. This paper gives a complete knowledge of the concept 'One Person Company'. It has showcased the origin and impact of the OPC in India. It has focused on all the provisions of OPC under Indian law. It also gave a picture about how to incorporate One Person Company, how to convert it into private and public companies and also tells about how a private company can get converted into one-person company. It also talks about the features of One Person Company. This paper also comprises of the difference between a one-person company and a sole proprietorship and also tells us how better OPC is, comparing to sole proprietorship. It has conclusion about how helpful this One Person Company is?

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INTRODUCTION

The name ‘one-person company’ itself describes that the company consists only one person. This concept is newly introduced in India under section 2(62) on company act 2013 where it says “One Person Company” means a company which has only one person as a member²⁷⁸. The most significant feature of one Person Company is the limited liability. The target behind presenting the idea of OPC was to give a legal regime to small entrepreneurs. OPC are in presence in specific nations. In India this idea has been mooted by the Ministry of Corporate Affairs by permitting One Person Companies in India in accordance with UK, China, USA, Australia, Singapore, Qatar, Pakistan and a few different nations. It is a right thinking in right course by the Ministry of Corporate Affairs. One person Companies have been in presence in UK for quite a long while now. This concept of one Person Company has come into existence from the case of *Saloman v. Saloman & co Ltd.*²⁷⁹

In this case Salomon gave his business of boot making, to an organization (Salomon Ltd.), joined with individuals containing himself and his family. The cost for such exchange was paid to Salomon by method for shares, and debentures having a floating charge (security against obligation) on the advantages of the organization. Later, when the organization’s business fizzled and it went into liquidation, Salomon’s privilege of recuperation (secured through gliding charge) against the debentures stood prior to the cases of unsecured loan bosses, who might, subsequently, have recouped nothing from the liquidation continues. The Court of Appeal, proclaiming the organization to be a myth, contemplated that Salomon had consolidated the organization in opposition to the genuine plan of the then Companies Act, 1862, and that the last had directed the business as an operator of Salomon, who ought to, consequently, be in charge of the obligation brought about over the span of such office. The House of Lords, be that as it may, upon advance, switched the above decision, and consistently held that, as the organization was properly joined, it is a free individual with its rights and liabilities fitting to itself, and that “the thought processes of the individuals who participated in the advancement of the organization are totally unessential in talking about what those rights and liabilities are”. Hence, the lawful fiction of “corporate shroud”

²⁷⁸ “Company Act 2013.” N.p., n.d. Web. 29 July 2016.

²⁷⁹ [1896] UKHL 1



between the organization and its proprietors/controllers was immovably made by the Salomon case. Hence this became the initiation and a landmark case in the history of company law.

IMPACT OF OPC IN INDIA

The idea of OPC is still in its incipient stages in India and would require some more opportunity to develop and to be completely acknowledged by the business world. With entry of time, the OPC method of business association is good to go to wind up the most favored type of business association extraordinarily for little business visionaries. The advantages radiating from this idea are numerous, to give some examples –

- Minimal printed material and compliances
- Ability to shape a different legitimate substance with only one part
- Provision for change to different sorts of lawful elements by affectation of more individuals and alteration in the Memorandum of Association.

The One Person Company idea holds a splendid future for little dealers, business visionaries with okay taking limit, artisans and other administration suppliers. The OPC would go about as a platform for such business visionaries to showcase their capacities in the worldwide field.

The partners of Indian OPCs in Europe, United States and Australia have brought about further fortifying of the economies in the particular nations. OPCs in India are gone for organized, sorted out specialty units, having a different legitimate substance eventually assuming a urgent part in further reinforcing of the Indian economy.²⁸⁰

LEGAL FRAMEWORK IN DIFFERENT COUNTRIES:

United Kingdom

(1) A company is formed under this Act by one or more persons— (a) subscribing their names to a memorandum of association (see section 8), and (b) complying with the requirements of this Act as to registration (see sections 9 to 13).

²⁸⁰ “One Person Company and Its Limited Liability.” *Corporate Law Reporter*. N.p., 2014. Web. 12 Aug. 2016.



(2) A company may not be so formed for an unlawful purpose.²⁸¹

Singapore: One person company was incorporated²⁸².

China: China included one-person company in 2005

Pakistan: Single Member Company is legal²⁸³

NOTICE BY MINISTRY OF CORPORATE AFFAIRS - LEGAL DEFINITION²⁸⁴

3. One Person Company

(1) Only a natural person who is an Indian citizen and resident in India

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company. Explanation. - For the purposes of this rule, the term “resident in India” means a person who has stayed in India for a period of not less than one hundred and eighty-two days during the immediately preceding one calendar year.

(2) No person shall be eligible to incorporate more than a One Person Company or become nominee in more than one such company.

(3) Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days.

(4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.

(5) Such Company cannot be incorporated or converted into a company under section 8 of the Act.

²⁸¹ Section 7 of UK companies act, 2006

²⁸² Companies amendment act, 2004 Singapore

²⁸³ Single member companies rule 2003, Pakistan

²⁸⁴ Section 3 of Companies act, 2013



(6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body-corporates.

(7) No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of One Person Company, except threshold limit (paid up share capital) is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

SALIENT FEATURES OF OPC²⁸⁵

The Salient components of an OPC incorporate the accompanying:

- An OPC can be shaped under any of beneath classes:
- Company constrained by guarantee.
- Company constrained by shares.
- An OPC constrained by shares should conform to taking after necessities:
- Shall have least [paid up capital of INR 1 Lakh].
- Restricts the privilege to exchange its shares.
- Prohibits any solicitations to open to subscribe for the securities of the company.

PROVISIONS:

- Who can incorporate OPC: Any normally conceived Indian who is additionally an occupant of India (i.e. have stayed in India for no less than 182 days amid the instantly going before FY). Be that as it may, one of such individual can't frame more than one OPC.²⁸⁶
- section 3(1)(c) of the Act gives that the words 'One Person Company' must be said underneath the name of the organization in section wherever it shows up.
- Restrictions: OPC can't be consolidated or changed over into Section 8 Company (i.e. organization with altruistic articles, and so forth.) or do non-keeping money monetary exercises, incorporating interest in securities of anyone corporate.

²⁸⁵ "One Person Company." *Http://www.mondaq.com/india/x/278154/Corporate Commercial Law/One Person Company a Concept for New Age Business Ownership*. N.p., n.d. Web

²⁸⁶ Rule 3.1 and 3.2 of Companies (incorporation) Rules, 2014



- Voluntary conversion: A One Person Company can get itself changed over into a Private or Public organization in the wake of expanding the base number of individuals and chiefs to two or least of seven individuals and a few executives all things considered, and by keeping up the base paid up capital according to prerequisites of the Act for such class of organization and by making due consistence of segment 18 of the Act for transformation.²⁸⁷

Exception: Edge limit (paid up offer capital) is expanded past Rs.50 Lakhs or its normal yearly turnover amid the significant period surpasses Rs.2 Crores i.e., if the Paid-up capital of the Company crosses Rs.50 Lakhs or the normal yearly turnover amid the important period surpasses Rs.2 Crores, then the OPC needs to perpetually record frames with the ROC for transformation into a Private or Public Company, with in a time of Six Months on rupturing the above edge limits.

- Signatures on Annual Returns – Section 92 of the Companies Act,2013

It is given in section 92 of The Companies Act, 2013, that the yearly returns on account of One Person Company might be marked by the organization secretary or where there is no organization secretary, then by the chief of the organization.

- For the reasons for holding Board Meetings, if there should be an occurrence of a one individual Company which has one and only chief, it might be adequate consistence in the event that all resolutions required to be passed by such a Company at a Board meeting, are entered in the minutes-book, marked and dated by the part and such date should be esteemed to be the date of the Board Meeting for every one of the reasons under this Act. For other One Person Companies, at least one Board Meeting must be held in every 50% of the date-book year and the hole between the two gatherings ought not be under 90 day

WHAT ARE THE STEPS TO INCORPORATE ONE-PERSON COMPANY?

This procedure is to be followed:

- Acquire Digital Signature Certificate [DSC] for the proposed Director(s).
- Acquire Director Identification Number [DIN] for the proposed director(s).

²⁸⁷ “One Person Company Under New Companies Act,2013.” *TaxGuru One Person Company Under New Companies Act2013 Comments*. N.p., n.d. Web. 12 Aug. 2016.



- Select reasonable Company Name, and make an application to the Ministry of Corporate Office for accessibility of name.
- Draft Memorandum of Association and Articles of Association [MOA and AOA].
- Sign and record different archives incorporating MOA and AOA with the Registrar of Companies electronically.
- Installment of Requisite expense to Ministry of Corporate Affairs Furthermore Stamp Duty.
- Investigation of records at Registrar of Companies [ROC].
- Receipt of Certificate of Registration/Incorporation from ROC.

NOMINEES IN ONE PERSON COMPANY

An OPC must specify one individual as “Chosen one” in case of death, insufficiency, and so on who will-(a) turn into an individual from OPC²⁸⁸; (b) be qualified for all shares of the OPC, and (c) bear all liabilities of OPC. Nonetheless, composed assent of such Nominee to go about as candidate must be gotten and documented with the RoC at the season of consolidation alongside MOA and AOA.²⁸⁹

A Nominee may, pull back his assent by giving a notification in keeping in touch with the sole part and to the OPC. The sole part then designates someone else as candidate inside 15 days of the receipt of the notification of withdrawal.

Further, the OPC is required to document with RoC: (a) notification of such withdrawal of assent; (b) name of the new individual selected by it (in Form No INC-4 alongside the expense as gave in the Companies (Registration workplaces and charges) Rules, 2014), and (c) composed assent of the new individual so assigned (in Form No. INC.3). The above recording necessity must be satisfied inside 30 days of receipt of the notification of withdrawal of assent from the prior candidate. Additionally, a Nominee can be changed whenever by giving a notification to the ROC.²⁹⁰

²⁸⁸ Section 4(1)(F) of Companies act, 2013

²⁸⁹ Section 3(1)(c) of Companies act, 2013

²⁹⁰ “ONE PERSON COMPANY UNDER COMPANIES ACT, 2013.” N.p., 2015. Web. 12 Aug. 2016



PROVISIONS OF CONVERTING PRIVATE COMPANY INTO ONE PERSON COMPANY

A Private organization other than an organization enrolled under segment 8 of the Act having paid up offer capital up to Rs. 50 lacks or normal yearly turnover amid the significant period up to Rs. 2 crores may change over itself into One Person Company by passing an exceptional determination when all is said in done meeting.

Before passing such determination the organization might get No Objection in composing from individuals and loan bosses. The one individual organization might record duplicate of the unique determination with the Registrar of organizations (ROC) inside 30 days from the date of passing such determination in Form No. MGT 14.²⁹¹

The Company should record an application in Form No. INC. 6 for its change into One Person Company alongside charges indicated, by joining taking after records, specifically: -

- the executives of the organization might give a statement by method for affirmation appropriately sworn in affirming that all individuals and banks of the organization have given their assent for transformation, the paid up offer capital of the organization is Rs. 50 lacks or less or normal yearly turnover is not as much as Rs. 2 crore or less, all things considered;
- the rundown of individuals and rundown of banks;
- the most recent Audited Balance Sheet and the Profit and Loss Account; and
- the duplicate of No Objection letter of secured banks.

On being fulfilled and ordered with necessities expressed thus the Registrar should issue the Certificate.

CONTRACT BY ONE PERSON COMPANY (SECTION 193)

- (1) Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a

²⁹¹ "One Person Company Under New Companies Act,2013." *TaxGuru One Person Company Under New Companies Act2013 Comments*. N.p., n.d. Web. 12 Aug. 2016.



memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract:

- (2) Provided that nothing in this sub-section shall apply to contracts entered into by the company in the ordinary course of its business.
- (3) The company shall inform the Registrar about every contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors under sub-section (1) within a period of fifteen days of the date of approval by the Board of Directors.²⁹²

DIFFERENCE BETWEEN OPC AND SOLE PROPRIETORSHIP

Separate Legal, Limited Liability, Perpetual succession, Loan not the sole responsibility of the owner, Registration required, Finance –credit record of the OPC where as in sole proprietorship it is vice versa and the finance credit record is of the owner.

OPC structure would be like that of a proprietorship worry without the ills for the most part confronted by the proprietors. One most essential component of OPC is that the dangers relieved are constrained to the degree of the estimation of shares held by such individual in the organization. This would empower entrepreneurial minded people to go out on a limb of working together without the botheration of prosecutions and liabilities getting connected to the individual resources.

One Person Company has a different lawful character from its shareholders i.e., the organization and the shareholders are two unique elements for all reasons. Then again proprietorship does not have a different lawful character from its individuals.

The presence of a One Person Company is not needy upon its individuals and subsequently, it has an unending progression i.e., demise of a part does not influence the presence of the organization and the Sole proprietorship is an element whose presence relies on upon the life of its individuals and passing or some other possibility may prompt the disintegration of such an element.

In OPC the business head is the chief, he is not reliant on others for recommendations or execution of proposals and so forth., bringing about faster and less demanding basic leadership. He is the

²⁹² Section 193 of companies act, 2013



sole individual who maintains the business and thus, the subject of agreement or lion's share feeling and so on does not emerge.

CONCLUSION

I feel one-person company is the most important and useful features that has come up which will definitely bring up the small enterprisers and also it has got a provision of limited liability. There is less challenge of fraud, misrepresentation, concealment etc in the contracts. This will encourage all the small traders and also give them success as it has been successful in other countries. There will not be any joint liability or partnerships eventually they can have complete freedom over their own company. The difference between One Person Company and sole proprietorship has made it easier and convenient for traders.



ANALYSIS OF GLUTEN-FREE FOOD MARKET IN INDIA
OPPORTUNITY ASSESSMENT FOR MAX FOODS²⁹³

ABSTRACT

The following work details out the market scenario of gluten free food products in India. This market is at a nascent stage here as of now and for the big players like MaxFoods to plan their advent into the field, a thorough analysis of the market drivers as well as restraints and strategic means to get past them is needed. This study details out the challenges that would be faced by the company and also talks about the growth properties of the market in future. A survey has been conducted and results analyzed on the consumer population to provide a better knowledge of the consumer barriers and specific requirements.

Keywords: Gluten-free food, Health consciousness, consumer barriers and market strategies

²⁹³ Shubham Gupta, IIT Delhi and Kriti Garg, SCMS Pune



INTRODUCTION

Gluten - The Protein

Gluten (derived from Latin word meaning 'glue') is a complex protein composite found predominantly in wheat and in small quantities in related grains like barley and rice. Gluten is used due to its gluey sticky properties that binds the particles of grains together giving it the condensed structure. Gluten is thus quite vehemently available in food products with wheat being the major constituent. Some examples of gluten rich food products are - Pasta, Bread Flour, Cookies, Cakes, Muffins, Pastries, Cereal, Beer, Oats, Sauces etc. Certain additives used in packaged foods has also been found to contain fair amounts of gluten.

How it affects us

- For the people sensitive to gluten, it affects their immune system adversely. This immune reaction can further lead to intestinal wall degeneration and various nutritional deficiencies might pop up with also chances of various digestive issues and fatigue.
- Studies has shown extreme gluten content in food intake could cause inflammation of the intestine opening the doors to many other serious digestive diseases.
- According to gluten-sensitive idiopathic neuropathy, many causes of neurological illnesses could be initiated or exacerbated by excess gluten consumption.
- Gluten is found to be at the base of many autoimmune diseases with celiac disease being the most common one of them, Patients suffering from celiac disease are strictly kept on a gluten free diet.

Celiac disease - Gluten free the only solution

Celiac disease, also known as celiac sprue or gluten- sensitive enteropathy is a very common autoimmune disease that is hereditary with the chances of getting it being 1 in 10 given the close family has been affected. It occurs as a reaction to ingestion of gluten wherein celiac suffering patients experience problems with digesting gluten. It causes their immune system to attack or act against the body leading to intestinal disorders and in rare cases critical diseases.

Celiac disease can also leave a person highly susceptible to disorders like osteoporosis, seizures, miscarriages and infertility, cancer of the intestines and malnutrition in children. People affected



by this disease can also possess autoimmune diseases like Thyroid, Type 1 diabetes, Lupus, Rheumatoid arthritis etc thus rendering the immune system even weaker. An estimated 1 in 133 Americans that amount to almost 1 % of the entire population has been diagnosed with the disease with many others living undiagnosed. Pharmaceutically, there is no known cure for celiac disease. Doctors recommend a 100 percent gluten free diet to be the only cure as of now.

INDUSTRIAL OVERVIEW

Global Market scene

Globally, the gluten free products market is experiencing a double digit growth. Statistically speaking, the global gluten-free product market is projected to reach a value of \$6,206.2 million, growing at a CAGR of 10.2% by 2018. Gluten-free bakery and confectionery products accounted for the largest volume share of about 46%, followed by gluten-free snacks that contributed about 20% in the gluten-free product market. Demarcating the growth by country, the analyst reported the major chunk of growth coming from the North American market with Europe just behind in 2012. The bakery and confectionery market is expected to be the fastest growing one in Europe. Australia in the Asia-Pacific region and Brazil in the Rest-of-World region are the largest markets expected to grow further by 2018. Companies like The Hain celestial Inc. (U.S.), General Mills Inc. (U.S.), Dr. Schar (Italy), Amy's Kitchen Inc. (U.S.), and Boulders Brand Inc. (U.S) were involved in market dynamics and proved to be the major cause for the upcoming rise in the market scenario.

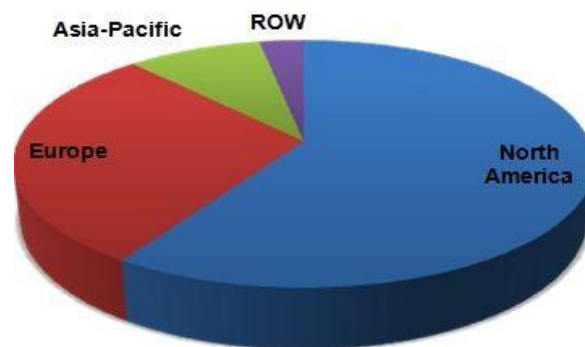
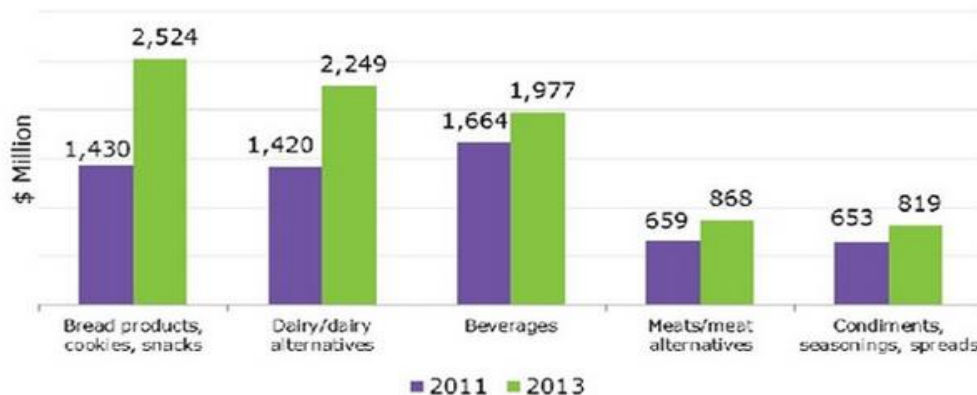


Figure 1: Gluten-Free Products Market Share (Value), by Geography, 2013



Another reason for this record breaking growth witnessed here could be the upcoming developments in this field. As the demand grows, the companies involved start striving harder to meet them coming up with newer recipes and ingredients that can render the food manufacturing department completely gluten free. The advent for health consciousness among the people further helped this market to rise. Gluten free products are now not only the demand of celiac suffering patients but certain health conservative and proactive individuals have been including them in their natural dietary plan. Because of this change in people's choice of living, the gluten-free products market has witnessed a revolution where these products were seen as a specialty niche product, and today, they are known as mainstream products. Millions of Americans are adopting a gluten-free diet and thus expanding the clientele base of the gluten free food services industry.



* 52 weeks ending June 11, 2011; June 9, 2012; June 8, 2013
Note: Numbers may not equal total due to rounding
Source: SPINS/Nielsen/Mintel

Figure 2: Retailer sales of gluten free foods (by segment) at current prices (2011-2013)

Indian Market - Growth Analysis

Research has shown that there had been a breakout of coeliac disease, called the “Coeliac Belt”, affecting north India, Pakistan and Bangladesh in 2012. A study also showed that Asians are less likely to adhere to a strict gluten-free diet, the researchers suggested that strategies need to be developed to change that. Since then, awareness regarding the disease as well as the advantages of a gluten free diet has spread in India with many organizations working towards it. This has led to an upwelling growth in this sector.



When compared to the global market, the Indian subcontinent hosts certain individualistic features that affects the growth of any market phase. When focusing on the rise of gluten free products in the Indian market, one realizes that as opposed to the condition in US and Europe, the usage of gluten-free products in India is primarily after a person is diagnosed with celiac disease. The awareness about celiac disease and importance of gluten-free products is very low. As the cases of celiac disease pop up more in the northern part of the country, the demand for gluten-free products majorly comes from this region as wheat is a prevalent cereal in North India; rice-based foods contribute for most of the South Indian food consumption. Thus the market no doubt is geographically screwed.

India produces many gluten free grains which are sold at reasonable prices – kuttu, jowar, bajra, makki, ragi, etc. The ingredients needed are all mostly grown locally. Packaged gluten free food products are sold only at premium stores and online. Thus the suppliers in the gluten-free products are typically small and medium-sized companies with their overall product portfolio majorly focused in the gluten-free products and similar health products. Most of these suppliers have their manufacturing and marketing base in Punjab and Delhi region. The market economics generally does not support much credibility for a foreign brand to take hold but this does not deter them as undoubtedly India is a growing market with a huge population that is becoming aware and health conscious by the clock. It has been noticed that food giants such as Nestle, Hershey's, and ITC are on their way to introduce their gluten-free products in the Indian market.

Thus in a nutshell, India still sees gluten free products as a medicinal entity with its retail being still focused in health stores. Only in certain states like Punjab and Delhi has the product gained its space in viable commercial stores openly accepted by the general public. It has been stated by various market researchers that it will not be long for the advent of commercialized gluten free product marketing with the big players catching their hold here. Later on, we will be discussing the efforts of certain organizations towards the same. But to date, this market has been majorly confined to the online retail but the trend is expected to change in the near future.

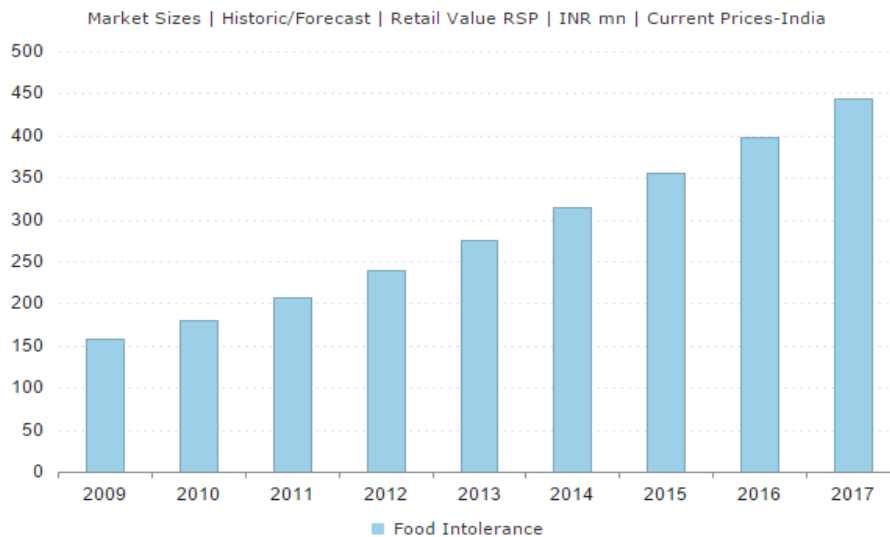


Figure 3: Food Intolerance curve throughout the years in India

COMPANY OVERVIEW

Max Foods is one of the premier Importer and Marketer of globally renowned food and beverage brands in the Indian market. It is among the few such companies which are ISO 9001 certified. Decisively and uniquely positioned as a dominant marketer representing these global companies and their brands in the country; Max foods offer solutions in the areas of logistics and supply chain management, product launch and marketing strategies, consumer behavior analytics, marketing research and market validation etc. The company came into existence in 1997 and has been in this Business for the past 18 Years. It is a family run Enterprise started by Mr. Amit Lohani with the help of his brother Mr. Vinod Lohani after Mr. Amit finished his MBA from the University of Queensland, Australia. Now the Company caters to leading FMCG brands from all over the world. Mr. Amit is also the Convener of Forum of Indian Food Importers (FIFI).

Max foods provide total and encompassing logistics solution, leading to a fully integrated and real-time updated inventory management control module. The system is constantly updated at various set points including stock levels, sales data and delivery operation details of various regional distributors, which is further branched out to their sub-distributors and finally reaching out to the retailers. With the work force of 52 distributors, 42 wholesalers and 18 sales persons, their distribution network is spread across 13 states, 2 union territories. The company has coverage of



more than 10000 retail outlets comprising of supermarkets like Reliance Fresh, Spencer's, Big Bazaar, Big Apple etc. The company also caters to Hotel chains like Leela, ITC group, Nikko metropolitan, Hyatt group, Sheraton group, Barista Coffee etc. Their present line includes products from international companies like Post Cereal(USA), Starbucks Coffee, Nestle(Malaysia), Kraft foods(UK), Tostitos(USA) etc. The company also caters to export markets in Africa and Caribbean's Islands for Rice, Juices and edible Oil products.

Having been successful in weaving a comprehensive distribution network for such products in the course of the last few years; the company is continually rationalizing its portfolio, adding even more brands to the product mix and extending the product lines of the existing principals; in the Indian Market. Regular training is imparted to the team to sharpen their skills. The team is headed by a full time professional Chief Executive with a strong marketing and financial Background. The achievements of the business ventures illustrate their vision, business intellect and management capabilities. Their success in building a strong market base for their clients reflects the fact that they would be able to perform with such acclamation with respect to any brand out in the world

MARKET DYNAMICS – AN ANALYSIS

Market Drivers - Why the sudden growth

The current trend and craze among the individuals of staying fit and healthy has added to the demand of gluten free products and boosted the market. The reasons behind buying a gluten free food items are - digestive health consciousness, weight management and high nutritional need. As the brands like Max Foods, endeavor to add taste to these products, the market further increases.

Keeping in mind the advent of new companies like Max Foods in the gluten-free product market, we wanted to jot down the driving forces that would help the company to establish its stronghold over the market. When it comes to Indian market, one needs to keep in mind the very specific needs and demands of the Indian customers. The clientele base here is very different from the west where the Dr. Schar products have already become vastly popular. Marketing this product in India would require deep understanding of the customer's mindset and buying needs.



Some of the salient features of the Indian market that are expected to help Max Foods grow:

- High gluten intolerance by the body of the Indian population
- Increase in awareness among the general public regarding good health and fit lifestyle.
- Improvement in standard of living thus increasing the buying power of an individual.
- No big players in the market, hence Max foods has first mover advantage.
- Huge consumption of wheat related products due to agricultural backbone of the nation.
- Gluten free substitutes for raw materials are widely available in India.

Market Restraints

Even if there is huge potential in the gluten free market, there are certain hindrances to its growth in the Indian market. Some of them are stated below.

- Most of the existing sales exists on the online platform, with the dire need of improving the accessibility of the product to interested buyers through offline retail and marketing
- Lack of awareness of Gluten free products and their benefits
- Indian people will tend to adopt Gluten free products when specifically asked to and not for precaution, hence limiting majority sales only to those affected by gluten problems.
- India produces naturally occurring gluten free products like bajra that can completely replace wheat domination thus creating roadblocks for penetration of chemically or commercially made gluten free products in the Indian market
- Lack of early adopters in Indian economy leads to low level of acceptance towards any kind of change makes any new business idea a difficult task.

Future Market Potential

Research shows that India's population would be overshooting that of China by the year 2028.

India is estimated to grow from approx. 1.2 billion 2010, 1.35 billion by 2020 and 1.45 billion by 2030. The celiac disease is also registered on huge increase potential in the next 2-3 years. On an average 1 in every 300 people are diagnosed with celiac disease. Apart from this, the poverty rate in India has been estimated to decrease from 22 percent currently to around 15 percent in the future. This means that more and more people are coming above the poverty line and accustomed to a certain standard of living day by day.



Summing all the above facts and figures, analyst report the gluten free market to be the most profitable sector in the food services industry. Even if we consider the patients of celiac disease to be our sole customers, that too amounts to a stark 7 percent of the entire population in North India. In reality, the figures are much more profitable.

SURVEY QUESTIONS

- Do you know about Gluten or Celiac disease?
- Do you know about the availability of gluten free foods?
- If told how gluten leads intestinal disorders and is found primarily in wheat, will you buy gluten free products at higher prices?
- Amount of involvement in the daily routine if opted for?
- What do you consume daily for general health purpose only?
- You would prefer Indian or foreign brand?
- What is your first preference (taste, brand, nutrition etc)
- If suffering from intolerance would you mind taking gluten free food daily

CONCLUSION

Some revelations about the Indian community

Based on a survey done on a sample in Delhi comprising of audience in the age group of 18-45 years, awareness levels of Gluten free products were recorded. They were targeted as the majority buyer population of Gluten free food in India. Their answers to certain questions provided new insights to the mentality of Indian consumers regarding the purchase of healthy/nutritious food products. The statistics have been diagrammatized below:

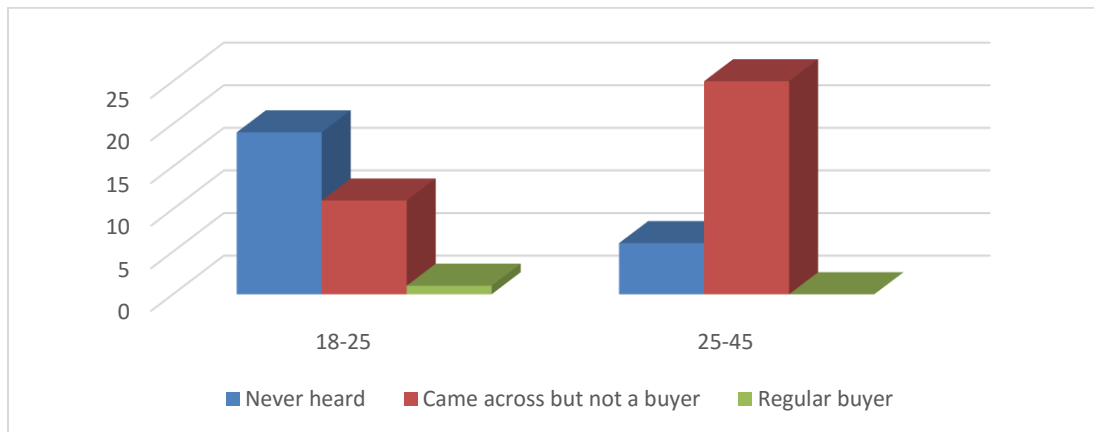


Figure 4: Awareness about the market

Popularity of the Gluten Free Market: Majority of youth population is unaware of Gluten and its related problem while the term is relatively popular among adults. As can be clearly seen from popularity graph, Indian market as very few early adopters for the costlier Gluten free products. The reason behind this can be attributed to meagre household expenditure on health care in India.

Based on the same survey, Brand Consciousness and different factors a consumer looks for while buying food was also analyzed. Surprisingly, around 62% of the populations prefers to buy products from an India brand or a small co-operative rather than buying from an International manufacturer. Although there were no specific reasons for that but people seem to have a common belief of MNC's charging premium for similar quality products. For one-third of the population brand consciousness will not play a role and would prefer to buy products on the basis of nutritional value irrespective of the price and company. This market segment does not mind paying a little extra for superior brands. A significant fraction of market also thinks that due to regular consumption of gluten free products, its taste and freshness will also play a deciding role in brand selection. Moreover, Maxfood's promotional campaigns are primarily based on nutrition value, which deprives them of approximately 40% of the target population in long term. Use of fear marketing can play a critical role in this field for the Gluten free market in India.

Hence, we can say that daily consumers will not mind paying premium for a product that best replaces the current one available.

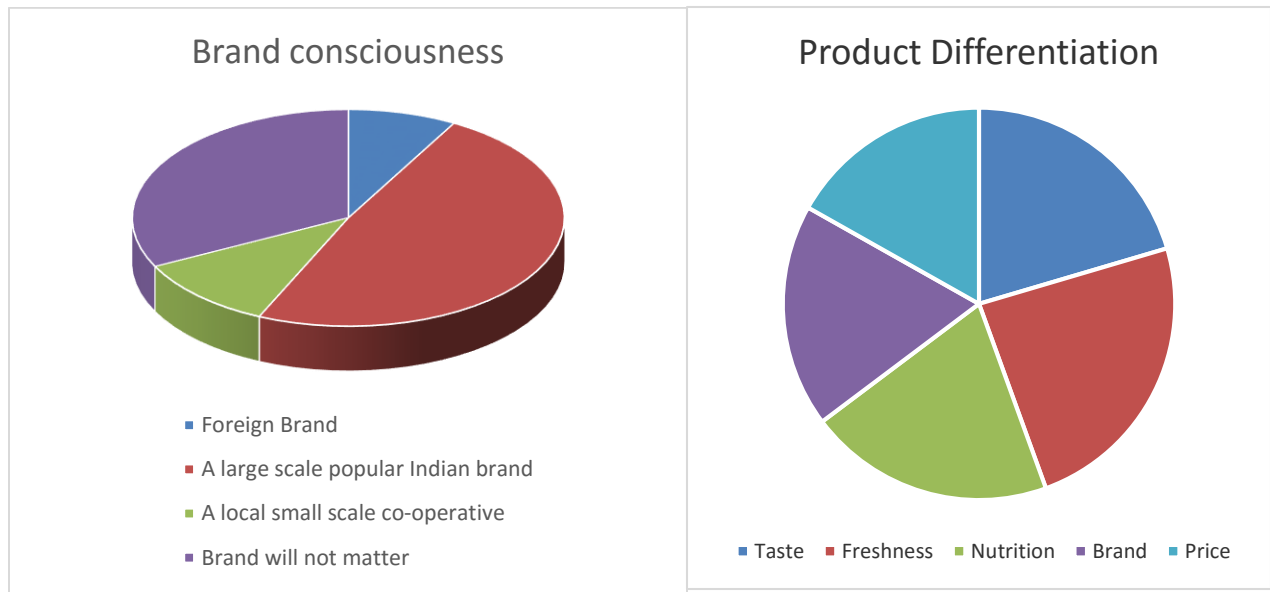


Figure 5: Brand Consciousness and the Property of Product Differentiation in Indian Consumer

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USE OF FORCE IN CYBER-ATTACKS: DIFFERENT PERSPECTIVE²⁹⁴

ABSTRACT:

A traditionally established rule of law under international law on prohibition of 'use of force' against another state has emerged with new nuances with the advent of cyber-attacks by way of cybercrimes and cyber warfare. Cyber-attacks on Estonia, Georgia, Sony, etc are all the example of cyber-attacks under modern form of warfare, which has shown great potential of lethal destructions over the years by causing great harm at national and international arena.

Therefore, the applicability of the available legal frameworks/regulations on cyber-attacks is in question; whether cyber-attacks can be equated to traditional kinetic armed attack to establish responsibility of a state for an internationally wrongful act or to held a state internationally liable for an act there is a need for a whole new regulation governing the integrities of cyber-attack in international arena.

As a result, there is an ongoing debate, as to whether the already existing law can govern the new possibilities in cyber space or there is a need for new laws. This research paper focuses on these two aspects and the already existing rules like one enshrined under Tallinn manual, Cyber Space in Peace Time, General Assembly Resolutions on Information & Communication and domestic laws in various countries.

Key words: Internationally Wrongful Act, Use of Force, Sovereignty, Cyber Space, Tallinn Manual.

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INTRODUCTION:

Cyber-attack in its literal sense can be understood as alteration, disruption, or destruction of computer system/systems or network/networks or the information or any programs on it.²⁹⁵ Though a definite and internationally accepted definition of cyber-attack is yet to be coined and consented however, scholars have tried to define cyber-attack by looking into the real life incidents like a virus disrupting financial records, viruses incapacitating stock market,²⁹⁶ spam mails shutting off nuclear reactors²⁹⁷ or opening the dam's gate²⁹⁸ and black out of air traffic control causing plane crash,²⁹⁹ causing huge economic and physical damage. The biggest challenge faced by the scholars and authorities in defining cyber-attack is its vivid nature as its range and scope varies from mere hacking of an account to a large scale infrastructural destruction, resulting in complete breakdown of the nation's economy and critical infrastructure.³⁰⁰ Therefore this wide breadth of cyber activities, their consequences and duration makes it very challenging and difficult in applying legal obligations and regulations on the defaulter/defaulting state.³⁰¹

Cyber-attack, as an emerging issue in International Law does not have any exclusive piece of treaty or convention which could govern the vivid scope and ambit of cyber-attacks. However various analogies have been drawn to encompass cyber-attacks within traditional international laws like prohibition of use of force³⁰², armed attack and armed conflict and breach of Sovereignty³⁰³ of a nation.

There also exist contradicting views of the authors who believe and argue that, in absence of any customary international law or state practice, cyber-attacks being a new challenge in the

²⁹⁵ COMM. ON OFFENSIVE INFO. WARFARE, NAT'L RESEARCH COUNCIL, TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 10-11 (2009)

²⁹⁶ Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023, 1042 (2007).

²⁹⁷ Vida Antolin-Jenkins, *Defining the Parameters of Cyberwar Operations: Looking for Law in All the Wrong Places?* 51 NAVAL L. REV. 132, 140 (2008).

²⁹⁸ Barton Gellman, *Cyber Attacks by Al Qaeda Feared; Terrorists at Threshold of Using Internet as Tool of Bloodshed*, *Experts Say*, WASH. POST, June 27, 2002, at A01.

²⁹⁹ General Accounting Office, *Air Traffic Control: Weak Computer Security Practices Jeopardize Flight Safety* (May 1998).

³⁰⁰ Matthew C. Waxman, *Cyber Attack and the Use of force: back to the Future of Article 2(4)*, 422, YALE J. INT. LAW.

³⁰¹ *Ibid.*

³⁰² Article 2(4) of UN Charter.

³⁰³ Article 2(1) of UN Charter.



international arena, must be governed and tackled under new treaties or conventions. Conceptualization of the Tallinn Manual³⁰⁴, which is an attempt to cater the problem of cyber-attack by proposing new law, is a stepping stone in that direction, though it is yet to attain legal sanction, enforceability and acceptability at international level, as it is just a report cum book.

CYBER ATTACKS CONSTITUTING USE OF FORCE:

In absence of direct law governing the issue of cyber-attack, different approaches and arguments have been given by various authorities for constituting cyber-attack as Use of force or not a Use of force. The supporters of the former argue that the prohibition of use of force is a *jus cogens* norm and thus any act in violation of prohibited use of force will attract the liability of violation of UN Charter.³⁰⁵ Article 2(4) states that any act against territorial integrity or political independence, or is against the purpose of UN charter to maintain peace and security in international arena.³⁰⁶ Thus an accurate reflection of customary international law, states that prohibition on the use of force, apply to any use of force, regardless of the weapons employed.³⁰⁷ An act to be qualified as a use of force does not require State's armed forces.³⁰⁸

The scholars have argued that when the effects of cyber operations, direct or indirect, have consequences similar to kinetic attack, regardless of the magnitude and duration of the attack,³⁰⁹ such an act would reach the threshold of norm embodied in Article 2(4).³¹⁰ Therefore, cyber-attacks can be put within the ambit of Art 2(4).³¹¹ ICJ in Nicaraguan³¹² ruled that even arming and training a force, engaged in hostility against another state would qualify as a use of force. So providing assistance in carrying out cyber-attacks would qualify as use of force.³¹³

However, it is pertinent to note that it is neither the designation of a device, nor its normal use, which make it a weapon but the intent with which it is used and its effect. The use of technical

³⁰⁴ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed. 2013).

³⁰⁵ The Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion) 1950 I.C.J. 4, 8 (Mar. 3);

³⁰⁶ *Supra* note 8.

³⁰⁷ Nuclear weapons Advisory Opinion, para. 39

³⁰⁸ *Supra* note 10 at R.10

³⁰⁹ Corfu Channel, U.K. v. Albania 1949, ICJ 4.

³¹⁰ Michael Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT'L REV. RED CROSS 373 (2002)

³¹¹ *Supra* note 10 at Rule 11 paragraph 9

³¹² *Nicaragua v. U.S. Military and Paramilitary Activities* 1986 I.C.J. 160.

³¹³ *Supra* note 10.



inputs of cyber space resulting in a considerable destruction of property and loss of critical infrastructure is a reason for concluding it an “armed” attack.³¹⁴ The protection of infrastructures is the key concern of cyber security for a State.³¹⁵ The ICJ has used the scale and effects³¹⁶ to capture the quantitative and qualitative factors to be analyzed in determining whether a cyber-operation qualifies as a use of force.³¹⁷ Prohibition of use of force applies to any use of force, regardless of the weapons employed.³¹⁸

In the case of Corfu Channel³¹⁹ ICJ ruled that, the ‘overall control’ test was used in order to consider when an act amounts to an ‘armed attack’. The same forum in another case of Nicaragua³²⁰ found that arming and training a guerrilla force that is engaged in hostilities against another state qualifies as a use of force.³²¹ Therefore any act by a state in providing any training to the individuals indulge in cyber-attack would amount to the prohibited use of force by that country. Providing an organized group with the malware and the training necessarily to use it to carry out cyber-attack against another State would also qualify as use of force.³²² Therefore an act that causes injury, kills people or damage objects are unanimously considered as use of force.³²³

The authors also advocate a different approach to book cyber-attacks as use of force by using a consequence-based approach.³²⁴ Under this approach, the cyber-attack must be analogous to the effects of a classic military operation.³²⁵ Article 2(4) of the UN Charter requires states to refrain from the threat or use of force in their international relations.³²⁶ This norm finds its place in several international instruments and is an accepted principle of international law.³²⁷

³¹⁴ KARL ZEMANEK, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, § 21.

³¹⁵ UN GA Res. 58/199(Jan. 30, 2004);

³¹⁶ *Supra note*, 16 at ¶¶. 362, 431.

³¹⁷ *Supra note*, 10 at 45.

³¹⁸ *Supra note*, 16 at 39.

³¹⁹ *Supra note* 15.

³²⁰ *Supra note* 18.

³²¹ Nicaragua para 228.

³²² *Supra note* 10 at 11 cmt. 4

³²³ *Supra note* 10 at 11 cmt.7

³²⁴ Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILL. L. REV. 587-89 (2011).

³²⁵ *Ibid.*

³²⁶ UN Charter, art. 2(4).

³²⁷ Declaration on Friendly Relations.



Further it has been described as the ‘corner stone of peace’,³²⁸ and any intrusion in peace is considered as violation of the sovereignty of the state.

Thus, in this changed paradigm, the prohibition of the use of force applies “to any use of force, regardless of the weapons employed”.³²⁹ Consequently, based on a test of ‘scale and effects’,³³⁰ it is the end result of an act that must be considered to ascertain whether an event amounts to a use of force.³³¹ When the effects of cyber operations, direct or indirect, have consequences similar to kinetic, chemical or biological force, regardless of the magnitude and duration,³³² they would reach the threshold of norm embodied in Article 2(4).³³³ Hence, cyber operations are understood to be prohibited under Art 2(4) if an analogy is allowed to be drawn and till the time there is no other piece of legislation available on the issue of cyber-attacks.³³⁴

CYBER ATTACK NOT CONSTITUTING USE OF FORCE:

Cyber Attack, being a new challenge in the realm of cyber space does not have any specific law to govern it and even the existing laws cannot be used explicitly to govern cyber-attacks. The scholars promoting such approach argue that as a general practice, the principles of international law must be interpreted in their original context.³³⁵ The Preamble of the UN Charter restricts the meaning of ‘force’ by stating that armed force should not be used save in common interest³³⁶. The fact that the term ‘armed’ qualifies the term ‘force’ in the Preamble establishes that ‘force’ in the UN Charter must refer to armed force alone.³³⁷ Article 44 of the UN Charter, in which the word ‘force’ has been held to mean armed force³³⁸ lends further support to the above argument, wherein even the economic force was not accepted as a use of force within the realm of force, as mentioned in the UN Charter.

³²⁸ C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 REC. DES COURS 451 at 492 (1952).

³²⁹ *Supra* note 16 at 24.

³³⁰ Nicaragua at ¶¶ 187-201.

³³¹ Oona Hathaway, *Law of Cyber Attack*, 100 CALIF. L. REV. 33 (2012).

³³² Corfu Channel Case,

³³³ Michael Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT’L REV. RED CROSS 373 (2002)

³³⁴ *Supra* note 10 at Rule 11 cmt. 9

³³⁵ VCLT Art. 31(1).

³³⁶ UN CHARTER, Preamble.

³³⁷ Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSN’L L. 885, 904 (1998).

³³⁸ UN Charter Article 2(4).



Article 2(4) and *travaux préparatoires* of the UN Charter prohibits only military use of force,³³⁹ does not include prohibition on economic and political pressures, thus clearly differentiating between armed force and the economic and political pressure. In this pretext, cyber-attack does not arise from the conduct of armed forces and therefore cannot be considered threat or use of force within the meaning of Art. 2(4). Pursuant to this prevailing approach no cyber-attacks have been considered armed attack unanimously by the international community.³⁴⁰ So many recent cyber-attacks like the one in Estonia in the year 2007, by way of DDoS attacks, i.e. Distributed Denial of Service was not considered to be a use of force though a lot of evidences and the then prevalent political scenario were pointing directly towards Russia and its involvement in the entire episode.

ICJ in the case of Nicaragua³⁴¹, held that any act to constitutes a use of force within the meaning of Art. 2(4), must fulfill the ‘scale and effect’ required to reach the level of a use of force.³⁴² The scale and effect is to be seen in context of each case and is determined by the quantum of physical damage done by injury or death to person or destruction to cyber infrastructure. Thus any form of coercion³⁴³ other than physical damage does not meet the threshold of use of force.³⁴⁴ Further the scale and effect must be grave³⁴⁵ resulting in great suffering or death. However, in case of attacks which do not even reach the threshold of use of force, therefore they cannot be said to rise to the level of armed attack and use of force.³⁴⁶

It is further argued by the authors that Cyber-attacks does not violates the purpose of UN Charter to maintain peace and amicable international relations respecting sovereignty of each state, as the cyber-attacks lack ability and intend in any way to violate sovereignty and to overthrow or undermine government, assist armed insurrection, cause domestic unrest or civil strife through acts of terrorism. Furthermore, is cyber space intervention does not constitutes

³³⁹BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 118(Oxford University Press, New York, 2nd ed., 2002).

³⁴⁰ *Supra* note 10 at 13 ¶ 13.

³⁴¹ *Supra* note 18 at 215.

³⁴² *Supra* note 10 at 11.

³⁴³ Nicaragua v. US., 1986 I.C.J.,109.

³⁴⁴6 U.N.C.I.O. Docs. 334, 603 (1945) doc. 2, 617(c) (4), 3 U.N.C.I.O. Docs. 251, 253-4 (1945).

³⁴⁵ *Supra* note 10 at 13.

³⁴⁶ *Supra* note 18 at 109.



coercive conduct below the threshold of use of force, to violate sovereignty by preventing State from exercising function, activities or making choices entitled under international law.³⁴⁷

CONCLUSION:

After analyzing the act of inter-country cyber-attacks and the established rule of customary international law, state practice and judicial pronouncement the author concludes that cyber-attack is the new challenge faced by the international community at large. Due to lack of established specific laws, there are different opinions of jurists and scholars regarding cyber-attacks, whether it will fall within the ambit of use of force under traditional law or not. The author is of the view that since International law is not codified and is influenced by the state practices; it is high time that the international community should come up with a specific regulation covering the matters relating to cyber-attack so that there is no ambiguity with regards to the applicability of the laws. The author advocates this approach for the very simple reason that use of force defined under UN charter was not drafted in order to include activities like cyber-attacks. When an attempt to include economic and political threat within the ambit of use of force was rejected, it was clear that the intention was only to include armed use of force and no other forces, as use of force.

Therefore, the author believes that a new legislation should be made so that all the nations must be governed by those set of rules and regulations. Thus in the present context, till the time there is no specific law governing cyber space at international level no actions can be taken against any country or any individual causing wide spread cyber-attacks as there is no law to book such entities under international law. Thus it is now high time that an initiative must be made to make a binding law and not just a report cum book like Tallinn Manual or Peace Time Regime which has no binding effect and is only a persuasive piece of work. As it is important to have better applicable and enforceable laws and rules in order to achieve the objective of UN charter, which is to provide sovereign equality and peace at international level and maintain amicable relations between nations.

³⁴⁷ Katharina Ziolkowski, PEACE TIME REGIME, at 218, 2013.



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19. Vienna Convention of Law of Treaty, Art. 31(1).
20. United Nation General Assembly Resolution 58/199 (Jan. 30, 2004).

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22. Corfu Channel, U.K. v. Albania 1949, ICJ 4.
23. Nicaragua v. U.S. Military and Paramilitary Activities 1986 I.C.J. 160.



RIGHT TO SURROGACY AND THE JUDICIAL APPROACH³⁴⁸

INTRODUCTION

The ethical, legal and social complexities surrounding the practice of surrogacy make it one of the most discussed subjects in the country. With the increasing reproductive tourism in the last decade, the Indian surrogate industry has transformed itself into a global industry. Lack of proper laws, cheap medical service and readily available surrogate mothers have made India one of the most sought after nations for people in search of parenthood. Despite the booming market, the legal framework that exists in the country is incomplete and inadequate. Several instances have been recorded where the both the surrogate mother and foster parents had to bear the aftermath of the incompetent laws. At present surrogacy in India is governed by the guidelines laid down by the *Indian Council of Medical Research (hereinafter 'ICMR')* and the only legislation under process is The *Assisted Reproductive Technology (Regulation) Bill 2010 (hereinafter referred to as 'Draft Bill')* has still not been passed by the Parliament. The Draft Bill is flawed in a number of ways and major modifications need to be made regarding issues like '**nationality**' and '**parentage**' which have not been addressed comprehensively in the current Draft Bill.

The article has kept the ethical argumentation out of its ambit and has not addressed whether the practice in itself is morally sound or not. Varying opinions exist on the same. While radical feminist factions see the practice as a form medicalization, commodification, and technological colonization of the female body, contemporary scholars view it on lines of cultural impact the practice has in the present society. The author believes in the liberty of people to act and provide the services of surrogacy. However, the article focuses on the existing laws and judicial decisions surrounding the practice and keeps the moral responses surrounding the same out of its scope.

The assignment has been divided into four sections. The first section deals with the definition and medical aspects of the practice. It further elaborates upon the present laws that deal with surrogacy. The second section is about the landmark cases and approach used by the judiciary and the fourth section deals with link of the topic with the theme allotted along with the author's

³⁴⁸ Jalaj Pandey, NUJS Kolkata



analysis. It is to be noted that the surrogate child is the stakeholder in the entire practice and the rights and welfare of the child is of utmost importance. If the laws and statutes in a country fall short of providing this rudimentary form of protection it becomes an issue of grave concern.

SECTION I

With medical advancements and technology, surrogacy has turned out to be the easiest alternative to adoption. It can be defined as a method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child which she will not raise but hand over to the contracted party.³⁴⁹ The mother agreeing to procedure is called the '*surrogate mother.*' The child born is eventually passed over to the foster parents who have the legal rights of parenthood over the child. In medical terms it is referred to as *Assisted Reproductive technology*. Surrogacy can be broadly classified into two forms:

1. **Traditional Surrogacy:** The form where the female gametes are that of the surrogate mother and the child is conceived with intention of relinquishing the child to be raised by others.³⁵⁰
2. **Gestational Surrogacy:** In this case the embryo is directly implanted in the surrogate mother and the surrogate is not biologically related to the child conceived. The ovum does not belong to the surrogate mother and she is only the carrier.³⁵¹

The **traditional form of surrogacy** is relatively low cost owing to artificial insemination. The insemination is directly into the reproductive organs of the surrogate mothers does not involve any medical technology which reduces the cost. These pregnancies are achieved using artificial insemination, typically with sperm provided by the commissioning husband. On the other hand, in **gestational surrogacy** the implantation takes place through In-vitro Fertilization which comparatively a much expensive exercise because of the medical complexities involved. Since an implantation is involved, the process involves the embryo to kept and medically examined. The key that makes gestational surrogacy a more preferred form of surrogacy, in spite of being an expensive exercise is primarily because of the surrogate mother is not genetically related

³⁴⁹Baby Manji Yamada v. Union of India, (2008) 13 SCC 518

³⁵⁰R.R. v M.H., 689 N.E.2d 790, 795 (Mass. 1998)

³⁵¹Babu Sarkar, Commercial Surrogacy: Is it morally and ethically acceptable in India, The Practical Lawyer, December, 2011, available at, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22512.



which makes her only the gestational carrier for the period of pregnancy. The clichéd expression of '*wombs for rent*' was coined when it became possible for fertilized eggs to be implanted and, thus, grow to a full term baby in any womb, sometimes with the help of cross-border surrogacy mothers.³⁵²

SECTION II

The practice of surrogacy in India is majorly governed by the guidelines laid down by the **ICMR**.³⁵³ Apart from this the other legislation in process is the **Assisted Reproductive Bill, 2010**.³⁵⁴ The major reason for the lack of development of legal mechanisms in India has been the friction between different governments and judiciary. The Government's recent attempt to prohibit commercial surrogacy in India and make altruistic form of surrogacy available only to Indian citizens served severe blow to the progress made in the legislations regulating surrogacy.³⁵⁵ It is important that the surrogacy laws are not politicized and the Government's conclusion should be based on neutral point of view. Though the ICMR guidelines continue to be the backbone, the guidelines are inherently non statutory in nature and therefore are not legally binding. The problems with lack of laws on surrogacy can be traced back to several cases.

Apart from the ICMR guidelines the surrogacy agreements are not separately categorized and the Indian Contract Act, 1872 has a complete control over the agreements. The author believes that surrogacy agreements in nature cannot be equated to that social contracts and the State needs to realize that the people involved in the contracts are of varying backgrounds. We know that the majority of the surrogate mothers involved are part to the practice because of the economic incentive of it. It is necessary that every contract undergoes some form of legal scrutiny. It is important that no party to the contract is dictated with unjustified terms and

³⁵²Wombs for rent: A tale of two mothers, BBC News World, July 28, 2011, available at <http://www.bbc.co.uk/news/world>

³⁵³ Indian Council of Medical Research guidelines on Surrogacy, 2005, available at, <http://indiansurrogacylaw.com/icmr-documents-on-surrogacy.html>.

³⁵⁴ The Assisted Reproductive Technologies (Regulation) Bill 2010.

³⁵⁵ No commercial surrogacy, only for needy Indian couples, Govt tells SC, The Indian Express, December 25, 2015, available at, <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples>.



controlled by the other party. There have been several instances where either the surrogate mother or the foster parents were coerced with unjustified terms.

The first of cases was the **Baby Manji Yamada case**.³⁵⁶ In the following case one Japanese couple was involved, travelled to India to hire a surrogate child and bear a child for them. While the sperms were that of the husband, the egg was harvested from an anonymous Indian woman. The embryo was eventually implanted in the surrogate mother's womb and child was conceived. However due to some matrimonial dispute, the couple ended in divorce. The husband wanted to raise the child, while the wife disowned the child. The husband wanted to raise the child. A situation of crisis came after child born had practically three mothers but legally had none. The crisis left the child in a problematic situation as the existing Japanese laws did not give citizenship to surrogate child with an independent parent. The child had to eventually bear the aftermath of the lack of laws as it could neither get the Indian citizenship or Japanese citizenship. The child's grandmother filed a suit in Supreme Court, and the question of the child's citizenship became extremely intricate. The situation was even more problematic as the judiciary didn't have any laws to base its decision on. It directed the case to National Commission for Protection of Child Rights and the body finally decided in giving judgment in favour of the grandmother, on 29th September, 2009. The nature of this case shows the problems with lack of laws as it took several years for surrogate child to passed over to the foster parent.³⁵⁷ A careful analysis of the case and its issues would make us that surrogacy legislations are imperative and mere preceding judgements or Indian Council of Medical Research (ICMR) guidelines are not enough to address such a broad issue. However, a critique regarding that has been elucidated meticulously in later part of the assignment.

Apart from this with regards to the nationality of the child, the standard guidelines are that that babies born in India to gestational surrogates are Indian citizens and are entitled to Indian passports. The Supreme Court in the case of **Jan Balaz v. Union of India**,³⁵⁸ made an exception and allowed the two surrogate twins to be taken by the German foster parents. The court

³⁵⁶ Shashank Bengali, India scales back 'rent a womb' services, Los Angeles Times, January 25, 2015, available at, <http://www.latimes.com/world/asia/la-fg-india-surrogacy-20160125-story.html>.

³⁵⁷ Baby Manji Yamada v. Union of India, (2008) 13 SCC 518

³⁵⁸ Jan Balaz v. Union of India, 1362 Supreme Court, 2009.



recognized that the long standing problem with existing laws continues to create impediments for all the parties involved in the surrogate contract.

The other problem faced in the surrogacy is the medical visas available to the people. The absence of laws on surrogacy has become a major impediment for people to access the visas. The New India Medical Visa Regulations which became effective from 15th November, 2012. These were popularly known as '**Medical Visas**'. The Medical Visa regulations it was made two mandatory requirements –

- a) For the foster parents travelling for the purpose of surrogacy would have to apply for same and not fulfilling the condition would lead to Visa rejection.
- b) It also mandated a letter from the embassy or Foreign Ministry of the country of the foster parents. The letter should clarify the legal position of surrogacy in the country. It should clarify that the country recognizes surrogacy and that the child born would be permitted entry in the country and would be awarded the legal status as that of the biological child of the couple.
- c) The authenticity of the ART clinics was also mandated where the concerned surrogacy needs to be performed is also imperative and should be one which is recognized by the **ICMR**.³⁵⁹
- d) The regulations mandated that the surrogate child could only take after issuance of certificate of the ART clinic from **Indian Foreigners Regional Registration Office (FRRO)**.

The Bill has been framed but still remains to be passed by the Parliament of our country. The Bill has a number of shortcomings which need to be addressed. To analyze the Bill, certain points have been enumerated below:

1. It talks about the custody of a surrogate child and the waiver of the rights of the surrogate mother.
2. It has included guidelines to stop the exploitation of surrogate mothers.
3. It addresses the custodial rights of single / gay / unmarried / divorce parents.
4. Establishing the genetic constitution of the surrogate child.

³⁵⁹ Anindita Majumdar, 'Transnational Surrogacy: The 'Public' Selection of Selective Discourse', EPW, Vol – XLVIII, No. 45-46, November 16, 2013.



5. The establishment of National and Advisory Boards.³⁶⁰

The key points have only been mentioned above. So what the Bill fails to analyze are issues which are more grave and intricate. For e.g. The issue of nationality is one which needs to be addressed without any ambiguity. But the Draft Bill fails to address the issues of nationality of the surrogate keeping in mind that a majority of customers are the ones who come from abroad. The issue has though not completely but to a great extent has been addressed by the '**Medical Visa**' but what is needed is a uniform policy. The problem is when different regulations address the same issue they at times contradict each other which leads to complex situations.

Secondly, the absence of any Court or judicial forum to resolve issues and disputes regarding surrogacy creates the biggest vacuum in relation to surrogacy. The national and State Advisory Boards created by the Bill will not serve the purpose to determine issues of parentage, nationality, issuance of passports, grant of visas and problems of disputed parentage. In light of these shortcomings the Legislature should amend the Draft Bill and form legislations which encompass the imperative issues more profoundly. Unless we have standardized legislation the disputes would continue leading to the exploitation of the weaker party.

There have been numerous instances where the judiciary has made attempts to change the societal perception of the practice. In **K. Kalaiselvi v. Chennai Port of Trust**³⁶¹ the Gujarat High Court decided that a surrogate child would be entitled to all the rights that a biological or adopted child is entitled to. Subsequently, the Gujarat High Court awarded the judgement in favour of the mother who acquired a surrogate child and petitioned for paternity leave from the Chennai Port.

Since most of the times the practice is availed by foreign couples, the problem with foreign couples remains same. In **Shihabeldin v Union of India**,³⁶² a Sudanese national had filed a petition against the discriminatory laws and problems that existed for foreign national in matters of surrogacy. The petition was rejected as no comprehensive laws existed that dealt with the same. The judiciary had given the verdict as per the Ministry of Home Affairs guidelines. The guidelines restrict surrogacy to foreign nationals who were married for two

³⁶⁰ Shalini Nair, The Issues around surrogacy, The Indian Express, November 2, 2015, available at, <http://indianexpress.com/article/explained/the-issues-around-surrogacy/>.

³⁶¹ Kalaiselvi v. Chennai Port Trust, 2013 (2) KLT

³⁶² Shihabeldin v. Union of India, (2014), Punjab and Haryana HC,



years and only after they were required to have the medical visa. This has become extremely problematic for a number of other foreign nationals that wish to have surrogate children. Such problems continue to exist and there is great need to replace with better laws and a more effective framework.

SECTION III

In this section the author analyses the standing problems with the surrogacy framework in the country. In the status quo the following problems can be listed down:

1. Health Issues of the surrogate mother

The health issues of the surrogate mother remain completely unaddressed. Firstly, there needs to be an establishment of a Public agency that would bring every kind of surrogacy – traditional or gestational on one platform. This agency would act as body for filtering and reviewing contracts. This makes it the first filter to any exploitative clauses in the contract. Secondly, strict guidelines need to be laid down with regards to the mother following a pattern during her pregnancy. There has been critique to same as being pattern or routines being restrictive to the surrogate mother. But the pattern or health routines should be set by this agency which would work as a neutral party. Thirdly, the counselling of the surrogate mother needs to be made a mandatory part of the contract. It has been reported in a recent survey that psychological and emotional breakdowns are common. Routine counselling should be made a part of the surrogate mother. For this **Israel's model** can be used as a framework. The State – appointed Committee, composed of seven member: two physicians specializing in gynecology and obstetrics, a physician specializing in internal medicine, a clinical psychologist, social worker, public representative who is a jurist by training and a person of the clergy of the parties' religion with a mandate of having three males and three females in the Committee.³⁶³ However the author contends the inclusion of clergy but the basic idea of having such a body can be used in the Indian Surrogate system.³⁶⁴

2. Price disparities that run throughout the country

³⁶³ Commissioning Surrogacy in India, Lawz Magazie, August 12, 2015, available at, <http://lawzmag.com/2015/08/28/commissioning-surrogacy-in-india/>.

³⁶⁴ Jwala D Thapa, Analyzing the status of the surrogate mother under The Assisted Reproductive Technologies (Regulation) Bill, 2010, NUJS Working Paper Series, 2012.



Price is undoubtedly a subjective factor that may differ in different contracts. There can be no fixed parameter to decide the prices. Since no fixed parameter exist in the present scenario price disparities occur commonly. With no body existing to address the same there have numerous cases of exploitation of both the surrogate mother and the foster parents. The problem with current surrogacy system is the prevalence of a system which creates room for under the table transactions. Uneducated, illiterate surrogate mothers are often deceived and not paid the amount that they rightly deserve.³⁶⁵ At the same time foster parents who are desperately looking for surrogate mother end up paying more than what they should. There needs to be some set parameter that could act against the exploitative nature of contractual terms. It creates a win – win situation for all safeguarding and protecting the two parties.

3. Surrogacy stages and the compensation the surrogate mother is to receive.

With issue of price disparity what needs to be addressed is that regardless of the fact it is a contract between two parties but the prices should have a fixed parameter. One of the problems with existing contract is that the Bill fails to comprehensively contemplate a situation when the procedure of surrogacy fails before the surrogate mother becomes pregnant. It addresses the issue by providing only 5% of the total amount agreed upon. In case of the surrogacy failing in the second attempt only then the surrogate mother receives 50% of the agreed amount. The author believes that five percent is far less and needs to increase to 15 – 20 % of the amount. The health and social aftermath of the same needs to be contemplated and compensation should be substantial for the surrogate mother. Further it has become a convention for the foster parents to look for another surrogate mother in case of one failure. In such scenario the second clause becomes redundant and fails to be even distantly relevant for the safeguards of the surrogate mother.

4. Question of autonomy (issue of informed consent)

With India context the question of autonomy is a very important one. The Draft Bill makes it mandatory for the surrogate mother to enter in to the surrogacy agreement of only after the

³⁶⁵ Vidya Krishnan, 'India's draft surrogacy Bill bars Homosexuals, live-in couples, Jan 30, 2013, available at, <http://www.livemint.com/Politics/ZsS2zs7KvqHlk4FCguW0EN/Draft-surrogacy-Bill-bars-homosexuals-livein-couples.html&g>.



consent of her husband.³⁶⁶ The Bill fails completely on defining consent and further creating a mechanism for safeguarding the freedom of choice of the surrogate mother. There have been numerous instances where surrogate mothers have been forced in to such professions by their families. There are two ways to go about this problem. First, by prior extensive counselling of the surrogate mother and ensuring that the mother is aware of the procedure, the pros and cons of the same.³⁶⁷ The author believes that the element of counselling is the most important which works for the benefit of all. Second, penal provisions for the same need to be made stricter and awareness programs regarding the same are run extensively. The author believes that it is one of the most effective ways to address the issue of freedom of choice and bring true consent in to the picture.

5. Question of accountability

Question of accountability is also one which has to be comprehensively dealt with. Again the Israeli model becomes exemplary. First of all, notice regarding the actual birth of the child must be given no later than 24 hrs. after its occurrence. The intended parents must initiate proceedings for a decree called a Parenthood Order within seven days of the birth; otherwise the welfare agent will initiate such a procedure. A decree is granted unless the child's best interests demand otherwise. The decree is final unless there comes a situation where the surrogate mother is not ready to deliver the child and got emotionally attached to the child. However, the facts of the case at hand need to be reviewed by the Committee and reimbursements and payments need to be made accordingly. The author believes that mid-way to such contracts is not a way out and keeping a position where the surrogate mother or the foster parents cannot unilaterally put an end to the contract.

CONCLUSION

In the entire agreement of surrogacy, the concerns of three parties need to be kept in mind and thereafter the legislations be made accordingly. The first is the surrogate child, second the foster parents and third the surrogate mother. It is to be made sure that the surrogate child does not become a centre of controversy and would have to bear the repercussions of the dispute

³⁶⁶ Sheela Saravanan, 'Transnational Surrogacy and Objectification of Gestational Mothers', EPW, Vol XLV, No. 16, April 17, 2010.

³⁶⁷ Anil Malhotra, Ending discrimination in Surrogacy Laws, The Hindu, May 3, 2014.



between the surrogate mother and foster child. Thereafter it is also important to make sure that both the foster parents and the surrogate are not exploited and their rights remain preserved.

An essential way to combat this apart from making legislations is creating awareness. The social stigma attached to the practice affects the life of the all the parties involved and it is important that there is a form of social acceptance which would one of the best form of panacea as far as the problems related to surrogacy are concerned.

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**CORPORATE SOCIAL RESPONSIBILITY: GOALS AND FUTURE PERSPECTIVE IN
INDIAN CONTEXT³⁶⁸**

ABSTRACT

Corporate Social Responsibility (CSR) which was earlier perceived as philanthropy had gained social as well as somewhat corporate acceptance in the past decade and keeping in view the changing role of corporates in the society, it was made compulsory in India in the year 2013. After, being mandated, a good proportion of the Corporate fraternity didn't welcome it with open hands but looked it as a new form of tax being imposed and 'responsibilities' being shifted on them by the government. But, the recent surveys and researches have proved that CSR is beneficial for the businesses too in the longer run. This article aims to delve into the goals and legal nuances of CSR and also at the same time the researcher intends to look into the way CSR has been implemented after the Company's Act, 2013. The article further aims to discover the future prospects of CSR in India.

Keywords: CSR, Companies Act 2013, Mandatory, Present Scenario, Prospects.

³⁶⁸ Mayank Srivastava & Shubham Jain, II Year, B.B.A L.L.B. (Hons.), Chanakya National Law University, Patna.



INTRODUCTION

“Creating a strong business and building a better world are not conflicting goals – they are both essential ingredients for long-term success”.

-William Clay Ford Jr.

To understand the notion of Corporate Social Responsibility (CSR), it would be better to understand the term ‘Corporate Social Responsibility’ in fragments. According to the Oxford dictionary;

Corporate means an organized business,

Social means relating to society,

Responsibility means the state or fact of being accountable.

Therefore, it can be stated that, CSR means the accountability of business organizations towards the society.

There is no universally accepted definition of CSR, going with the definition given by United Nation Industrial Development Organization (UNIDO), “Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders.”

Understanding the definition, it can be said that CSR is a way or means a company achieves a balance or integration of economic, environmental and social requirements while at the same time addressing shareholders and stakeholders. This balance is also required because of the reason that if the society and environment will itself cease to exist, where the business will be? The same was the opinion of renowned theorist **Keith Davis**. According to him, social responsibility is often referred to as having risen from an *Enlightened Self Interest* where organization realizes that it is in their own best interest to act in ways that the community considers socially responsible. He also states about the “Iron Law of Responsibility” in which, in the long run, those who do not use power in a way society considers responsible will tend to lose it.



CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

The concept of Corporate Social Responsibility (CSR) flows from the idea of Corporate Governance and business ethics. As a famous saying goes – “*With great power comes great responsibility*”. Fine, ‘responsibility’ is OK, but the question may arise as to what or why is need there to serve the community? The answer is that the purpose of the business enterprise is to create wealth, create market, and to take proper care of their shareholders ‘health’. For this, the business takes resources such as raw materials, human resource, infrastructure, etc. from the society and also depends wholly on society to provide proper environment in which the enterprise can peacefully function. Hence, morally (now legally³⁶⁹ in India), it becomes responsibility of the corporates to give something back to the society in one or other form. In this way, there is corporate responsibility towards the society, thus, known as Corporate Social Responsibility.

There is no standardized definition of Corporate Social Responsibility, but, following the US-UK tradition, it can be defined as:

“Corporate Social Responsibility is operating a business in a manner which meets or excels ethical, legal, commercial or public expectations that a society has from a business.”

Explaining the definition and understanding it in an easier way, it can be sated that, Corporate Social Responsibility is nothing but giving back something to society in the form of beautification of locality or city, building of hospitals or library, preservation of environment and cultural heritage, development of community relationship, etc. The philosophy is basically to render back to society which the enterprises are using in their quest of wealth.

Historical Background

The elements of CSR can be traced down from the history. In the year 1916, J.M. Clark writing in *The Journal of Political Economy*, noted that, “if men are responsible for known results of their actions, business responsibilities must include the known results of business dealings, whether these have been recognized by law or not.” The traces of CSR go even back to the nineteenth century, a notable example is the Cadbury chocolate makers in the UK that prospered in the 1870s and moved in 1879 to a green field site which came to be called

³⁶⁹Section 135, The Companies Act, 2013.



Bournville village for the benefit of its workforce. The Cadbury family introduced social responsibility practices including works committees, a medical department, pension funds and education and training for employees. In the 1900s they built "a successful business in a successful community".³⁷⁰

In India, CSR has its origin since ages. The famous, *Kural*, the great book of *Tiru Valluvar's* verses is a treatise par excellence on the art of living. *Kural* has attracted the best of minds of the world down the ages. Raja Gopalachari's English version of *Kural* stipulates the following moral verses for discharge of social responsibilities. These also apply to corporate citizens, apart from human beings.

- What good did the creatures of the earth do to the clouds that pour the rain? So indeed you should serve society, seeking no return;
- Good men put forth industry and produce wealth, not for themselves but for the society.³⁷¹

According to Vedas, man can live individually but can survive only collectively. Since, corporates need to survive, they should try to preserve this society so that they can flourish. Hence, concluding the above statements, it can be said that the corporates should work towards the maximum benefit of maximum people.

"Samasta Janaanaam Sukhino Bhavantu"

Evolution of CSR in India

Moving on to modern era, it can be stated that CSR has evolved in five different phases which may overlap. The phases are as follows:

- In the **first phase**, CSR was mainly driven by the forces such as *charity* and *philanthropy*. During the era of pre-industrialization, which lasted till 1850, wealthy merchants were used to build temples and religious places as well as they also provided the necessities during the times of floods, drought and epidemics.

³⁷⁰CR and visionary companies, CSR Quest, (Aug. 6, 2016, 3:10 p.m.), <http://www.csrquest.net/default.aspx?articleID=13125&heading>

³⁷¹ The Institute of Company Secretaries of India, Corporate Social Responsibility & Sustainability (2009)



- The **second phase** came during the period of independence movement in which the industrialist and wealthy persons had the stress to show their dedication towards the benefit of society. It was the time when Mahatma Gandhi introduced the concept of '*trusteeship*'. According to this concept, the industrialists were required to manage their opulence in such a manner, that it benefits the common man.
- In the **third phase**, the public sector saw an enormous growth but at the same time, it was understood that the public sector is alone not enough for the growth of the society and participation of private sector is also crucial. In 1965, Indian academicians, politicians and businessmen set up a national workshop on CSR aimed at reconciliation.³⁷²
- The **fourth stage** can be referred as period from 1980-2013 in which the economy went through plethora of changes such as *globalization* and *liberalization* which helped CSR in gaining momentum.
- The **fifth stage** or the current stage is period afterwards 2013 when CSR was made mandatory by the *legislation* and thus becoming the first nation in the world to compel CSR by the corporates. It is the period, when CSR is growing rapidly and thus transforming the society.

GOALS OF CORPORATE SOCIAL RESPONSIBILITY

Determining the goal or objective of any phenomenon is very significant. The management studies also state that objective of the Corporates define the success of corporates. The relevance of CSR is very pertinent from different angles. The goals of CSR can be understood by understanding the goals of its stakeholders from CSR, i.e., Business, Government and Society. Analysing all these three standpoints, we find that, if business and social objective is accomplished then Government's objective is automatically fulfilled. To get accumulative success over these three objectives of CSR, coordination among them is essential.

Corporate's Goal

The importance of CSR is very strategic for the business organisation. This era is very competitive and social activist. To sustain in this, the organisation cannot only focus on profit but it should also be concerned with the society. This will help in the sustainability of the

³⁷² M.Vasan, Corporate Social Responsibility, at 52 (1st ed. 2015).



business in the competitive market. There are various objectives (benefits) of business through CSR and some significant ones are as follows:

Enhancement in Brand's image and its Goodwill: - Consumers are drawn to brands and companies with good reputation in CSR-related activities.³⁷³

Access to Capital: - If the reputation of company in terms of social responsibility is good in front of the society, it helps in easy access to capital.

Fascination and Retaining of Employees: - Corporates having strict implantation of CSR policies are able to easily recruit or retain employees which results in reduced turnover and training cost.

Government's Goal

The main aim of the government behind CSR is social prosperity of lower sector of the society. It is true that proper execution or implementation of social welfare schemes and programs is not possible without active support of people (here it refers to Corporate). The idea behind mandatory CSR is not imposing a tax in a new form but intention of the Government is to regularise the behaviour of the corporates towards the social obligation in the form of legal compulsion. Government has set only benchmark (i.e. 2% of average profit) but it is totally up to the organisation how to get competitive edge. This government initiative has increased the healthy competition between organizations which ultimately results in the development of the society.

Society's Goal

The term CSR itself denotes responsibility towards the society. The aim of CSR toward social world is to accomplish the requirement as well as desire of the society from the Corporates. Social objective determines the framework or core structure of CSR policy of any organisation. It is true that no CSR policy can be frame in absence of Social Objective.

³⁷³ Supra Note 4, p.6.



LEGAL ASPECTS AND IMPLEMENTATION OF CSR

The following is the chronological phases of events that led to Companies Bill, 2011 which aims to substantially amend the Companies Act of 1956.

- **2004** Ministry readies concept paper on revised Company Law.
- **2005** J J Irani Committee submits its report on concept paper, new law.
- **2008** Cabinet approves new law, lapses due to resolution of Lok Sabha.
- **2009** Re-introduced as a Bill 2009, goes to Parliamentary Panel for scrutiny.
- **2010** Parliamentary Panel submits report on Bill.
- **2011** Cabinet approves Company Bill 2011.
- **2012** Introduction and Passage of Bill by Lok Sabha.
- **2013** Introduction and passage of bill by Rajya Sabha and Receipt of President assent on the Bill.

After being made mandatory in India, the concept of Corporate Social Responsibility is governed by Clause 135 of Companies Act, 2013, which got the President's assent on 29th of August, 2013 after being passed by both the houses of Parliament. The provisions of CSR enumerated in the Act is applicable to companies with an annual turnover of 1,000 crore INR and more, or a net worth of 500 crore INR and more, or a net profit of five crore INR and more.³⁷⁴ The new rules and regulations, which has been applicable from the fiscal year 2014-15, mandates the company to set up a committee consisting of board members, including at least one independent director³⁷⁵.

The Act encourages companies to spend at least 2% of their average net profit in the previous three years on CSR activities. The ministry's draft rules, define net profit as the profit before tax as per the books of accounts, excluding profits arising from branches outside India.³⁷⁶ The Act makes a list of the activities that are eligible under CSR. These activities may be implemented by the companies by taking into account the local conditions after seeking board approval.

³⁷⁴Section 135(1), The Companies Act, 2013.

³⁷⁵Sc. 149(6) of The Companies Act, 2013.

³⁷⁶Confederation of Indian Industries, Handbook on Corporate Social Responsibility in India (2013).



The activities that can be undertaken by the companies to fulfil the obligations of CSR includes eradication of extreme hunger and poverty, promotion of education, promotion of gender equality and empowering women and reduction of child mortality and improvisation of maternal health.³⁷⁷ The activities like combating diseases such as AIDS, malaria, etc. can also be taken up by the companies. The other activities that fall under the ambit of CSR are setting up homes for women, orphans and the senior citizens, measures for reducing inequalities faced by socially and economically backward groups, ensuring environmental sustainability and ecological balance, animal welfare, protection of national heritage and art and culture, measures for the benefit of armed forces veterans, war widows and their dependents, training to promote rural, nationally recognized, Paralympic or Olympic sports, contribution to the prime minister's national relief fund or any other fund set up by the Central Government for socio economic development and relief and welfare of SC, ST, OBCs, minorities and women, contributions or funds provided to technology incubators located within academic institutions approved by the Central Government and rural development projects.³⁷⁸

A company can implement its activities of CSR through its own³⁷⁹, through its registered trust or society, subsidiary or associate company, a company established by its holding or otherwise, provided that the company has mentioned the activities to be undertaken, the ways for utilization of funds as well as monitoring and reporting process. If the entity through which the CSR activities are being undertaken is not established by the company or its holding, subsidiary or associate company, such entity would need to have an established track record of three years undertaking similar activities.³⁸⁰ The significant point that needs to be mentioned here is that only those activities will be taken into consideration for CSR which will be undertaken in India and the activities meant exclusively for employees or their families will not qualify.

³⁷⁷ Schedule VII, Companies Act of 2013.

³⁷⁸ Ekta Bahl, An overview of CSR Rules under Companies Act, 2013, Business Standard (Aug. 7, 2016, 3:37 p.m.), http://www.business-standard.com/article/companies/an-overview-of-csr-rules-under-companies-act-2013-114031000385_1.html

³⁷⁹ Supra Note 9.

³⁸⁰ Supra Note 11.



Reporting

The new Act requires that the board of the company shall, after taking into account the recommendations made by the CSR committee, approve the CSR policy for the company and disclose its contents in their report and also publish the details on the company's official website, if any, in such manner as may be prescribed. If the company fails to spend the prescribed amount, the board, in its report, shall specify the reasons.³⁸¹

Results after the Implementation of the Act

After, almost three years of mandating CSR, the results are clearly visible. The companies have taken a positive approach towards the implementation of CSR. Some companies have done it in the form of women empowerment³⁸², some in the form of upliftment of mentally challenged persons³⁸³ whereas others in the form of development of infrastructure near the operational areas of the organization³⁸⁴. Hence, in the light of the above, it can be said that the objective behind mandating CSR has taken a positive approach towards its fulfilment.

THE WAY CSR HAS TRANSFORMED AND ITS POSSIBLE FUTURE DEVELOPMENT

India is a country of innumerable opacy. On one hand it has grown as one of the largest economy in the world and evolved as a global leader in the business community. On the other hand, the major portion of the Indian population still survives in absolute poverty. As the development of the society is directly influenced by the business that flourish in its environment. In the same manner the success of the business is to be determined by the stability of that society. Therefore, the corporate needs to concentrate on their role not only towards the profit but also towards their social responsibilities. The corporates are required to do beyond the government initiatives towards social welfare. They have to come forward and initiate programs for improvement of health, sanitation and living standard of the society. Corporate Social Responsibility (CSR) is "the commitment of business to contribute to sustainable

³⁸¹ Supra Note 9 p. 13.

³⁸² Corporate Social Responsibility, Reliance Industries Limited (Aug. 10, 2016, 6:12 p.m.), <http://www.ril.com/OurCompany/CSR.aspx>

³⁸³ Corporate Governance, Infosys (Aug. 10, 2016, 6:25 p.m.), <https://www.infosys.com/investors/corporate-governance/Pages/social-responsibility.aspx>

³⁸⁴ Corporate Social Responsibility, Oil and Natural Gas Corporation Limited (Aug. 10, 2016, 6:48 p.m.), <http://www.ongcindia.com/wps/wcm/connect/ongcindia/home/csr>



economic development, working with employees, their families, and the local communities.”³⁸⁵ If we talk in global perspective, then CSR tactic is holistic and cohesive with core business strategy for social and environmental impacts of businesses. It needs to address the well-being of all stakeholders and not just the company’s shareholders. Philanthropic activities are only a part of CSR, which otherwise create a much larger set of activities entailing strategic business benefits.³⁸⁶ United Nation secretary general Ban Ki- Moon speaking on UN Global Compact’s schemes states that “*We need business to give practical meaning and reach to the values and principles that connect culture and people everywhere*”. In Indian context the concept of CSR originated from “Helping the poor and Disadvantaged” as mention in ancient literature³⁸⁷. The oldest form of CSR in India can be seen in the form of philanthropy and charity, which later converted into corporate or business strategy to earn society’s faith or to get competitive edge. With the passage of time, it was observed that Corporates became only profit oriented and forgot their responsibility towards the society. In fact, they became stranger towards the society, which provide them better environment for their better existence. It seems that corporates have forget the famous saying that, “*With great power comes great responsibility*” After decades of slow growth, India is now consistently hitting economic growth rates well above its historical average since becoming an independent nation. Overs the last twenty years, India’s per capita income level has leapt from \$355 to \$1,499 in 2013³⁸⁸. On the contrary India’s economic modernisation remains demoted to small portion of the population. The rank of India in Human Development Index, which is released by United Nation Development

³⁸⁵Corporate Social Responsibility, wbcscd (Aug. 2, 2016, 8.38 p.m.),<http://www.wbcscd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx>

³⁸⁶ Anupam Singh & Dr. Priyanks Verma, From Philanthropy to Mandatory CSR: A Journey towards Mandatory Corporate Social Responsibility in India, European Journal of Business and Management, Vol. 6, No. 14, p.147.

³⁸⁷CSR in India, Global CSR Summit, EY,(Jul. 29, 2016, 3.16 p.m.),
[http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India/\\$File/EY-Corporate-Social-Responsibility-in-India.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India/$File/EY-Corporate-Social-Responsibility-in-India.pdf)

³⁸⁸Richard M. Rossow, CSR in India, How the Companies Act May Augment Regional Disparities, CSIS (Aug. 6, 2016, 2.24 p.m.)
https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150330_corpresponsibility.pdf.



Programme (UNDP) was 136 (out of the 187 countries).³⁸⁹ Despite of relatively high economic growth rate, the country has only been able to move a single step in the last seven years. From this we can easily analyze the disparity between rich and poor. One who is rich becoming richer and one who is poor becoming poorer. The government takes extensive growth initiative through a series of programmes and policies. But we all know that it is not only the work of government but corporate sector is also needed to come forward and take responsibility of the place or society where they operates. There is noteworthy variation in reference to social, economic, ecological, legal and political environment, from nineteenth century to twentieth century. In nineteenth century the corporates were required to distillate on only profit maximization objective. But the circumstances were changed in twentieth century, here the corporates have social, legal, environmental, economic, political responsibilities which they must have to fulfil with greater responsibility. In the preview of above mentioned situation, now Corporate Social Responsibility has been made mandatory for the corporates by the Companies Act 2013. With this legislation India become the only country in the world with legislated Corporate Social Responsibility.

Future Growth of CSR

Coming straight forward to the point, currently, most of the Companies in India are viewing CSR as a tax imposed by the Government on them and are of the view that Government is trying to shift its responsibility on them. CSR has been done in the past two years, but more out of compulsion and less out of impulsion. As it is well understood that something which is done out of compulsion does not thrive in the longer run. Hence, to make CSR eternal, it is necessary to inculcate it in the minds and nerves of the Organisation. For this, there is a strong need that the market or business leaders step up forward for the inculcation of these values in their respective organizations and put an example before the business fraternity and subsequently it will be followed. In this way, there exists a brighter future for CSR in India.

³⁸⁹Madhavi Rajadhyaksha, India ranks 136 in human development index, The Times of India (Aug. 3, 2016, 1..23 p.m.), <http://timesofindia.indiatimes.com/india/India-ranks-136-in-human-development-index/articleshow/18990526.cms>



CONCLUSION

CSR holds a vital spot in the improvement scenario of the world today, and can act like an apparatus for feasible improvement. As CSR is an always advancing idea, it has numerous definitions and elucidations. CSR might be characterized as different exercises embraced by the firm reflecting its responsiveness towards different partners such as representatives, clients, society everywhere and so forth. CSR can be considered as ‘viaduct’ to synthesize and integrate the different interests of society and corporations.

The benefits of CSR may not be viewed in a short run but it definitely has a long term effect. Customers, too, have an acceptance towards the company which is responsible as well as ethical in nature. The amount spend on the CSR is actually not expenditure but an investment, which the company will realize in the coming years in the form of retaining of employees, increased customer loyalty, etc.

Many of the corporates were often critical on the question whether CSR is pro company. This also has the answer and it can be said that air is now almost cleared. As per global survey by Ernst and Young, 94 % of organizations trust that advancement of a CSR system can convey genuine business advantages. Research found that organization’s CSR programs impact 70 % of all consumer buying choices. Keeping in view the benefits of CSR for the society as well as organization, the Government of India has made CSR mandatory and thereby becoming the first country in the history to mandate it. Hence, the compulsory CSR may seem like a burden to the corporates like the taxes but it is just a matter of understanding the responsibility and willing to change. As stated earlier, the corporates are necessitated to imbibe the value of CSR and move forward and hence build a healthy and sustainable world.



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INDIAN COMPETITION REGULATOR: EFFICIENT OR INEPT?³⁹⁰

ABSTRACT

In the globalised era, antitrust regulator plays a crucial role in the growth of the competitive market with utmost fairness and transparency. It basically prevents monopolization and practices having adverse effect on the fair competition. In India, the Competition Commission of India (CCI or Commission), a body established under the Competition Act, 2002 is empowered to take cognizance of such anti-competitive effects in the Indian market. CCI is considered as one of the most active regulator in the country. Recently, there is significant increase in the number of cases before the Commission due to globalization and opening of the economies. Further, with the recent positive change in the economic climate and spate of regulatory changes in the pipeline, India is poised for a new era of globalized activity. The article analyses the activeness of the CCI in passing various decisions and their impact on the Competition in the Indian market. It will also help in better understanding of the role playing by the CCI in present and of course the future prospect of CCI with respect to the growth in the economy and changes in the regulatory factors.

Keywords: Competition, Commission, Economy and Market

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INTRODUCTION

Globalisation, characterized by trade liberalisation, relaxation and reduction of restrictions on finance and investment, regional and national integration, deregulation and to some extent privatization, saw the world being reduced to one geographic market. From 1991, the industrial policy changes has ushered an era of liberal trade and transactions in industrial and financial sectors of the economy. Globalization of trade and commerce has transformed the outlook of global economy and legal systems.

In the last two decades, India witnessed substantial rise in the good level of the competition in the market. In fact, over the last two years, the government came out with several initiatives towards reviving the economy and providing the business friendlier environment. Currently, India has become more competitive and prosperous relative to the rest of the world.³⁹¹ Now, the competition in the Indian market can be considered as on advanced level as compared to earlier times. Competition is the function of confidence in the market, global economic situations and increased competition. It is the engine of free enterprises.

Indian competition law regime has grown considerably in the last six years ever since the Act became operational in 2009. In Recent time, the CCI was considered as the most active regulator in India. In the short span of time, it has prima facie raised concerns on several transactions, major being in the pharmaceutical and cement sectors.³⁹² CCI has given immense power under the law to deal with the anti-competitive deal. Till 2015, CCI addressed issues of anti-competitive behavior in real estate, infrastructure, power, media and entertainment, automobiles sector including couple of e-commerce cases where CCI examined online and offline transactions.³⁹³ The provisions of anti competitive agreements and abuse of dominance are very important as seen by the judgments given by the Court in various decisions concerning Competition Law.

³⁹¹ Anant Vijay Kala, *India's Competitiveness and Prosperity Rankings Rise Under Modi*, The Wall Street Journal (01/06/2016), available at <http://blogs.wsj.com/indiarealtime/2016/06/01/indias-competitiveness-and-prosperity-rankings-rise-under-modi/>, last seen on 12/08/2016/

³⁹² In 2012, CCI fined 11 cement firms Rs. 6300 crores for cartelisation in India

³⁹³ Mr. Ashish Ahuja v. Snapdeal.com and Anr, MANU/CO/0056/2014



CCI is a developing and evolving body in itself, but its journey is often imbalance with the cases of procedural lapse or on other grounds. The recent trend of reversal or remand of decisions of Commission by the Competition Appellate Tribunal (COMPAT or Appellate tribunal) has given a questionable view on the CCI. Most of the penalties imposed by CCI in various cases are over ruled on procedural issues like rules of fairness and natural justice but not on merits. Moreover, the Commission has only one judicial member where the probability of error in the orders of CCI on the judicial point is more. Therefore, the need has aroused to have more efficiency in the CCI through some reformation. It is to be kept in mind that the healthy Competition Law policy will go a long way in promoting efficiency and encouraging new entrepreneurs and businesses.

EVOLUTION OF COMPETITION LAW IN INDIA

In India, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was the operative competition law until it was repealed in the year 2009. Though the Competition Act was enacted in the year 2002, but it is fully effective from 15th May 2009.³⁹⁴ The MRTP Act was a forerunner to the Competition Act and sought to legislate over issues relating to restrictive and monopolistic trade practices. The replacement of the MRTP Act with the Competition Act was a natural corollary to economic liberalisation and opening to competition. The provisions of the MRTP Act and judicial pronouncements thereof are not useful in the changing economic scenario of India. Therefore, the need was felt for a change in approach towards fostering competition. Considering the need of the economic and social environment in India, a high level committee is constituted, called 'Raghavan Committee', which ultimately advised for the enacting of new Competition law.

The thrust of the Competition Act is to promote competition and the objective of the MRTP Act was to prevent economic concentration and restrictive trade practices. The Combine objective of both the law led to the enactment of the Competition Act, 2002.

CCI: AN ANTI-TRUST REGULATOR IN INDIA

³⁹⁴ See <http://www.cci.gov.in/sites/default/files/notification/cf3.pdf>



Antitrust and competition laws lie at the nexus of international law and business.³⁹⁵ In India, the Competition Act, 2002 is fair legislation and vital to the economic growth of the country. The Act provides for fair competition in the interest of the consumers and freedom of the trade carried on by the participants in the market. The mission of the CCI is to eliminate anti-competitive practices³⁹⁶, such as cartels and abuse of dominance³⁹⁷, as well as check anti-competitive mergers and takeovers³⁹⁸ to protect the interest of consumers and achieve economic efficiency.

The authority entrusted to achieve the objects of the Act is the Competition Commission of India (CCI)³⁹⁹ and orders passed by the CCI may be appealed before the Competition Appellate Tribunal (COMPAT).⁴⁰⁰ Further the order of the COMPAT can be appealed before the Supreme Court of India under Section 53T of the Competition Act, 2002.

CCI also have the power to extend its jurisdiction beyond the Indian shores. CCI can exercise its power by way of entering into arrangements and memorandum of understandings with the regulatory bodies of other countries in order to achieve its objective. Even CCI can recall or review its order subject to certain restrictions and the same should be done sparingly and not in every case where an investigation has been ordered without proper hearing.⁴⁰¹ CCI can begin inquiry of the alleged anti-competitive practice either on the basis of information received from private parties or on reference received from the Central or the State Government or by taking suo moto cognizance.⁴⁰²

In 2014 and 2015 (till May), several cases decided by CCI have reached to the Supreme Court, where approximately 72 cases were filed and interestingly in only 8 cases, CCI has approached the Supreme Court. This would seem to indicate that in a fairly high percentage of cases, COMPAT is upholding rulings of CCI.⁴⁰³ In a relatively short period of time, CCI and

³⁹⁵ American antitrust law is synonymous with competition law in the rest of the world.

³⁹⁶ S.3, The Competition Act, 2002

³⁹⁷ S.4, The Competition Act, 2002

³⁹⁸ Ss. 5 & 6, The Competition Act, 2002

³⁹⁹ T. Ramappa, *Competition Law in India* (2nd edn, Oxford India Paperbacks 2009) 42

⁴⁰⁰ S. 53B, The Competition Act, 2002

⁴⁰¹ Google Inc. v. CCI, MANU/DE/1271/2015

⁴⁰² S. 19, The Competition Act, 2002

⁴⁰³ Nishith Desai Associates, *Competition Law in India – A Report on Jurisdictional Trends*, June 2015, p. 8



COMPAT have shown their ability to handle litigation and going forward, both institutions may require additional infrastructure to handle litigation. But presently, the COMPAT is not upholding the decisions of the Commission, mostly in the cases where penalty is imposed, due to lack in the clarity of orders or violations of principles of natural justice. Keeping in mind the need and recognizing the constitutionality of specialized tribunals, the Supreme Court reiterated the well-settled principle that quasi-judicial tribunals were bound to comply with principles of rule of law and principles of natural justice.⁴⁰⁴

As India integrates at a fast pace with the global economy there is a need to ensure international cooperation with other competition regulator across the globe, to tackle cross border challenges. Competition law has to be tacked in an international perspective and cannot be looked into in isolation. The domestic jurisprudence of the competition law should be in aligning with the international jurisprudence concerning the competition law.

CCI: INQUIRY, ENFORCEMENT AND PENALTY BY THE CCI

CCI is considered as one of the active regulators in the nation. It has passed several orders providing for 'cease and desist' along with orders imposing heavy penalty. CCI has imposed billions of rupees of penalty in various cases. CCI has levied penalties of a little over Rs. 14,000 crore on companies since its inception in 2009. But it has been able to recover only Rs. 82 crore. While in some cases, appellate courts have granted stay, pending disposal of the appeal, in other cases, the appellate court has refused stay on recovery of penalty. But, such interventions by COMPAT do not diminish importance of CCI as its orders lead to deterrence in the market.⁴⁰⁵ The Commission has created the fear among the companies or organisations for the consequences of non-compliances of the provisions of Competition Act, 2002. Where the consequences of non-compliances will give rise to the heavy penalties by CCI. Further, to ensure compliance speedily and efficiently, it was thought fit to confer more powers on the

⁴⁰⁴ Namit Sharma v. Union of India, (2013) 1 SCC 745.

⁴⁰⁵ ET Bureau, Competition Appellate Tribunal sets aside Rs 1,773 crore penalty on Coal India, available at http://articles.economictimes.indiatimes.com/2016-05-18/news/73151859_1_cci-order-coal-india-ltd-compact, last seen on 10/08/2016.



Direct General. However, the Competition Bill has lapsed and it remains to be seen if it is reintroduced or any further action is taken by the Central Government.⁴⁰⁶

Currently, it seems that the commission lacks something while deciding the cases. CCI's adjudication lacks clarity while imposition of penalties. As a quasi-judicial body, the Commission is bound by certain constitutional principles and is bound to disclose reasons for its rulings⁴⁰⁷ and consequently, the opinion expressed by the Commission under Section 26 (1) of the Act, should not take into account merits of the contentions, should be based on a preliminary review of material on record and finally, the order passed, should have reasons. CCI orders imposing penalty do not have a discernible rationale which provides a legal or economic basis for imposition of a particular percentage of penalty.⁴⁰⁸ While imposing penalties, the authorities like CCI should apply the legal principles not mechanically or blindly but after carefully considering the factual aspects. And such factual aspects depend upon companies to companies and it could include the financial ability of the company, the necessity of the product, the likelihood of the company being failure on account of unreasonable harsh penalty etc. This list is certainly not exhaustive and the authority can and should consider all the relevant factors while imposing the penalty. It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court.⁴⁰⁹

Further, CCI has immense power under the Act, so it can also impose penalty for delay in furnishing of the information or failure to furnish information⁴¹⁰ or non-compliance with the

⁴⁰⁶ See Competition (Amendment) Bill, 2002, available at <http://www.prindia.org/billtrack/the-competition-amendment-bill-2012-2571/>, last seen on 11/08/2016

⁴⁰⁷ Seimens Engineering & Manufacturing Co. of India Limited v. Union of India & Anr, (1976) 2 SCC 981.

⁴⁰⁸ M/s. Excel Crop Care Limited v. Competition Commission of India & Ors, 2013 CompLR799 (CompAT)

⁴⁰⁹ Ibid

⁴¹⁰ Consumer Unity & Trust Society (CUTS) v. Google Inc., USA and Google India Private Limited, (Google Case)



orders of CCI⁴¹¹ and others. Companies should bear in mind consequences of non-compliance while engaging with CCI.

COMPAT: A SUPERIOR COMPETITION WATCHDOG

Competition Appellate Tribunal (COMPAT) is an appellate tribunal established under the Competition Act, 2002. The appeal from the Commission lies to the COMPAT under Section 53B of the Competition Act, 2002. Under the Competition law, Commission has expert and administrative functions whereas the tribunal has the adjudicatory functions which are judicial in nature.

In the recent time, CCI has decided several cases where it seems that it is developing towards achieving its objective concerning the competition law. Most of the cases decided by CCI are on merit based. It has addressed lots of important issues since its inception in 2009. Even, COMPAT is upholding the rulings of CCI. The cases in which heavy penalty is imposed are appealed to the COMPAT and presently, it seems that mostly every order of decisions of the CCI where heavy penalty is imposed is set aside or over ruled by COMPAT.

CCI has imposed penalties of several billion rupees for violating the provisions of the Competition law. The orders and decisions of the Commission lacks clarity in terms of abiding principles of natural justice and providing a reason based judgment. Therefore, COMPAT has started looking into the finer economic and legal analyses of orders passed by CCI. Some of the recent cases, where commission has imposed heavy penalties and the same are set aside by the COMPAT on several grounds.

▪ **Coal India Limited and Ors v. CCI (Coal Case)**⁴¹²

COMPAT quashed a 2013 decision of the antitrust regulator which imposed a Rs.1,773 crore fine on Coal India Ltd (CIL) and three of its subsidiaries for misusing their monopoly to supply poor quality coal and fixing prices. CCI's order against CIL set aside as all members' of CCI didn't have benefit of hearing arguments. In the case, all members of commission who signed orders imposing penalty upon CIL and its subsidiaries did not have

⁴¹¹ Magnolia Flat Owners Association v. M/s. DLF Universal Limited & Ors, 2012 CompLR94 (CCI)

⁴¹² 2016 CompLR716 (CompAT)



benefit of hearing arguments as they not present during hearings of parties but mechanically signed orders, orders so passed had to set aside on ground of violation of principles of natural justice. The Tribunal said that the CCI, *being a quasi-judicial body, had to comply with principles of natural justice that is 'he who heard the case, must decide'*.

▪ **Interglobe Aviation Ltd v. Secretary, CCI**

Here, CCI violated principles of natural justice by passing order without giving an opportunity of being heard to appellants. The Commission passed impugned order without giving an action-oriented notice to appellants and an effective opportunity to controvert what commission had perceived as contrary to section 3, commission had violated principles of natural justice which it was duty bound to comply with in view of mandate of section 36 of the Competition Act.

▪ **Indian Jute Mills Association v. Secretary, CCI**⁴¹³

COMPAT quashed penalty imposed by CCI on 'Indian Jute Mills Association' and 'Gunny Trade Association'. The investigation by CCI revealed that both the associations were engaged in anti-competitive practices and penalty was imposed upon association and its office-bearers and members of Executive Committee. But in the absence of a determination by the Commission that appellants had abused their dominant position in the relevant market, CCI could not have imposed penalty upon appellants holding them guilty of anti-competitive conduct.

▪ **India Trade promotion organisation v. CCI**⁴¹⁴

COMPAT quashes CCI's penalty order of Rs. 6.75 crore on India Trade Promotion Organisation. It was found that the time gap restriction for holding exhibitions/ fair and other events at Pragati Maidan had substantially been reduced and 3 day's time gap did not appear to have adverse.

▪ **Shib Sankar nag Sarkar v. CCI**⁴¹⁵

In this case, COMPAT quashed penalty imposed by CCI on members of Druggists Association. The investigations by commission revealed that BCDA, a chemist and druggist

⁴¹³ MANU/TA/0034/2016

⁴¹⁴ MANU/TA/0033/2016

⁴¹⁵ MANU/TA/0029/2016



association, was engaged in anti-competitive practice and penalty was imposed upon appellants, being office-bearers and members of Executive Committee of BCDA, in absence of any evidence of show that appellants were in-charge of and responsible to BCDA for conduct of its business, penalty could not have been imposed upon appellants holding them guilty of anti-competitive conduct.

▪ **Hyderabad Cylinders (P) Ltd. V. CCI**⁴¹⁶

Here, COMPAT held that CCI couldn't impose penalty arbitrarily on basis of net-profit instead of average turnover. Section 27(b) of the Act provides for imposition of penalty on average of turnover of preceding three financial years and, therefore, it was legally impermissible for commission to apply different yardsticks for imposing penalty on appellant merely because it did not file financial statement.

▪ **Alkem laboratories ltd v. CCI 2016**

COMPAT sets aside penalty on 'kerala drug union' as complainant had suppressed facts.

▪ **Shree cement ltd. V. Builders' Association of India**⁴¹⁷

In this case, COMPAT set aside Rs. 397.15 crore penalty against Shree cement. The penalty was imposed upon appellant cement manufactures on basis of findings of another order in related matters, when said order had been set aside, order imposing penalty in instant case was also to be set aside.

▪ **Cement Case**

COMPAT quashed the penalty of Rs. 6,300 crore imposed on cement industries. The CCI, through an order dated 20 June 2012, had penalised 10 cement manufacturers in India for having engaged in cartel to fix prices of cement and earn super-normal profits. This has been the highest penalty ever imposed by the CCI in a cartel case. COMPAT set aside the matter on the ground of violation of principle that 'only one who hears can decide', and has directed the CCI to hear the matter afresh.

From the above cases, it seems that COMPAT came out heavily on this approach of the Commission and set asides the orders. The majority of the decisions of Commission are being

⁴¹⁶ MANU/TA/0024/2016

⁴¹⁷ 2016 CompLR23 (CompAT)



over-ruled on procedural issues like rules of fairness and natural justice but not on merits. One may be tempted to argue that the COMPAT is impeding competition concern by giving undue importance to hyper-technicalities. The rule of natural justice is likely to haunt the Commission.

In any particular industry, position taken by the anti-trust regulator i.e. Commission and the eventual response of the Appellate forum shapes the future course of jurisprudence in the competition law. But right now, the Commission is not even able to make its way through the litmus test of principles of natural justice. The role playing by the CCI seems to be on different track where immediate corrective measures are required.

One of the reasons for the lack of clarity in the decisions of the CCI may be the presence of only a single judicial member in the Commission. The preponderance of members in the Commission from administrative services has a visible influence on the procedures and protocol followed. There have been instances of differences in approach, amongst different members, in the orders passed by the CCI. Out of seven members, there is only one judicial member. The Competition Act does not impose restriction on having more than one judicial member and looking at the present trend, the Commission should contemplate this option and it will definitely give positive result which will ultimately enhance the jurisprudence of the competition law

CONCLUSION

International economic factors will have a strong impact on the Indian Market where now India is considered as the best market for the investment. Further with improvement in ease of doing business will contribute towards more efficiency and effectively the entrant of new foreign players which will definitely make the market more competitive. In the era of globalisation, the commission is pro-active in dealing with evaluation of cases relating to adverse effect on the competition in the market, but better environment in terms of the efficiency and effectiveness in evaluation the cases is necessary.

Perhaps the most important area for CCI to address is evolving principles on imposing penalty. From a jurisprudential perspective, it is also important for CCI to set out principles for determining relevant market since the implications from a relevant market are quite severe. CCI's approach on analyzing terms of a contract is quite pragmatic and the principles should



help companies manage their affairs. However, for their part, it is very important that companies be alive to their obligations under the Act and should also vigilant about its rights.

A heartening and encouraging aspect about CCI rulings are CCI's generally cautious approach to laying down principles, generally each ruling serves as an order in respect in only that case. With passage of time and adjudication of appeals by COMPAT and the Supreme Court, jurisprudence will also strengthen and with it, the institution itself. In the globalised era, effective competition policy is necessary to suits the rapidly growing business environment. It is the need of hour to develop the jurisprudence of completion law. Currently, there is need for increase in the efficiency of the commission concerning the jurisprudence of the competition law in the Indian market. The Infusion of resources from Judiciary into CCI will definitely increase its efficiency in terms of the qualitative decisions and it will also reduce the burden of COMPAT. Currently, the competition regulator is at evolving stage and its future prospects seem to be bright concerning the competition law in the Indian market.

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