Printed, Published and owned by Amit Gupta. Printed at Shubham Enterprises, 129, DSIDC Sheds, Okhla Indl. Area, Phase-I, New Delhi - 110020.
Published at JIMS Engineering Management Technical Campus 48/4, Knowledge Park-III, Greater Noida. Editor: Amit Gupta

VOL 4 | No 1| Jan-June 2020

ISSN : 2581-6837

jims

JIMS JOURNAL OF LAW

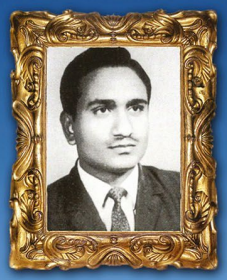
A Bi-Annual Peer Reviewed Journal

JIMS ENGINEERING MANAGEMENT TECHNICAL CAMPUS
48/4, KNOWLEDGE PARK III, Greater NOIDA 201308
www.jimsgn.org

A TRUE VISIONARY

"You see things and you say **Why***? But I dream of things that never were and say* **Why** *not?"*

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!

JIMS (Rohini)	**-**	**1993**
JIMS (Kalkaji)	**-**	**1997**
JIMS (Vasant Kunj)	**-**	**2003**
JIMS (Jaipur)	**-**	**2003**
JNIT (Jaipur)	**-**	**2004**
JIMS (Greater Noida)	**-**	**2008**
Jagannath University (Jaipur)	**-**	**2008**
Jagannath University (Bahadurgarh)	**-**	**2013**

And more dreams to come!

EDITORIAL BOARD MEMBERS

Editorial Office & Subscriber Service
JIMS Engineering & Management Technical Campus
48/4, Knowledge Park-III, Greater Noida, U.P. Phone #-01203819700,
jimslawjournal@jagannath.org,lawjournal.gn@jagannath.org

Message from Editor's Desk

It is a matter of immense pleasure to publish Volume 4 Issue-1of JIMS Journal of Law. The Editorial Board is grateful to all the authors who have contributed scholarly research articles on contemporary legal and socio-legal problems. This issue of JIMS Journal of Law covers one research article to highlight why and what amendments are required in Competition Commission of India Bill, 2020. Author discuss about the need of establishment of Governing Board and merging of director office with commission. One of the articles deals with role of Human DNA profiling in criminal investigation. In this article author has focused on the role of technology & Forensic science in the investigation of crimes specially crime against child rape. Another article is focusing on the various dimensions of Rights of healthy environment. In this article author has focused on the model of Swachh Bharat Mission to keep cities clean and right of person to have healthy environment. This issue also covers the article on Plight of Indian Seafarers at times of Covid-19: Let the Voyage of life sail. In this article author tried to elucidate the legal framework for seafarers and to alleviate. Another article deals with Cyber Terrorism's interface on Social Media: Dissecting its Legal Regulation. Author of this article suggested need of effective legal regime to stop misuse of social media and internet for terrorism (cyber terrorism). Other paper specifically deals with 'Control Conundrum' under the Draft Competition Commission Bill 2021. In this article author discussed definition o control and combination and suggested the material influence standard. This issue also deals with Nomination Policy in Banking and Insurance Industry. In this article author discussed the concept and process of Nomination under law of banking & insurance. I take utmost pleasure and privilege in presenting this intellectual and thought provoking issue of JIMS Journal of Law to Bar, Bench and academia with a huge expectation that this issue will bring reforms in the society by raising legal awareness and achieving access to justice for all.

Prof.(Dr.) Pallavi Gupta
Thanking You

Vol. 4 Issue 1, January - June 2020 ISSN : 2581 - 6837

JIMS JOURNAL OF LAW

CONTENTS
Vol 4, Issue 1, January - June 2020

OVERRUN BY THE EXECUTIVE? - A LOOK INTO THE PROPOSED INSTITUTIONAL DESIGN OF THE COMPETITION COMMISSION OF INDIA UNDER THE DRAFT (COMPETITION) AMENDMENT BILL, 2O2O

Hartej Singh Kochher
Assistant Professor, ICFAI Law School

Aditya Laroyia
Advocate, Delhi High Court

ABSTRACT

Quis Custodiet Ipsos Custodes is an old Latin adage that has been in use for over a millennium asking the basic question - who watches the watchmen? Currently, the Competition Law jurisprudence of our nation is in a flux. The new Draft Competition (Amendment) Bill, 2020 has suggested certain radical changes, inductions and deletions from the current Act. While, the changes so suggested are wide ranging, this paper simply seeks to look into and demystify certain changes to the regulatory architecture of Competition Law of our country. The first being the establishment of a Governing Board in the Competition Commission of India and the second, the merger of the office of the Director General with the Commission. A genuine attempt would be made to understand the fantastical and grandiose expression used in the Competition Law Review Committee report. This paper seeks to understand how these two changes are going to actually affect the workings of the Competition Commission of India and office of the Director General. The main inquisition would be on the question - *Is this an attempt by the executive to overrun a relatively independent institution and turn it into another one caged parrot bowing down to every writ of its master?*

Keywords: Competition, Draft Competition (Amendment) Bill, 2020, Competition Commission of India, Director General, Governing Board, Selection Committee.

INTRODUCTION

The Ministry of Corporate Affairs and the Competition Commission of India (CCI), recently put out a Draft Competition (Amendment) Bill, 2020 in the public domain to invite suggestions and comments, as to the proposed changes they wanted to bring into the Competition Act, 2002.[1] A Competition Law Review Committee (CLRC) was constituted to enable a holistic review of the existing legislation, and to help keep it up with the present-day economic environment.[2] Also, the lacunae that were identified in the implementation of the aims of the existing legislation, needed to be plugged and a method to that end was needed. The CLRC submitted its report in mid-2019[3] and suggested a host of changes which to a large extent aim to alter the existing paradigm of the Competition Law regime in the

[1] *Draft Competition (Amendment) Bill, 2020,* MINISTRY OF CORPORATE AFFAIRS (May 22, 2020, 10:00 AM), http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.
[2] *Government constitutes Competition Law Review Committee to review the Competition Act*, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:00 AM), https://pib.gov.in/PressReleseDetail.aspx?PRID=1547975
[3] *Report of the Competition Law Review Committee submitted to Union Finance and Corporate Affairs Minister*, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:05 AM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=192629.

country.[4] If passed, the Draft Bill would materially alter the legal framework as it exists, as regards certain provisions of the Competition Act, 2002.[5]

The effort of this study aims to study some of these materially altering provisions. The first part of the paper will deal with an interesting change mooted in the Draft Bill, as advised by the CLRC- the constitution of a "Governing Board" in the CCI[6]. The authors will examine the structure and composition of this proposed Board and the framework to enable its existence and working. A critique of the same will offered along with suggestions for making this body robust. In the next part, the study will delve into the Draft Bill's recommendation to merge the Director General's (DG) Office with the CCI, as opposed to the existing provision of there being a division between the two. The DG is the investigative arm of the CCI and hence this proposal has wide ramifications on independence of the DG office and the basic question of natural justice - whether those who investigate can also adjudicate, takes prominence. The authors will weigh in with their stance on the said merger.

GOVERNING BOARD

The ostensible role of the Governing Board is envisaged to be that of a supervisory regulation making body[7], over and above the Chairperson and whole-time members who will be the actual persons adjudicating upon Competition Law related matters[8]. At present, it is only the Chairperson and other members who constitute the Commission.[9]

The members of the proposed Governing Board will include: the Chairperson and six whole time members[10] of the commission, Secretary of the Department of Economic Affairs, Ministry of Finance (or his nominee not below the rank of Joint Secretary), Secretary of the Ministry of Corporate Affairs (or his nominee not below the rank of Joint Secretary), and four other part time members to be appointed by the Central Government.[11]

---

[4] *Report of the Competition Law Review Committee,* MINISTRY OF CORPORATE AFFAIRS(May 22, 2020, 10:50 AM), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf

[5] *id.* The press note contains the key recommendations in bullet points.

[6] The Draft Competition (Amendment) Bill, 2020 suggests amendments to Section 8 to achieve this end.

[7] The CLRC refers to this role as "quasi-legislative". Additionally, the Board is required to focus on policy decisions and an overall supervisory role.

[8] The CLRC clearly states that there needs to be a differentiation between the adjudicatory functions and the executive and quasi legislative functions and hence, the Board is not expected to be tangled in adjudicatory intricacies.

[9] The Competition Act 2002 § 8

[10] Those who were under the Competition Act, 2002 are referred to as 'whole time members' under the Draft Competition (Amendment) Bill, 2020. The Draft Bill carves out a distinction between whole time members (who will be actually adjudicating) and part time members (who will only serve on the Governing Board)

[11] The Draft Competition (Amendment) Bill, 2020 § 8. The two Government representatives are 'ex-officio members'. Hence, a total of six part time members.

The rationale for constituting the Governing Board, as given by the CLRC in its report[12], is that it would provide a more robust governance mechanism, to the CCI, with help of external perspectives and oversight through part time members which would make the CCI more accountable. The phrase '*democratic legitimacy*' is also used.

Jurisprudentially, the CCI has been held to a regulator which performs roles in the nature of administrative, quasi-judicial and those of an expert body.[13] These include, rule making, investigating, levying penalties, advocacy amongst others. Hence, the CLRC was of the opinion that the introduction of a Governing Board would "*bring in an external perspective, objectivity and more transparency in the functioning of the CCI*", since it performs such diverse and multiple functions. According to the Committee, there was no deficiency in CCI's functioning, but, its role was bound to get more pronounced with the evolution of the Indian market. To this end, it was considered prudent to incorporate best practices in the CCI's structure to equip it for ensuing challenges.

Regulatory structure of multiple regulators, within and outside India was looked at to incorporate the regulatory best practices and reach the final recommendations which have been incorporated in the Draft Bill. The recommendation to set up the Board along with the recommendation of the composition of the Governing Board, have been incorporated in the Draft Bill, without any alterations.

The Chairpersons and the whole-time members are to be selected from a panel of names recommended by a 'selection committee', comprising of: the Chief Justice of India (or his Nominee) as the Chairperson, the Secretary in the Ministry of Corporate Affairs, the Secretary in the Ministry of Law and Justice and two experts of repute in the field, as members.[14]

This is where the authors start taking umbrage with the Draft Bill. The very purpose of having a selection committee is to have an unbiased, non-partisan approach towards recommending the best possible candidates for the adjudicatory processes. But, the presence of the Secretary of the Ministry of Corporate Affairs in *both* the Selection Committee and the proposed Governing Board raises serious concerns as to the intentions of the executive, to regulate a body, that on paper should be independent.

---

[12] *Supra* 4

[13] In BrahmDutt v. Union of India, AIR 2005 SC 730 and more recently in Mahindra and Mahindra Ltd. v. CCI, (2019) SCCOnline Del 8032.

[14] The Competition Act, 2002 § 9. The Draft Competition (Amendment) Bill, 2020 via a proposed amendment to Section 9, just changes the verbiage to include selection of 'whole-time members'

For ease, imagine a scenario wherein Mr. X, being the Secretary of the Ministry of Corporate Affairs, is part of a selection committee which selects all the whole time members, and even the Chairperson. Now, by virtue of being an ex-officio member of the Governing Board, he is keeping a close eye and an oversight over everyone involved in decision making. There might be a scenario, where the members, who ostensibly, ought to be independent after their appointment, try to please and fall in line with the demand(s) of the Executive, brought in through the views and opinions of Mr. X. This might seem implausible to a few. But, added to the mix are a few other provisions, which make this seem like a sinister machination.

All decisions on questions coming up before the Governing Board have to be taken by way of a majority vote.[15] On the face of it, the adjudicatory members have been given majority votes and the Chairperson even has a casting vote.[16] Coupled with the votes of two ex officio members and, any decision has a chance of passing due to the influence exerted by Mr. X as he is the person who has been on the Committee which selected these very members and they might be expected to fall in line. But, they might not fall in line due to the fact of having security of tenure after appointment.[17] Notwithstanding this security, there might remain a nagging doubt as to the willingness of the whole-time members and the Chairperson to conform.

In addition to the foregoing, it is not always that the full prescribed strength of adjudicatory members is there. Because of this the Governing Board members except the adjudicatory members (whole time members) may be able to steam-roll decisions at will.

For example, currently there are only three adjudicatory members in the CCI, whereas the maximum strength permissible is seven[18]. These current adjudicatory members are One Chairperson and two members. All career bureaucrats, and not a single person with a legal background. This, inspite of the Delhi High Court, recently mandating in a judgment[19] that it is imperative to have a judicial member present while hearing a case. Ultimately, the lack of a judicial member led the HC to finally clarify that such a vacancy would not preclude the CCI from hearing matters till such time a judicial member was appointed by the Central Government.[20] This relaxation was imperative as the adjudicatory work of the CCI would

[15] The Draft Competition (Amendment) Bill, 2020 § 18(3)
[16] *id.* The chairperson along with whole time members number seven, meanwhile the total part-time members are six.
[17] The Draft Competition (Amendment) Bill, 2020 § 11.
[18] Including the chairperson (The Competition Act 2002 § 8).
[19] Mahindra and Mahindra Ltd. v. CCI, (2019) SCCOnline Del 8032
[20] Anshuman Sakle, Dhruv Rajain & Ruchi Verma , *Delhi High Court Clarifies the Scope of Directions Passed in Mahindra Judgment Re Appointment of Judicial Member,* CYRIL AMARCHAND MANGALDAS(May 25, 2020, 10:00 AM)

have come to a grinding halt otherwise. The Bill does not mandate for a judicial member while hearing a matter, in clear contravention of the High Court directive.[21]

Coming back to the ability of being able to "steam-roll" decisions and the next point of concern, which pertains to the "part-time members" except the ex-officio members of the Governing Board. They are appointed by the Central Government, and have no security of tenure. If seen as non-compliant, they can be removed before their term of appointment ends, after being given a reasonable opportunity of being herd.[22] No guiding principles are given as to constitute grounds for removal. An opportunity of being heard, which may just be perfunctory in nature, is the only safeguard.

Thus, there are manifold measures which can be adopted by the Executive to enable it to set the narrative for the CCI. This, would impact the whole Competition Law framework, as even the appellate institutions would be adjudging on the basis of the law made by the Governing Board.

Any regulator is bound to be independent if bodies of the Government can also be parties to the proceedings before it. And indeed, many a case have seen government bodies being a part of such proceedings.[23] If there is even a hint of possible partisanship creeping in, it has to be rectified. It is in the common law traditions that *"not only must Justice be done; it must also be seen to be done".*[24]

The example quoted above can also be stretched to conceive a situation wherein, due to the oversight of Mr. X, prejudices start impacting actual decision making in cases. Although far-fetched, it is plausible. It is always to be remembered that even a modicum of bias (or possibility thereof) is sufficient to challenge the credibility of the decision and the decision makers.[25] Which in turn, impacts the credibility of the organization itself.

The reasons given, for the constitution of the Governing Board, harp on consistently for the need of accountability. Accountability and transparency are inextricably linked together. One is useless without the other. Hence, when the overt aim is to ensure accountability, the

---

https://competition.cyrilamarchandblogs.com/2019/07/delhi-high-court-clarifies-scope-directions-passed-mahindra-judgment-re-appointment-of-judicial-member/

[21] The decision of the Delhi High Court has been challenged in the Supreme Court. Fiat India Automobiles (P) Ltd. v. CCI, SLP (C) No. 12938/2019 ; Mahindra and Mahindra v. CCI, SLP (C) No. 10346/2019 and Tata Motors Ltd. v. CCI, SLP (C) No. 11478/2019.

[22] The Draft Competition (Amendment) Bill, 2020 § 11(4).

[23] For example – Public Oil Companies, Railways, Container Corporation of India have been parties to proceedings before CCI in various proceedings.

[24] R v. Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233).

[25] *id.*

procedures should be transparent. The CLRC should have taken note of the said overlap of one of the members of the Selection Committee and the Governing Board in its report and should have suggested an alternative mechanism to drive home the suggestion. It is in the interest of accountability itself that such an overlap not be there.

CCI was initially conceived to be an expert-body in the field of Competition Law. But, by virtue of the proposed Draft Amendment Bill, instead of experts, the Governing Board can be packed by Central Government appointees[26] (both whole time and part time) who might be there because of paying obeisance to those in powers in the past, whether in courts, civil service or otherwise. The Governing Board may become a post retirement haven for those subservient to the Central Government. In case of part time members, who develop an independent streak, the powers in the nature of a summary dismissal, as stated above, can be easily utilized.

The present body responsible for making and amending regulations to effectively implement the Act, is the Commission itself (i.e. the members having adjudicatory powers). This power is proposed to be transferred to the Governing Board. It is to be kept in mind that the adjudicatory power holding members are also a part of the Governing Board. Hence, by taking away these regulation making powers, one is only adding to the procedures and processes to make regulations. The members who work daily within the parameters of the regulations are the best judges of what works and what does not. One argument can be that the work load of the adjudicatory members will be reduced. But, if they are a part of the Governing Board, they would still have to draft and approve the regulations, along with others. Second argument can be that the Governing Board can provide expertise in the field. But, as discussed earlier, there might be a scenario wherein there may be no experts at all in the Governing Board. Also, in the present scenario, help/suggestions can be sought by the Commission in these processes, by itself.

The Governing Board has also been tasked with promotion of Competition Advocacy, this inspite of a separate “Advocacy Division” already existing within the present Commission. Thus, it appears that instead of streamlining processes, what is being done is an increase in red tapism and procedures. The Board will have to rely on the already existing division, but, the processes to get approvals or sanctions might get more tedious. Under the Draft Bill, the Governing Board is only required to meet mandatorily only once in a quarter.[27] Hence, if the

[26] This is a possibility even in the current framework, but the Draft Bill makes this possibility more overt.
[27] The Draft Competition (Amendment) Bill, 2020 § 18A.

final approval rests with the Board, decisions might get delayed for months on end, in the instances of the matters of the advocacy division and otherwise as well.

MERGER OF DIRECTOR GENERAL OFFICE WITHIN CCI

Another major change in the constitutional framework of the CCI, is merging of the Director General (DG) office with the Commission, to form the "*Investigation Division*" of the Commission.[28] Till now, the position of DG office in Competition jurisprudence of our country has been quite curious. Currently as the things stand, a DG is appointed by the Central Government to assist CCI, "*in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.*"[29] Earlier, under the Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP Act) there was an office of Director General of Investigation and Registration whose primary role was, "*for making investigations for the purposes of this Act and for maintaining a Register of agreements subject to registration.*"[30] The current position of the DG office under the Competition Act, 2002 seems to be more or less similar to that of its predecessor under MRTP Act when it comes to functionality i.e. an investigative authority assisting an adjudicatory authority in matters related to field of Competition Law.

The inner workings of DG office are influenced by both the Central Government (CG) and the CCI with both of them holding writ over certain aspects of its functioning. A prominent area where CG has considerable influence would be the recruitment and other service conditions of officials working in the DG office and rules such as, the CCI (DG) Recruitment Rules, 2009[31] and CCI (Number Of Additional, Joint, Deputy Or Assistant Director-General Other Officers And Employees, Their Manner Of Appointment, Qualification, Salary, Allowances And Other Terms Conditions Of Service) Rules, 2009[32]would make the same quite obvious. The CG is also better represented than CCI in the Departmental Promotion Committee which decides the appraisal of the officials working in the DG office.[33] The

[28] The Draft Competition (Amendment) Bill, 2020 § 16.
[29] The Competition Act, 2002 § 41(1).
[30] The Monopolies and Restrictive Trade Practices Act, 1969 § 8 (1).
[31] *Competition Commission Of India (Director General) Recruitment Rules 2009,* COMPETITION COMMISSION OF INDIA, (May 26, 2020, 10:50 AM), https://www.cci.gov.in/sites/default/files/rules_pdf/R13.pdf.
[32] *Competition Commission Of India (Number Of Additional, Joint, Deputy Or Assistant Director-general Other Officers And Employees, Their Manner Of Appointment, Qualification, Salary, Allowances And Other Terms And Conditions Of Service) Rules, 2009* COMPETITION COMMISSION OF INDIA, (May 27, 2020, 10:50 AM), https://www.cci.gov.in/sites/default/files/rules_pdf/R11.pdf.
[33] *Schedule III of theCompetition Commission Of India (Number Of Additional, Joint, Deputy Or Assistant Director-general Other Officers And Employees, Their Manner Of Appointment, Qualification, Salary,*

intricacies of the same would create an impression in the mind of a reader that the CG is the authority having major say over the internal workings of DG office. In reality, however, the DG office has been since its inception, treated as a division of CCI. Just by scanning through the Annual Reports of CCI, one would observe the same. No separate budgetary allocation is given to DG office. All the personnel of DG office are shown to be working under CCI.[34] The same has been observed by the CLRC in its report, which has noted that in practice it is the CCI which monitors most of the daily activities and administrative affairs of the DG office.[35] These observations have also found voice in two separate judicial pronouncements wherein it was specifically stated, that the DG office as established under section 16(1) of the Competition Act is a "*specialised investigating wing of the commission*"[36].

All of this creates a very muddled situation wherein both CG and CCI are influencing the inner workings of DG office. But, neither is having a clear control in precedence to other. The CG in essence controls the Human resource aspect but, it is CCI which has a more direct control over the day to day working of the DG office. As per the CLRC, the DG was accountable to the CG, and not the CCI. This confused state of affair doesn't bode well in an emerging economy. There is a need to streamline the regulatory architecture of our nation to provide a better response to the new emerging issues in the field of Competition Law. The CLRC to deal with this issue has looked into the three primary models of institutional framework of competition regulators all across the globe as espoused under the Model Law on Competition (2010) – Chapter IX[37]. The three models can be defined as :

Bifurcated Judicial Model wherein, the regulatory authority can investigate any contravention of the Competition Law as such. However, the "*enforcement actions*" are only to be brought before judiciary and not some specialised tribunal, with the right to appeal also lying to the appellate courts only. Australia and Jamaica being the prime examples of the same.

Bifurcated Agency Model, wherein, the regulatory authority can investigate and the enforcement actions are to be brought before a specialized competition tribunal or authority,

---

Allowances And Other Terms And Conditions Of Service) Rules, 2009, COMPETITION COMMISSION OF INDIA, (May 28, 2020, 10:50 AM), https://www.cci.gov.in/sites/default/files/rules_pdf/R11.pdf.

[34] The annual report of the CCI are available on its website. The reports go on to prove that the DG office have no structural, financial or administrative independence from CCI. Available at: (https://www.cci.gov.in/annual-reports).

[35] *Supra* 4, Para 4.3 at Pg. 23.

[36] CCI v. Steel Authority of India Ltd., (2010) 10 SCC 744, Mahindra and Mahindra Ltd. v. CCI, (2019) SCCOnline Del 8032.

[37] *Model Law On Competition (2010)– Chapter IX , Sixth United Nations Conference To Review All Aspects Of The Set Of Multilaterally Agreed Equitable Principles And Rules For The Control Of Restrictive Business Practices, 2010,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, (May 29, 2020, 10:50 AM), https://unctad.org/en/Docs/tdrbpconf7L9_en.pdf.

with the right to appeal going to either a specialized appellate body or general appellate courts. South Africa and Chile being the prime example of this model.

Integrated Agency Model, wherein, the regulatory authority is empowered to carry out both the investigative and adjudicative functions, with a right of appeal lying to general or specialized appellate bodies. European Union and China being main examples of this model.

All the major economies have adopted one these models or some variation from these model. An example of the same would be a jurisdiction wherein the regulatory authority has full autonomy to investigate and adjudicate upon matters related to mergers and acquisitions. But, the same regulatory authority could be empowered only to investigate cases of restrictive trade practices or abuses of dominant position, with the courts or specialized tribunals adjudicating the same. If one is to discuss one such variation, the curious case of antitrust enforcements in the United States of America (USA) comes into mind. In the USA, there are two distinct regulators which look into the antitrust enforcements i.e. the Department of Justice (DoJ) Antitrust Division and the Federal Trade Commission (FTC). There seems to be a mutual understanding of sorts in between the two, on the basis of which it is decided who will investigate a particular case. Till very recently the duality has existed without any particular conflict of jurisdiction in between the two.[38] The FTC on its website has tried to bifurcate certain particular segments of economy wherein either one of these organisations has sole jurisdiction or more expertise. As such, FTC focusses on more on the areas where the consumer spending is high like healthcare; pharmaceuticals, food, energy, internet services and computer technology. Whereas DoJ focusses mostly on the banking, telecommunications, railways and airlines sector.[39] Last year, during the commencement of the investigations into the antitrust violations of the big tech companies there have been some skirmishes amongst the two. All of this reached a crescendo when the heads of both of these organizations in front of the Senate antitrust division admitted to having some disagreement regarding their oversight to regulate the big tech companies. Leading many to fear that, "*the regulators will squander an opportunity to crack down on potentially monopolistic behavior due to their own infighting*."[40]

---

[38] *Preliminary Conclusions, The Regulation Of Competition Across The Globe: Good Practice And Information, International Board On Economic Regulations*, THE FONDATION POUR LE DROIT CONTINENTAL, (May 30, 2020, 10:50AM), https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2016/07/Final-report-IBER-Competition-2016_EN.pdf

[39] *The Enforcers,* FEDERAL TRADE COMMISSION, (May 30, 2020, 11:55 AM), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers.

[40] Lauren Feiner, *Here's Why The Top Two Antitrust Enforcers In The Us Are Squabbling Over Who Gets To Regulate Big Tech,*CNBC, (June 1, 2020, 11:55 AM), https://www.cnbc.com/2019/09/18/the-ftc-and-doj-are-squabbling-over-the-right-to-regulate-big-tech.html.

The aforementioned example, makes the importance of a robust and clear regulatory architecture very important for proper investigation of anti-competitive behaviour. Coming back to the models, each of these models have their own inherent trade-offs. For example, the *Bifurcated Agency Model* may provide decision making by a specialized group of experts but could be a resource intensive process. The *Integrated Agency Model* is a administratively efficient enforcement scheme, but could lead to due process risks.[41]

The CLRC has while noting various situations wherein the CG has been given a say in the inner working of DG office has reiterated that it in fact is a *de-facto* part of CCI.[42] The CLRC has suggested a *formal adoption* of the *Integrated Agency Model* . It is of the opinion that such integration would lead to better administrative efficiencies and reduced timelines in the investigation. One more benefit of the same would be that till now the appointment of DG is done through deputation only. But, once the DG office is merged with CCI it could happen through other means as well. Through this, the issues of lack of domain expertise and institutional memory in the functioning of the DG office would also get curtailed.

Refocussing on the inherent pitfalls of this merger, the primary concern of anyone practicing in Competition Law would be that investigations being carried on by DG office would lose a major chunk of independence from CCI. If any member of CCI has made any observation, remarks or comment regarding any particular matter, the DG office is bound to get influenced by the same. With CCI replacing CG as the authority deciding the appointments or the appraisals to be given in DG office, the concept of proper, free and fair investigation is bound to come under the cloud of suspicion. It will be an antithesis of to the concept of an independent investigation.

In our view, it would be resoundingly preferable, that the investigating authority enjoys a fair share of independence. The independence here being administrative and budgetary. It is surprising to see how the DG office has been till date treated as a lackey of CCI. The Annual Report of CCI for the year 2018-19 reveals as opposed to 90 professionals sanctioned to CCI, only 32 have been sanctioned to DG office.[43] These professionals are from various disciplines such law, finance, economics or someone having expert sector specific knowledge. They're *sine qua non* for getting a better appreciation of the subject matter under investigation. The investigating authority needs the same resources as an adjudicatory authority would. But the current system doesn't allow for the same. The Annual Report

[41] *Supra* 37.
[42] *Supra* 4, Para 4.8 at Pg. 25.
[43] *Annual Report - 2018 19*, COMPETITION COMMISSION OF INDIA, (June 1, 2020, 11:55 AM), https://www.cci.gov.in/sites/default/files/annual reports/ENGANNUALREPORTCCI.pdf.

further reveals that the primary posts of Director General and half of the sanctioned post reserved for Additional, Joint and Deputy Director General were lying vacant during the 2018-19.[44] The authors find it difficult to imagine what would happen when DG office ceases to be functionally separate and is completely merged with the CCI. How would such vacancies help in expediting or bringing in more qualitative investigation is beyond comprehension.

Lastly, it is important to point out that the Draft Bill very conveniently takes the DG office and merges it into CCI, but, none of the best practices to ensure adherence to the due process, as prescribed by the CLRC in its report, have been inculcated in the Draft bill.[45] The Draft Bill fails to bring in the necessary safeguards within itself; amongst others, nowhere does the Draft Bill talk about affording the parties an opportunity to be represented or to examine the evidence which is against the rules of natural justice. Moreover, the suggestion of the CLRC, to have the DG directly reporting to the Chairperson has also not found mention anywhere, leaving a big question mark on the independence of the investigations carried out by DG office.

CONCLUSION

The CLRC's suggestions, if taken on their face value, seem to be based on creating a streamlined system of conducting effective and efficient investigation and adjudication of violations of the Competition Act. However, the regulatory architecture under scrutiny doesn't require these changes. It requires more independence from, rather than more subjugation to, the Executive. The Governing Board which would look into the workings of the CCI, has been touted as a harbinger of accountability by the CLRC needs to be called for what it is, a post retirement office for bureaucrats who would be working at the behest of the Executive to impede working of an important regulator. The authors recommend that the idea of the Governing Board be scrapped. If not binned, then the overlap of the member in the Selection Committee and the Governing Board should be rectified in earnest, to at least give a veneer of transparency and accountability.

This paper highlights that the merger of the DG office into CCI, is a formalization of an already established relationship in between the two authorities. The DG office, created under

[44] *id.* Pg. 64.

[45] Shivam Tripathi, *Introduction Of Competition (Amendment) Bill, 2020: A Step Towards Revamping Indian Market (2020)*, SCCONLINE, (June 1, 2020, 11:55 AM), https://www.scconline.com/blog/post/2020/05/06/introduction-of-competition-amendment-bill-2020-a-step-towards-revamping-indian-market/#_ftn25.

the Competition Act, has been treated like a division, but a separate division, with a Chinese wall of sorts, since its inception.

The CLRC to its credit had specifically mentioned certain best practices for maintaining a distinction in the new between the "*Adjudicatory*" and "*Investigative*" wings in their report. However, why none of them have found their way into the Draft Bill is beyond comprehension.[46]

Through these structural reforms the executive seems to be consolidating its grip over an independent regulatory body which would be a disaster for the Competition Law jurisprudence of nation. It seems that the ineffectual MRTP Act has been completely forgotten by the executive. What the regulatory framework under the Competition Act requires is not more consolidation by the executive, but more independence. The CCI is not a perfect authority but its independence ought to be saved and shouldn't be sacrificed for achieving "*Democratic Legitimacy*" to satiate the Executive. The same is equally true for DG office if not more. The investigative arm cannot be subservient to the adjudicatory arm. There has to be a parity in between the two when it comes resource allocation for effectively doing their job. But, more importantly there ought to be some distance in between the two. Separation of powers isn't simply a slogan. It is an ideal – which has stood the test of time.

[46] The CLRC advocates for a "firewall" to have internal division in the different wings.

"ROLE OF HUMAN DNA PROFILING IN CRIMINAL INVESTIGATION"

Dr.Faizanur Rahman
Assistant Professor, Faculty of Law
Jamia Millia Islamia, Central University, New Delhi

Md. Faheem khan
Research Scholar, Faculty of Law
Jamia Millia Islamia, Central University, New Delhi

Sudhir Kumar Dwivedi
Research Scholar, Faculty of Law
Jamia Millia Islamia, Central University, New Delhi

ABSTRACT

Crime in India is increasing alarmingly with a disastrous spatial distribution of population due to mismanagement and an overwhelmingly ubiquitous new technology. Criminal has undergone a sea change from the earlier stereotypes, requiring a new paradigm to comprehend and manage the emerging scenario. Today's criminal could well be your suave, smooth talking colleague or neighbour, someone who is relatively well off and well educated. The criminal mind is no more matching the orthodox definition of an economically deprived background but on that seeks to compete, outsmart and short-change the society that he or she lives in. The number of child rape and molestation that is being reported from all parts of India including urban, semi urban and rural areas. Violent crime is on the increase. Emerging trends in cyber crimes include hacking, phishing, and cyber stalking with social media and terrorism as the new playground for the criminal mind to let itself loose. With these emerging trends in crime, it is time for India to revamp and reform how crime is reported, investigated and followed through with scientific evidence, which can ensure successful prosecution of the criminal. Discovery of DNA is considered as one of the most significant biological discoveries during the 20th century owing to its tremendous impact on science and medicine. Of late, it is acting as a very useful tool of forensic science that not only provides guidance in criminal investigation and civil disputes, but also supplies the courts with accurate information about all the relevant features of identification of criminals. DNA stands for deoxyribonucleic acid, the strands of identity that living beings receive from their ancestors. Outside of identical twins, no two people have the same DNA pattern. DNA fingerprinting also has certain distinctive features.

Keywords: Crime, Investigation, Scientific evidence, DNA profiling

INTRODUCTION

Crime in India is increasing alarmingly with a disastrous spatial distribution of population due to mismanagement and an overwhelmingly ubiquitous new technology. Criminal has undergone a sea change from the earlier stereotypes, requiring a new paradigm to comprehend and manage the emerging scenario. Today's criminal could well be your suave, smooth talking colleague or neighbour, someone who is relatively well off and well educated. The criminal mind is no more matching the orthodox definition of an economically deprived background but on that seeks to compete, outsmart and short-change the society that he or she lives in. The number of child rape

and molestation that is being reported from all parts of India including urban, semi-urban and rural areas is on the increase.

Emerging trends in cyber crimes include hacking, phishing, and cyber stalking with social media and terrorism as the new playground for the criminal mind to let itself loose. With these emerging trends in crime, it is time for India to revamp and reform how crime is reported, investigated and followed through with scientific evidence, which can ensure successful prosecution of the criminal. The Indian system of policing and criminal investigation is still stuck in the old ways of information gathering and beating out a confession from the suspects. The police force is completely untrained on modern methods of criminal investigation and is not primed to gather scientific evidence to present a watertight case in the court. This is why the gap continues between reporting of crime, arresting a criminal and finally ensuring successful prosecution of the accused.

Discovery of DNA is considered as one of the most significant biological discoveries during the 20th century owing to its tremendous impact on science and medicine. Of late, it is acting as a very useful tool of forensic science that not only provides guidance in criminal investigation and civil disputes, but also supplies the courts with accurate information about all the relevant features of identification of criminals. DNA stands for deoxyribonucleic acid, the strands of identity that living beings receive from their ancestors. Outside of identical twins, no two people have the same DNA pattern. DNA fingerprinting also has certain distinctive features.

In 1987, the DNA fingerprinting was utilized as a tool for criminal investigation, to establish blood relations and trace medical history. Investigators would find "anonymous DNA" at the crime scene and compare it with the DNA of suspects for possible matches. The investigator would generally use a swab to collect bodily substances from a suspect's mouth to match it with DNA collected from the crime scene.

Prior to the use of DNA, identification was heavily based on finger prints, foot prints, blood, or other evidence that a suspect may have left behind after committing a crime. The process of matching a suspect's DNA with DNA found at a crime scene has provided both law enforcement agencies and court officials with a higher probability of ascertaining the identity of offenders.

DNA fingerprinting has been very useful for law enforcement, as it has been used to exonerate the innocent. Unlike blood found at a crime scene, DNA material remains usable for an endless period of time. DNA technology can be used even on decomposed human remains to identify the victims. Clinical trial and medical research has long been an important area of medical sciences as it has been referred to in large number of mythological and historical texts and scriptures

DNA profiling technology, which is based on proven scientific principles[1], has been found to be very effective for social welfare, particularly, in enabling the Criminal Justice Delivery System to identify the offenders. Such tests relating to a party would definitely constitute corroborative evidence[2]. Appreciating the use and regulation of DNA based technology in judicial proceedings, particularly, identification of persons accused of offences under the Indian Penal Code 1860 (IPC) and other laws, identification of missing persons and disaster victims apart from its use in medical sciences; a need has long been felt to have a special legislation to regulate human DNA profiling. DNA analysis offers substantial information which if misused or used improperly may cause serious harm to individuals and the society as a whole.

ETHICAL FRAMEWORK

The ethical framework for human subject's protection has its origins in the ancient Hippocratic Oath, which specified that a primary duty of a physician was to avoid harming the patient. However, this oath was not necessarily respected in human experimentation and most advances in protection for human subjects came as a response to abuse inflicted on human subjects. Conducting research on human subjects essentially involves certain binding ethics and standards to be followed in a humane and culturally sensitive manner.

The Declaration of Helsinki, 1964, set the guidelines adopted by the 18th World Medical Association General Assembly. It contains 32 principles, which stress on informed consent, confidentiality of data, vulnerable population and requirement of a protocol, including the scientific reasons of the study, to be reviewed by an Ethics Committee. The Universal

[1] The DNA test has 99.99 % chance of correct conclusions and is perceived as an objective scientific test which may be difficult for an individual to refute. See: Veeran v. Veeravarmalle & Anr., AIR 2009 Mad. 64; and Harjinder Kaur v. State of Punjab & Ors., 2013 (2) RCR (Criminal) 146.

[2] Simpson v. Collinson, (1964) 1 All ER 262.

Declaration of Human Rights 1948 adopted by the United Nations General Assembly expressed concern about rights of human beings against involuntary maltreatment. The International Covenant on Civil and Political Rights, 1966 (ICCPR) has provided that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his consent to medical or scientific treatment". It also refers to various "minimum guarantees" in Article 14(3) (g) such as, "everyone has a right not to be compelled to testify against him to confess guilt".

Comprehensive Ethical Guidelines for Biomedical Research on Human Subjects were finalised by ICMR in the year 2000, which researchers in India have to follow while conducting research on human subjects. The Drugs and Cosmetics Act, 1940 and the Medical Council of India Act, 1956 (Amended in 2002 provide that all clinical trials in India should follow these guidelines. These guidelines were revised in the year 2006, influenced by the Belmont Report and have the same three basic ethical principles: Respect for person, Beneficence, and Justice. These ethical principles are fortified by inducting the following twelve general principles of:

(i) Essentiality;
(ii) Voluntariness, informed consent and community agreement;
(iii) Non-exploitation;
(iv) Privacy and confidentiality;
(v) Precaution and risk minimization;
(vi) Professional competence;
(vii) Accountability and transparency;
(viii) Maximizationof the public interest and of distributive justice;
(ix) Institutional arrangements;
(x) Public domain;
(xi) Totality of responsibility; and
(xii) Compliance.

INTERNATIONAL HUMAN RIGHTS LAW

Right to Privacy as a basic right was first enunciated in the Universal Declaration of Human Rights, 1948. Under the Declaration, no one shall be subjected to arbitrary interference

with his privacy, family, home or correspondence, attacks upon his honour or reputation. Everyone has a right to protection by law against such interference or attacks. Further, the right to privacy has been included in several major human rights instruments like the International Covenant on Civil and Political Right, 1966; The Convention on the Rights of the Child, 1989; as well as Regional Human Rights Conventions in Latin America, the Middle East[3] and Europe[4]

RECOMMENDATIONS BY DNA COMMISSION OF THE INTERNATIONAL SOCIETY FOR FORENSIC GENETICS:

In an article titled as, DNA Commission of the International Society for Forensic Genetics (ISFG) recommendations regarding the role of forensic genetics for disaster victim identification (DVI), the issue of establishing the identity of victims of a mass disaster, has been examined. Mass disasters can involve natural (e.g. earth quakes, volcano eruptions, avalanches, hurricanes, and tsunamis) or non-natural catastrophes (e.g. transportation accidents, terrorist attacks, wars, or political upheaval).

In this regard, the ISFG made certain recommendations on the role of forensic genetics in cases of DVI. In such cases the emergency response is multidisciplinary and is shared by many agencies dealing with deceased victims in matters such as body removal, victim identification and the issuance of the death certificates. This is normally the domain of municipality or a locally body.

Keeping in view the possibility of future mass fatalities it is desirable and necessarily required to train forensic geneticists in DVI tasks and response planning. The skills involved in DVI are closely related to both DNA testing in criminal cases and kinship investigations. Validated procedures and the adherence to good laboratory practices will minimize false, negative results and increase the reliability of the identifications. DNA should not be considered the sole tool for identification, as many circumstances will allow for faster identification of the

[3] Cairo Declaration on Human Rights in Islam, art.18U.N.GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add18 (Aug 5, 1990).

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms art.5, Nov.4, 1950, 213, U.N.T.S. 222 (entered into force Sept 3, 1953) as amended by Protocols Nos. 3,5,8 and 11 (entered into force Sept 21, 1970, Dec., 20, 1971, Jan 1 1990 and Nov 1 1998 respectively).

victims using dental records or fingerprint characteristics[5]. Moreover, consistent results across multiple modalities will also improve the confidence level of every identification. An interdisciplinary approach is encouraged and modalities of it need to be worked out early amongst the DVI team members.

ETHICAL AND PRACTICAL ISSUES RELATING TO DISASTER VICTIM IDENTIFICATION (DVI):

A number of ethical and sensitive issues arise during the identification of human remains in the particular case of DVI. One major factor that undermines cremation or exhumation and identification efforts is poor communication with the relatives of the missing. Understanding the survivor population is important, yet difficult because the effects of mass casualties on a population are varied and complex as such instances cause people to lose not only their family members and relatives, but also their means of income. It can deprive children of their parents as well as their roots. Survivors suffer from not only the deaths of their family members, but also a series of other traumas[6]

ETHICAL-LEGAL PROBLEM OF DNA DATABASES IN CRIMINAL INVESTIGATION:

Advances in DNA technology and the discovery of DNA polymorphisms have facilitated the creation of DNA database of individuals for the purpose of criminal investigation[7]. Many ethical and legal problems arise in the preparation of a DNA database, and these problems are required to be properly addressed by the legal provisions on the subject. There are three possibilities in which database can be created and dealt with; each of them has advantages and drawbacks. Besides, controversial issues arising in each of these possibilities are required to be examined for selecting one of the possibilities according to the specific need.

1. A system based on a general DNA fingerprinting analysis of the population and a conservation of the DNA profile analysis of all the evidence found at the crime

[5] R. Lessig, C. Grundmann, F. D h z h E h i i—a review of 1 year of continuous forensic medical work for victim identification, EXCLI J. 5 (2006) 128– 139.
[6] From Dust to Dust: Ethical and Practical Issues Involved in the Location, Exhumation, and Identification of Bodies from Mass Graves by Erin D. Williams, John D. Crews. Croatian Medical Journal 44(3):251- 258, 2003.
[7] Schneider PM. Datenbankenmitgenetischen Merkmalen von Straftaftatern (Criminal DNA databases: data protection and secutiry]. Datenschutz und Datensicherheit 1998; 22:330-3.

scene.

2. A system based on the DNA analysis of samples for a particular list of crimes only and the recording of the DNA profiles of all the evidence found at the crime scene for these particular crimes
3. A system based only on the specific analysis of a case, the taking of samples from an individual who is known to be connected to a fairly high degree with the crime under investigation and a comparison of the evidence which has been collected in this particular investigation[8].

CONSTITUTIONAL AND LEGAL ASPECTS OF DNA PROFILING

The Constitution casts a duty on every citizen of India " to develop the scientific temper, humanism and the spirit of inquiry and reform" and "to strive towards excellence in all spheres of individual and collective activity"[9]. Parliament is competent to undertake legislations which encourage various technological and scientific methods to detect crimes speed up investigation and determine standards in institutions for higher education and development in technical institutions (Entry 65 & 66 of the Union List).The relevant provisions of the Constitution which guarantees a right against the self-incrimination[10]; and protection of life and personal liberty of every person[11].

Indian Evidence Act, 1872:

Section 9 of the Indian Evidence Act, 1872 deals with "facts necessary to explain or introduce a fact in issue or relevant fact". Section 45 provides as to how the Court has to form an opinion upon a point of foreign law or of science or art, or identity of handwriting [or finger impressions] etc. Section 51 refers to grounds when opinion becomes relevant. Section 112 provides that birth during the continuance of a valid marriage is a conclusive proof of legitimacy with only exception that the parents had no access to each other during the period of conception. Under section 114 the Court may presume the existence of any fact which it thinks likely to have

[8] Ethical-legal problems of DNA databases in Criminal investigation (Margarita Guillen, Maria Victoria Lareu, Carmela Pestoni, Antonio Salas and Angel Carracedo University of Santiago de Compostela, Spain) in Journal of Medical Ethics 2000; 26:226-271.
[9] Article 51A(h) and (j) Part IV(A) of the Constitution of India.
[10] Article 20(3) Part III of the constitution of India.
[11] Article 21 part III of the constitution of India.

happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. If the evidence of an expert is relevant under section 45, the ground on which such opinion is derived is also relevant under section 51. Section 46 deals with "facts bearing upon opinions of experts". The opinion of an expert based on the DNA profiling is also relevant on the same analogy. However, whether a DNA test can be directed or not has always been a debatable issue.

Criminal Procedure Code, 1973

Section 53-A was added vide the Code of Criminal Procedure (Amendment) Act, 2005 w.e.f 23-6-2006, providing that an accused of rape can be examined by a medical practitioner, which will include taking of bodily substances from the accused for DNA profiling.

It is noteworthy that, the said Amendment substituted the Explanation to sections 53 and 54, and made it applicable to section 53A as well, to clarify the scope of "examination", especially with regard to the use of modern and scientific techniques including DNA profiling. Section 53 authorises the police officials to get medical examination of an arrested person done during the course of an investigation by registered medical practitioner. The Explanation provides that "Examination shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case". Section 311-A was also added to empower the Magistrate to order a person to give specimen signatures or handwriting.

Judgments Dealing with Self-incrimination of Persons vis-à-vis Article 20(3) of the Constitution

A judgment rendered by an eleven-Judges Bench of the Supreme Court in **State of Bombay v. Kathi Kalu Oghad & Ors**[12]. Dealtwith the issue of self - incrimination and held:

The giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness. [Emphasis added]

[12] AIR 1961 SC 1808.

In **Smt. Selvi & Ors. v. State of Karnataka**[13], a three-Judge Bench of the Supreme Court considered whether involuntary administration of certain scientific techniques like narco-analysis, polygraph examination and Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. The Court held: This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects.

The Supreme Court in **Bhabani Prasad Jena v. Convenor Secretary**[14], Orissa State Commission for women, whilst pressing upon the significance of DNA testing in the process of administration of justice held:

when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

The Human DNA Profiling Bill, 2016

The Bill 2016 was drafted by the Department of Biotechnology and was submitted to the Government of India. The Bill proposed to form a National DNA Data Bank and a DNA Profiling Board, and for using the data for various purposes specified in the Bill. The proposed DNA Profiling Board would have consisted of molecular biology, human genetics, population biology, bioethics, social sciences, law and criminal justice experts. The Board was to define standards and controls for DNA profiling. It was also to certify laboratories and handle access of data stored by law enforcement agencies. Similar bodies at State levels were also to be formed

The National DNA Data Bank was supposed to collect data from offenders, suspects, missing persons, unidentified dead bodies and volunteers. It was to profile and store DNA data in criminal cases like homicide, sexual assault, adultery and other crimes. The data was to be

[13] AIR 2010 SC 1974.
[14] AIR 2010 SC 2851.

available also to the accused or the suspect for proving his noninvolvement in the crime or at least to establish that he was not present on the place of occurrence at the relevant time.

The Bill was criticized for not addressing the concerns of privacy by a large number of organizations and public spirited persons on similar grounds and made various representations to the statutory authorities. The Bill did not make special provisions in respect of funding of the Board and how the required funds will be made available to the investigating agencies to collect proper reports of samples. Moreover, the Bill did not specifically provide as to on what stage the samples could be collected.

CONCLUSIONS

DNA Profiling, an accurate and well established scientific technique is used for disaster victim identification, investigation of crimes, identification of missing persons and human remains, and for medical research purposes. Most of the countries have enacted appropriate laws within the framework of their respective constitutions and other legal frameworks for the aforesaid purposes. DNA Profiling and use thereof involves various legal and ethical issues and concerns are raised and apprehensions exist in the minds of the common man about its misuse which unless protected may result in disclosure of personal information, such as health related data capable of being misused by persons having prejudicial interests, adversely affecting the privacy of the person Whether in Indian context privacy is an integral part of Article 21 of the Constitution is a matter of academic debate. The issue is pending consideration before the larger bench of the Supreme Court. The Bill of 2017 provides provisions intended to protect the right to privacy. The mechanism provided permits for processing of DNA samples only for 13 CODIS loci which would not violate in any way the privacy of a person and as a result will never go beyond identification of a particular person. The strict adherence to 13 CODIS loci will eliminate the apprehension of revealing genetic traits.

CONVERGENCE OF RIGHT TO HEALTHY ENVIRONMENT VIS-A-VIS CLEANER CITIES –A STUDY

Rajiv G.
Research Scholar, Ph. D. (Law) Vel Tech School of Law,
Vel Tech (deemed to be) University, Bangalore

ABSTRACT

Right to healthy environment is often seen as an extension of the right to life and liberty due to the many judicial pronouncements made by the Supreme Court of India. However, a lot of the points raised in these pronouncements have often acted as key pillars for the legislative measures through such administrative and executive set up and implementation of the same through such enactments of law in the society aimed towards the development of the society. A clean and healthy environment is an integral part of the civilized society and the concept of right to live in a clean and healthy environment is not a recent invention, it has been opined by the higher judiciary in India in many instances. Keeping in view of such principles, the Government of India introduced a dynamic new concept known as The Swachh Bharat Mission. Target of the Swachh Bharat Mission was both the Urban Cities as well as the Rural populous of the country. The author through this paper aims to look at the impact of the judicial intervention as well as dynamic new government schemes in this regards.

Keywords: Constitutional Law, Environmental Law, Conventions, Right to Health, Healthcare, Public Health, Article 21, Right to healthy environment, Swacch Bharath, Swacch Survekshan.

INTRODUCTION

The conference on human environment held at Stockholm is considered as the most important conference of environment and it spoke of a need to protect the environment, sustainable development and a nurture a healthy environment as thus, the "natural resources of the Earth including air, water, land, flora and fauna and especially the representative sample of natural ecosystem must be safeguarded for the benefit of the present and future generations through careful planning or management as appropriate."[1] The World Commission on Environment and Development suggested many principles for environmental protection and sustainable development. The 'Earth Summit' of 1992 additionally pronounced that people are qualified for a solid and profitable life in congruity with nature.[2]

Norbert Wiener defined cybernetics as "the scientific study of control and communication in the animal and the machine"[3] As a term it is loosely used to imply anything that controlled with

[1] The Report on UN conference of Human Environment, *available at*: http://www.un-documents.net/aconf48-14r1.pdf(last accessed 27.12.2019).
[2] Accessible at http://www.summit-americas.org/Boliviadec.htm (last accessed 27.12.2019).
[3] Norbert Wiener, Cybernetics, or Control and Communication in the Animal and the Machine, Second edition, fourth print (1985) MIT Press.

technology. Cybernetics answers the 'Why? – Questions' because it is the science of purposeful systems. Studies of systems include a wide array ranging from Mechanical, Physical, Biological, Cognitive and social systems. Digital revolution has brought with it a big set of complexities that have not been answered from the point of view of its governance by the states.

A clean and healthy environment is an integral part of the civilized society and the concept of right to live in a clean and healthy environment is not a recent invention, it has been opined by the higher judiciary in India in many instances. The right has been recognized by the Indian legal system and the Indian judiciary in the recent times, which is to say within the last seven decades[4]. The only difference in the enjoyment of the right is that the right to live in a clean and healthy environment has attained the status of a fundamental right as per the Part III of the Indian constitution[5] the violation of which, will lead to a relief before the High Court of a State[6] of the Apex Court of the Land[7].

The judiciary has managed to increase the ambit of the empowering Article[8] of the constitution of India, through various judicial pronouncements, to include the Right to healthy and clean environment to be a fundamental right under right to life. The responsibility of Waste management is ultimately cast at the Local levels wherein the Local Governmental Systems have to ear mark the necessary goals for such an efficient and speedy waste management. The

[4]It is widely considered that the proliferation of Public Interest Litigations coupled with the Higher Judiciary's (namely the Judge) widespread approach to such problems has led to Active Decision making and independent considerations of the Judiciary within the framework of Law or Judicial Activism.

[5]Part III – Fundamental Rights, *available at:* –http://lawmin.nic.in/olwing/coi/coi-English/Const.Pock%202Pg.Rom8Fsss(6).pdf(last accessed 27.12.2019).

[6] Article 226 (1) of Indian Constitution – Power of High Courts to issue certain writs - Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any otherpurpose...

The Constitution of India, *available at*: http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf(last accessed 27.12.2019).

[7] Article 32 of Indian Constitution – Remedies for enforcement of rights conferred by this Part. — (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part…

The Constitution of India, *available at*: http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf(last accessed 27.12.2019).

[8] Article 21 of the Constitution of India - No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Constitution of India, *available at*: http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf(last accessed 27.12.2019).

Constitution empowers the same to the municipalities[9] and the duty is cast upon the municipalities as per the entry six of the twelfth schedule of the constitution of India which speaks of the Public health, sanitation conservancy and solid waste management.

Judiciary on the Right to clean and healthy environment as a fundamental right vis-s-vis Article 21:

It is due to the article 21, that a duty is cast upon the state to protect the life and liberty of the people as a fundamental right. The idea of the Right to life has been widened through the legal declarations. While settling cases identifying with condition, the judiciary thought about the option to spotless or great condition as principal to life and maintained as central right and upheld it as a fundamental right.

It has been through the intervention of the higher judiciary that the deciphering the Article 21 of the Indian Constitution has gained a significant momentum. The scope of Article 21 of the Constitution and the applicability of Article 21 of the Constitution has been extended generally and significantly by the Supreme Court of India, which has deciphered the privilege of life to mean the option to carry on with an acculturated life and it likewise incorporates the option to clean condition. Therefore over the time the higher judicature brought into ambit that the right to live a civilized life also included a right to enjoy a clean environment.

It was through **M.C. Mehta v. Union of India (Environmental Literacy Case)**[10] that directions to improve environmental literacy and steps to eradicate the environmental illiteracy were given and through this case the Supreme Court directed the cinema halls/video parlors to exhibit not less than two slides on environment prepared by the Ministry of Environment. Also directed the doordarshan and All India Radio to allot 5-7 minutes daily for interesting programs on environment and directed that environment be made a compulsory subject in a graded way in schools and colleges and universities shall prescribe a course for the same.

---

[9] Article 243W – Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow—

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to—

(I) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) The Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

The Constitution of India, *available at*: http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf(last accessed 27.12.2019).

[10] *M.C Mehta v. Union of India: 1987 SCR (1) 819.*

Another landmark case in the case of environmental pollution would be the **M.C. Mehta vs. Union of India (Vehicular Pollution Case)**[11] In this instant case it was a matter regarding the pollution in Delhi city due to the vehicular traffic, and the Supreme Court held that it was the duty of the Government to see that the air did not become contaminated due to vehicular pollution. The Supreme Court again confirmed the right to a healthy environment as a basic human right and stated that the right to clean air also emerged out form the ambits of from Article21 which referred to right to life. This case was a major landmark case, because of which lead-free petrol supply was introduced in Delhi.

In **Subhash Kumar v. State of Bihar**[12]**,** the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the Court perceived the privilege to a healthy environment as a feature of the basic right to life. This case additionally showed that the districts and countless other concerned legislative organizations could no longer rest content with unimplemented measures for the reduction and anticipation of contamination. They might be constrained to take positive measures to improve nature initially when it went to the general attention to the clean environment.

It was in **Sacchidanand Pandey v. State of West Bengal**[13] the court said that when called upon to give effect to directive principles and fundamental duties, one is not to shrug its shoulders and say that priorities are a matter for the policy making authority. The court hence may always give necessary directions.

The High Court of Rajasthan in the case of **L.K. Koolwal v. State of Rajasthan**[14] extended the right to know and to entitle a person to have complete information about the sanitation program of the municipal corporation. Hence, the citizens' access to official environmental information within reasonable limits came to be within the ambits of a guaranteed right.

The Supreme Court in the case of **Consumer Education and Research Forum v. Union of India**[15] took a view that right to good health was an integral facet of meaningful right to life and extended the right to the robust health and vigor of the workers as well, without which the workers would lead a life of misery and in efficiency.

---

[11] *M.C. Mehtavs. Union of India 1991 SCC (2) 353.*

[12] *Subhash Kumar v. State of Bihar: 1991 AIR 420.*

[13] *SacchidanandaPandey v. State of West Bengal: 1987 SCR (2) 223.*

[14] *L.K. Koolwal v. State of Rajasthan: AIR 1988 Raj 2.*

[15] *Consumer Education and Research Forum v. Union of India: 1995 SCC (3) 42.*

Originally the Constitution of India did not contain any direct and specific provision regarding the protection of natural environment, perhaps, it was considered negligible. However, the protection of the environment and health was contained only in a few Directives Policies to the State on some aspects relating to public health, agriculture and animal husbandry and these were not enforceable and are still not judicially enforceable. Some of the articles of the Directive Principles of State Policy showed a deviance towards environmental protection in the form of individual and collective impose of duty on the State to create conditions to improve the general health in the country and to protect and improve the environment. Later through constitutional amendment two specific provisions i.e. Article 48-A[16], and Article 51-A (g)[17], have been added which imposes duty on state as well as the citizens of the state to protect and conserve the environment.

After a long time of interpretation of constitutional and legislative provisions by the judiciary and vigorous efforts of some citizens and other civil bodies, the Indian environmental scenario has undergone a positive change. Today, the environmental consciousness imported by the courts, mingled with subsequent legislative efforts in the later years, introduced the right to environment as a fundamental right under Article 21 of the constitution of India. The Courts have played a distinguishing role in gradually enlarging the scope of a qualitative living by engaging into, and resolving various issues of environmental protection. Consequently, activities posing a major threat to the environment were curtailed so as to protect the individual's inherent right to wholesome environment as guaranteed under various instruments for protection of legal and human rights.

Keeping in view of all of the above principles, the Government of India introduced a dynamic new concept known as The Swachh Bharat Mission. Target of the Swachh Bharat Mission was both the Urban Cities as well as the Rural populous of the country. The Swachh Bharat Mission emanated from the new vision of the Government which was articulated by the President of India in his address to the Joint Session of Parliament and mentioned as thus "We must not tolerate the indignity of homes without toilets and public spaces littered with garbage for ensuring hygiene, waste management and sanitation across the nation, a Swachh Bharat Mission". Swachh Bharat Mission is being implemented by the Ministry of Housing and Urban Affairs and by the Ministry of Drinking Water and Sanitation for urban and rural areas respectively.[18]

---

[16]Article 48A - The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.

[17]Article 51A(*g*) - to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;

[18] Available at: *http://www.swachhbharaturban.in:8080/sbm/content/writereaddata/SBM_Guideline.pdf* (Last Accessed on 27.12.2019).

As a foreword to encouraging cities to improve urban sanitation, Minister of Housing and Urban Affairs (formerly Ministry of Urban Development) had conducted the first Swachh Survekshan survey that is 'Swachh Survekshan-2016' for the rating of 73 cities in January 2016 and this was followed by 'Swachh Survekshan-2017' conducted in January- February 2017 ranking 434 cities for various parameters in Urban Sanitation and in a bid to size up the coverage of the ranking exercise and encourage towns and cities to actively implement mission initiatives in a timely and innovative manner, Minister of Housing and Urban Affairs conducted its third survey to rank all 4041 cities based on assessment of progress from January 2017 till December 2017 under the Swachh Bharat Mission-Urban[19].

The goal of the study was to support enormous scope and resident cooperation and create mindfulness among all areas of society about the significance of cooperating towards making towns and urban communities a superior spot to live in. What's more, the overview likewise proposed to bring forth a feeling of sound rivalry among towns and urban areas to improve their administration to residents, towards making cleaner urban communities.

With the end goal for urban communities to earn the most extreme formative advantages from the survey, difficult endeavors were taken to fortify the limits of the urban areas to comprehend the modalities and soul of the overview. Notwithstanding, giving towns and urban areas more opportunity to get ready for the survey, there were collaborations with urban local bodies to acquaint them with the study philosophy, overview procedure and yield markers, and explaining their desires from the study in further. Since resident cooperation was the urgent segment of the overview, online networking and other customary media channels was utilized deliberately at both national, state and city levels so as to instruct residents about the destinations of the review and study system, just as to strengthen the significance of their interest in the study, so as to guarantee altogether more elevated levels of investment from all residents.

The scoring for each urban local body for ranking was segregated into 4 main components, viz.

a) Part 1- Service Level Progress (1400 marks) which involved collection of documentary evidence provided by urban local bodies on the activities they undertake under SBM;

b) Part 2A – Independent validation, where part-marks were deducted from part I if on-ground verification differed from documented claim;

c) Part 2B – Direct Observation (1200 marks) where status of cleanliness was verified through on-ground observation at sample locations;

d) Part 3A – Citizen Feedback (1000 marks), where direct feedback from the citizens of each

[19] *Ibid.*

urban local bodies was collected through face-to-face facts, outbound calling, and online survey; and

e) Part 3B – Swacchta App (400 marks) where marking was based on number of downloads and complain tredressal.[20]

Between the time of fourth January and tenth of March 2018, an aggregate of more than 2700 assessors from Karvy went on ground to visit 4203 urban neighborhood bodies, spending over Rs. 2.3 lakh every day for getting together information under the Swacch Survekshan. The exercises of these assessors and study enumerators were observed continuous by a task supervisory group with affiliate in each state capital and the central node located at Noida, Uttar Pradesh. The last appraisal of which proves that came progressively through applications utilized by the assessors just as from more than 2 lakh pages of documentation couriered by the urban nearby bodies was done at Noida by the center research group of Karvy and with occasional oversight by the SBM – U[21].

There was additionally broad use of the online communication to make encompassing vision around the review, to enhance the endeavors of the Ministry to utilize the Survekshan as an apparatus towards making a mass development towards a cleaner India. This was done through advancements like the #Donateabin campaign and the Citizens Corner competition. Swacch Survekshan 2018 had more than 29 lakh twitter outreach, more than 6 lakhs of Facebook outreach, and over 2.5 lakh Instagram outreach.[22]

CONCLUSION

In the earlier occasions, the perils of the destruction of environment were not unreasonably perceived but rather now with the trend setting innovation and expanding populace the unfriendly impacts are plainly perceived. Ecological protection is the rule of the current occasions. It is the, direst need, in light of the fact that a contamination free condition is a firstnecessity for the wellbeing and security of humanity. Prior, just the plain reading of article 21 of the Constitution had a thin extension however with the time; the idea of Article 21 has been widened. The Judiciary has assumed an imperative job in deciphering the Article 21 of the Indian

[20] Available at https://swachhsurvekshan2020.org/Images/SS_2018_Report.pdf(last accessed on 03.03.2020).

[21] *Ibid.*

[22] Available at https://swachhsurvekshan2020.org/Images/SS_2018_Report.pdf (last accessed on 03.03.2020)

Constitution which has expanded the right of life to mean the option to carry on with a socialized life and it additionally incorporates the option to clean condition at all places. However, the Constitution doesn't expressly accommodate the resident's entitlement to a perfect and safe condition.

Further, condition and improvement are viewed as the two of a kind. Any of these can't be relinquished for the other. Or maybe, both are similarly significant for the advancement of our future. In any case, without worry for the loss of private benefit, the inclination must be given to the general wellbeing and to the clean condition. A definitive obligation lies on the Courts to manage these cases productively and with incredible vigilance.

A healthy environment is an absolute necessity for the well-being of all citizens. A sound domain is a flat out need for the prosperity all things considered. Be that as it may, on the other hand is it conceivable to make nature totally nonpartisan and liberated from human impedance in such a period of cutting-edge innovation and developing needs. All in all, the inquiry which remains is that whether it will be a privilege to sound condition ensured or is it optional to each measure taken. Such sort of natural issues can be dealt with appropriately if individuals are instructed and know about their exercises.

Likewise, the administration needs to take exacting measures with appropriate mind and give every individual the chance to access to the data concerning the same. States will encourage and support open mindfulness and investment by making data broadly accessible and undertaking such measure to advance urban neatness and give a hands on approach that is maintainable to what's to come. At the point when the first Swachh Survekshan was begun in 2016, it was intended to be an observing instrument. Ensuing Survekshans have concentrated on yield and afterward result level markers. Having accomplished a large portion of the result the focal point of the Survekshan 2019 had been on supportability and sustainability.

PLIGHT OF INDIAN SEAFARERS AT TIMES OF COVID-19: LET THE VOYAGE OF LIFE SAIL

Arun Wighmal
Advocate, Delhi High Court

ABSTRACT

This article will be an endeavour to fathom the precarious condition of seafarers in this tough time of covid 19. It will highlight the plights of people stranded with some personal narratives. It will also be an attempt to elucidate the legislative and legal framework for seafarers. The position or the stand the current dispensation has taken on this matter along with the way forward to alleviate the suffering and plight of the people engaged in providing essential services.

Keywords: Pandemic, Voyage, Covid-19, Standard Operating Procedure, etc.

INTRODUCTION

Throughout the course of history, virus outbreaks have created havoc on humanity, sometimes even changed a course of history. It would be apt to state that epidemics are structurally comparable events wherever they take place across the globe. The outburst of Covid-19 creates a sense of déjà vu" with numerous historical epidemic outbreaks transpired in the sheets of history such as Antonine Plague (A.D. 165-180), Plague of Cyprian: (A.D. 250-271), The Black Death (1346- 1353), The Great Plague of London: 1665-1666 and Spanish flu: 1918- 1920 wherein an estimated 500 million people were affected by the same.[1] As the outbreak of Corona Virus (Covid-19) is putting health facilities of world at a challenging position, it is imperative to analyse its impact on maritime industry especially in relation to seafarers who also deserve to be put on the board of savours of mankind in line with other respective state emergency services, medical professionals, armed forces as they set a fortune on civil society to receive essential commodities and medical equipment through a sea route.

That it would not be extraneous to state that the impact which Covid-19 has over the global supply chain is massive in nature which has virtually brought the lives of millions of folks at a standstill and has given indentation to the economics and health system of even major developed nations. However, there are many fields of services who are portraying gladiator's role against the existing evil, one of which is the *community of Seafarers*, driven with the passion and sense of service to mankind playing extremely important role in keeping the global supply chain of

[1]https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html(name of the author and Title of the article are missing and date of accessing it)

essential commodities alive and active at the cost of putting themselves at health risk by keeping themselves sail to a voyage with a destination port located in even the hardest hit nations in Europe and North America.

PLIGHTS TO NARRATE

It brings us to a crucially relevant sphere of concern i.e. predicaments faced by class of seamen. A report by U.K based organisation- Human Rights highlights the appalling and gloomy tale and narrate the condition of seafarers in ship, wherein they are cramped to stay within the premises of a vessel sailing or anchoring in the sea even when the period of their employment agreement comes to an end and they are left with no option but to confine their lives on a vessel which has no permission to reach ashore as many governmental authorities have prohibited their entries to their territorial waters.

It is pertinent to note that there is other section of seafarers whose employment service contract period has technically not triggered as it stipulates on the time when he/she boards the vessel and due to existing pandemic they are forced to confine themselves either at a hotel or other places of stay. They had to finance their stay in a foreign land with meagre to no assistance from their employer shipping company and concerned consulate general economical standing in a foreign land with very little or no assistance from their employer. It would be really hard to feel the psychological as well as physical agony and trauma they must be going through when their financial sources for sustenance are depleting with darkness of uncertainty hovers over their sleep in a foreign land.

It is worth mentioning that the community of active Indian seafarers in global maritime industry at present numbers around 40,000 extensively plays a role of vertebrae which have been overlooked to some extent during these hard times by their respective shipping companies coupled with governmental authorities in terms of *non-payment of wages, contract extension without informed consent*, *lack of medical facility* etc. Upon contacting, a Seafarer currently sailing near United States of America who chose to speak on the condition of anonymity narrated his impediments in an unequivocal manner:

> 'There are several issues concerning seamen on board such as many seafarers whose employment contracts are terminated are forced to stay on vessel with no assurance of wages, moreover such a long period of sailing has its massive impact on the psychological and physical health of seafarer equally burdened with the tension about the well-being of their family members who are left with no care-taker behind coupled with no sort of financial assistance provided to them by the concerned shipping company or the governmental authorities."

> *"The concerned seafarer also stated that his vessel has been continuously sailing and no crew change is happening since February which saved ship owners millions of dollars annually which is supposed to be spent on crew change globally. Such amount shall be allocated for the welfare activities such as providing protection kit, sanitizers and other sanitization equipments coupled with immediate financial assistance to stranded seafarers and their respective families, however no such steps are taken so far which spreads a wave of disappointment and sense of worry amongst the concerned."*

It is also pertinent to mention that there are several instances when a crew required to obtain permission from the ship owner company to take certain actions on board, for example, in case of any fault occurs in ODME (Oil Discharge Monitoring Equipment**)** then a permission has to be obtained from the corporate authorities which is resulting in immense delay on account of many of the offices are located in European region where sever lockdown is in place.

Thereafter on contacting numerous seamen who has chosen to share their narrative upon condition of anonymity said that;

> *"We completely understand the COVID-19 impact on the global community and we seamen are no exception to that, moreover we are one of the most effected classes of people when the crew changes are not allowed by the port authorities, such set of events make seafarers mentally and emotionally sick which have the potential to lead to accidents on board."*

Capt. Pradeep Kumar who contacted NGO Human rights at Sea[2] stated that

> *"Ship are sailing and calling at ports frequently with the Pilot on board. Nobody talks about danger of COVID-19 infection to the pilot or seafarer, because it is business. Standard cargo operation is going on with shore staff on board. Nobody talks about danger of COVID-19 infection and 14 days quarantine, because it is business. Regular stores and spares are being supplied on board. Nobody talks about danger of COVID-19 infection, because it is business."(f.n.)*

In one of the other case seafarerMehrzadWadiwalla who also contacted the NGO whilst stuck in Zarzis, Tunisia.[3] Narrates his predicament:

> *"He arrived on March 6 via Tunis to join his ship, but by 16 March the port had stopped*

[2]https://www.maritime-executive.com/article/ngo-seafarers-calling-for-help/Maritime Executive/NGO; Seafarers calling for help/02.07.2020 (name of the author and Title of the article are missing and date of accessing it)

[3]ibid

crew changes, and he had to return to a hotel. He has since tried to book flights home to India with his own funds and is now paying for his food and accommodation. His funds will not last indefinitely, and he remains away from his family."

Another seafarer, Hitesh Jain, is currently off Sharjah, UAE, after his contract was completed on January 15 following a transit from China. He has been stranded for months and adding to his trouble is the Visa policy of UAE which has suspended all visas. He also has a new born baby whom he hasn't seen yet.

LEGISLATIVE FRAMEWORK CONCERNING SEAFARER

In these trying times of Covid-19 as seafarers are facing diverse kind of impediments, it would be apt to analyse the statutory framework available at their disposal which ensures and reinstate faith that they too holds *'right to life which not limited to mere existence but extends to life with* dignity' as the same principle enshrined in Article 3 of the United Nations Declaration of Human Rights (UNDHR),[4] Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR)[5] and Article 21 of the Indian Constitution Moreover, several welfare provisions are enacted for the protection and welfare of the seafarers under ***Merchant Shipping Act, 1958, Merchant Shipping (Maritime Labour) Rules, 2016*** which provided them remedy to initiate appropriate legal action in the Court of Law to recover their unpaid wages and other statutory benefits from their respective shipping companies, however, as the current position demands invocation of immediate welfare benefits such as ***Seafarers welfare fund society*** whose primary objective is to provide several welfare facilities to seafarer who are in *distressed situation* by providing financial assistance to them, their family members, maternity benefits, old aged benefits in these tough times as the current situation across globe is a glaring example of massive threat to mankind wherein members of our seafarers community are one of the major victims.

That bring us to a question what are the benefits scheme put in place for the distressed class of seamen and their family members, whether any thought has been given to this area of concern for the people who are none less than a fighter against Covid-19 to keep the supply chain across globe intact. The need of the hour is to frame a public policy addressing the above noted concerns and put the utilization of Seafarers Welfare Fund for the well being of the deserved and their family members in order to set themselves free from psychological trauma regarding the welfare of their loved ones eagerly waiting to meet them during these difficult times.

[4]United Nations Declaration on Human Rights or UNDHR is a declaration adopted by the United Nations General Assembly by Resolution 217 A (III) on 10 December 1948 at the Palais de Chaillot, Paris, France.

[5]The International Covenant on Civil and Political Rights or ICCPR was created in 1966. It entered into force on 23 March 1976.

STEPS INITIATED BY INDIAN GOVERNMENT AND A WAY FORWARD

GUIDELINES FOR SIGN-ON

After taking into consideration the issues concerning Crew Changes in maritime sector, the Directorate General of Shipping, Ministry of Shipping, Government of India had issued Standard Operating Procedures/ Protocols (SOP) for controlled crew change i.e. Sign-on and Sign-off at vessels containing Indian crew members. There is an attempt made to slow down the sufferings of crew members on board as well as those stranded to board the vessel to start their voyage. Set of guidelines contained in the SOP reflecting upon the submission of travel history for last 28 days by the seafarer as per Form no. 1 attached to the SOP and the same has to be submitted to Ship owner/ RPS Agency via email, who needs to submit the same with DG Shipping approved medical examiner, for assessment and certification of the seafarer's fitness to join ship. Thereafter, as it gathered from the literal interpretation of the text, the medical examiner holds the discretion to call the seafarer to undergo standard medical examination prescribed by DG

Shipping as the text reads as follows:

> 4. "*Based on the seafarer's travel and contact history for last 28 days submitted by the ship owner/ RPS agency, the medical examinermay call the seafarer for standard medical examination prescribed by DGS for certifying medical fitness of the seafarer".*

To the understanding the criteria for exercising discretion by medical examiner does not stand on the foot of equity as the facts stated in the SOP are subject to be manipulated by the applicant and that would defeat the holistic purpose of putting the whole system in force.

It is further pertinent to mention herein that after the approval of medical examiner is obtained, then the obligation to identify the travel route along with arrangement of seafarer's vehicle and driver falls in the court of Ship owner/ RPS Agency and accordingly an e-pass would be generated which needs to be submitted to the local authorities where seafarer resides for issuance of a transit pass from the place of residence to the place of embarkation on shipping vessel. Upon reaching port of embarkation, the seafarer shall undergo the Covid-19 test and if the results turned out to be 'negative' then he/she would be ready to sign-on, otherwise actions would be taken as per the guidelines issued by Ministry of Health and Family Welfare.

GUIDELINES FOR SIGN-OFF

It would be apt to stated that as many seafarers who are eagerly waiting to reach their mother land

and unite with their families at the time of global crises, set of guidelines for Sign-off contained in SOP issued by DGSP which includes but not limited to ascertaining health of each crew member by master of ship before arriving at its port of call in India and submitting of Maritime Declaration of Health to the health authorities of designated Port. It would be the responsibility of ship owners/ RPS that all standard health protocols are observed till the time seafarer reaches the facility of sample collection and a seafarer shall be kept under quarantine facility for a period of 14 days from the date of departure from the last foreign port, upon completion of 14 days, he/she shall undergo a test to confirm 'negative' test.

That upon receiving 'negative' report of COVID-19, same procedure needs to be followed concerning identification of seafarer's travel route and making necessary arrangements for the same, however the question arises about the feasibility of the SOP at these difficult times when entire administrative machinery is struggling to prevent the bridge of economy and health system collapsing on its own path taker. Moreover, as the SOP stipulates about providing car along with a driver from place of residence to port of embankment and we stand in a position to examine the possibility of compliance of the same by those seafarers whose place of residence is hundreds of miles away and upon whose trust or assurance can they leave their families behind to tackle the pandemic as no policy has been framed so far concerning the same by our government.

CONCLUSION

At last I would like to conclude this article by asserting the rights of the community of seafarers, who I think should be considered as a part of essential workforce providing essential service to the people in these precarious times. Therefore it is the need of the hour to draft and implement a policy framework in order to cater to the needs of the seafarers and their family members in order to infuse a sense of belongingness towards them from their elected representatives and shout loud a message of unity and humanity in this war against indiscernible enemy i.e. Covid-19 when their loved ones are stranded somewhere at the middle of the Ocean and striving to make "*the voyage of Life Sail".*

CYBER TERRORISM'S INTERFACE ON SOCIAL MEDIA: DISSECTING ITS LEGAL REGULATION

Prabha Shree Sain
Research Scholar,
Indian Law Institute, New Delhi

ABSTRACT

As the advancement of technology is taking place in society and has been increasing day by day. Technology is all about the human choice how they use it whether it is negative or positive outcomes. Internet has become more resourceful and articulate, as it could easily be used. Terrorist organizations not only utilize internet but also expand their ideas, which is often termed as cyber terrorism. Cyber terrorism is no defined internationally or nationally, but several attempts have been made to define this phenomenon. Looking at the literature so far, this paper will try to emphasize on counter violent extremism and to counter radicalization, as various interventions through the digital potential has been made by the terrorist organizations. Cyber terrorism is one of the most debatable and most ignored problems. Social media is a new phenomenonworldwide builds the virtual networks and communities. Terrorist organizations such like ISIS or Taliban are strongly getting involved in cyber activities via social media and internet. In the era of digital technology extremist have use various strategies for psychological warfare, recruitment, fundraising, radicalization, networking, planning and even for sharing information. The present study tries to comprehend the concept and understanding of Cyber Terrorism as a phenomenon, and will try to find out the most pertinent to the future threats as well as the current situation. Also, exploring how extremist recruiters use available narratives and discourses to attract and bond with young people and will examine how the use of cyber terrorism, social media and internet have converged the virtual space for the terrorist organizations. Further, it will focus on what initiative has been taken to solve this problem globally.

Keywords: Cyber-terrorism, Social Media, Radicalization, Terrorism, Propaganda, Extremism, Online.

INTRODUCTION

A new era of millennial, the technology is rapidly growing so fast people are getting relied on. Information technology i.e. the computer - based technology is used by the people in order to gain information, whether it is for organizations, nations or even for the individual needs. However, the information is so enormous used that even the terrorist organizations used it to commit crimes via cyber space (internet) which leads to havoc to various organizations as well as the nations. Terrorism is one of the most destructive menaces in a contemporary society.[1] Various efforts have been made to solve such issue, but the perpetrators are having created havoc for various organizations. There could be various reasons why terrorism has become such crucialtopic whether it is unemployment or string headed motives behind it.[2] Due to rapid growth in the digital technology, various terrorist organizations are misusing the social media and in order to attack the national defense system in the developed countries.[3]

---

[1]Lee Jarvis, Stuart Macdonald and Thomas M.Chen, *Terrorism Online-Politics, Law and Technology* (Rout ledge Publication, 2016).

[2]*Ibid*

[3]Thomas Rid, *Cyber War will not take place* (C.Hurst&Co. Publishers Limited, 2014).

The core of this article would be the terrorist organization modus operandi which includes propaganda, recruitment, planning, funding and other terrorist activities done with the mode of social media and internet.[4]

Over the recent years, problem which is occurring is "Dark Web" or "Hidden Web "which is the dark side surfing internet, which requires special software to access data and passwords to unlock it.[5] The criminals, terrorist or hackers can do illegal work due to "digital underground."[6]

Search engines of deep web like duck duck go, torlinks, Onion URL repository which are easily accessible.[7] It is through deep web contents cannot be indexed. Considering the new activities like deep web and cyber terrorism are leading to misuse of the social media, on which theoretical and empirical research phenomena need to be done.[8]

THE CONCEPT OF CYBER TERRORISM

Cyber terrorism is one of the most debatable topics. The word itself talks about the two ingredients which are cyberspace and terrorism. So, it is a deadly combination of digital technology and terrorism. There are numerous national and international regimes which define cyber terrorism. Cyber terrorism is one of the low cost, as it provides for secure communication for the terrorist organizations so that they can carry their terrorist activities and other operations.[9] The main purpose of cyber terrorism is to provoke the violence or fear, by the use of the computer system or programs so that they can target the huge number of audience worldwide.[10]

Cyber terrorism is the most dangerous, destructive, damaging activities that take place in the cyber space. Terrorist group organizations like al Qaeda are considered as one of the most dangerous group.[11] Cyber attacksin which US officials data from computers wereseized in Afghanistan, denotes that terrorist groups have scouted systems which has control over there communication and other infrastructure.[12] Terrorist organizations remain active and target through the use of internet, launched attacks like Unix Security Guards (USG) which is a pro

---

[4]Iman Awan "Cyber Extremism: ISIS and the Power of the Social Media" published online on 15 March, 2017 *available at*: https://link.springer.com/article/10.1007/s12115-017-0114-0(last visited on February 15th, 2020).

[5]Michael Chertoff, "A Public Policy Perspective on Dark Web"*Journal of Cyber Policy*, Volume 2, 2017, Issue 1.

[6]*Ibid*.

[7]*Supra* note 5.

[8]*Ibid*.

[9]Babak Akghar and Ben Brewster, *Combating Cybercrime and Cyber Terrorism: Challenges, Trends and Priorities* (Springer Publication, 2016).

[10]*Ibid*.

[11]*Supra* note 1.

[12] K Mani, *Legal Framework on Cybercrimes* (ITU Publication, 2012).

Islamic group, Anti India Crew (AIC) which is a Pro Pakistan group launched attacks in India, other groups like World Fantabulas Defacers (WFD) also attacked many Indian sites.[13] The *modus operandi* could be various, but the advantages could be easily accessible, one of the cheapest methods to target large number of audience, identity remains anonymous, difficulty in tracing out the location due to advanced technology.[14]

Coming to the definition, there is no universally accepted definition, but cyber terrorism has been defined by various authors consist of the same ingredients.[15] However cyber terrorism is different as compared to other computer crime or conventional crime.[16] Every computer crime does not constitute the crime of "cyber terrorism".[17]

The Budapest Convention which is the cybercrime convention also aims at the protection of society against the cybercrime and criminal activity conducted through internet by harmonizing the national laws. India has not been the part of the convention but worked on the legal frame work by amending the Information Technology Act in 2008.

POWER OF SOCIAL MEDIA

Social media is one of the important assets of terrorist organizations, which provides various operational spheres to them. Generally, there are two categories under which the misuse of social media is done by the terrorist organizations. Firstly, the communication benefit, which includes recruitment by potential radicals, administer digitalized training environments, creating group forums, coordinating other activities with the terrorist organizations and also propagating the terrorist organization materials (Conway, 2016). Further, the level of secrecy has revolved through the mode of social media which are provided by various platforms. Secondly, operational digital action, which tends to spread terror and includes supporting operational financing, coordinating activities, planning, threatening, and sabotage of the infrastructure through cyberspace. (West, 2014).

Indeed the terrorist organizations such as ISIS had posted 15,000 items of "Jihadist Propaganda" and latterly the UK Government had removed such online extremist materials.[18]

---

[13] Dr M Das Gupta, *Cybercrime in India* (Eastern Law House Publication, 2012).

[14] *Ibid.*

[15] Tehrani PardisMoslemzadeh, *Cyber-Terrorism-The Legal EnforcementIssues*, p. no.105 (World Scientific Pub Co Inc, 2017).

[16] F Cassim "Addressing the Spectre of Cyber Terrorism: A Comparative Perspective" May 2017 *available at:* https://www.ajol.info/index.php/pelj/article/view/81295(last visited on February 21st, 2019).

[17] *Ibid.*

[18] Imran Awan, "Cyber Extremism: ISIS and the power of the Social Media" published online on 15th March, 2017 *available at*: https://link.springer.com/article/10.1007/s12115-017-0114-0(last visited on February 15th, 2020).

Similarly other videos were also posted in which leader of ISIS; Abu Bakr Al- Baghdadi had called for the "Sunni Youths" to fight for the ISIS (Islamic State of Iraq and Syria) in which he stated that "I appeal to the youths and men of Islam around the globe and invoke them to mobilize and join us to consolidate the pillar of the state of Islam and wage jihad against the rafid has (Shia)" (New Delhi Times, 2015). The terrorist organizations have used various tactics of using social media platforms, so that there could be a direct connection with the wider global audience and they will able to get a larger platform.[19]

Social media is a channel through which a larger number of audiences are getting connected as there are 1 billion users each month. And every hour at least 6 billion hours of video are being watched every month and uploaded.[20] Similarly, Twitter has around 500 million tweets per day and on average has 3,50,000 tweets being sent.(Fiegerman, 2015) The largest social media network is Facebook which has 500 million active members and 55 million people all over the world sending updates. ISIS has been using all these platforms so that they can attract a large number of people to achieve their target and ideologies. A video was posted in which called for the Muslims to join ISIS. A large number of audiences got attracted by the video which accompanied the words like "Proudly Support the cause". The videos were shown in different languages as well as the countries like Libya, Egypt Algeria which actually unveil the tactics used by the ISIS.[21] The video has a message for the young men and they specified in the video to join ISIS from various part of the world.[22]

Funding of terrorist organizations is done through the e-commerce and exploitation of online payment tools.[23] Transferring of the fund is often done by credit card or other facilities like PayPal or Skype. Younes Tsouli case[24] in the United Kingdom is an example of users of illicit gains to finance acts of terrorism. There are various organizations which provide charity to terrorist organizations. Benevolence International Foundation, Global Relief Foundation and

---

[19]David Lowe, *Policing Terrorism-Research Studies into Police Counter terrorism Investigations* p. no. 116 (CRC Press, 2015).

[20]*Ibid.*

[21]*Supra* note 1.

[22] Dr M. N Sirohi, *Cyber Terrorism and Information Warfare (*Vij India Private Limited, 2015).

[23]*Supra* note 19.

[24]Younes Tsouli is a Moroccan-born resident of the United Kingdom who, in 2007, was found guilty of incitement to commit acts of terrorism (a crime introduced in the Terrorism Act 2006) and sentenced to 16 years in prison. His crimes were carried out via the internet, where he was known by several pseudonyms based on variations of Irhabi 007; "Irhabi" being the Arabic word for "terrorist", and "007" a reference to the fictional British secret agent, James Bond.Tsouli's activities included setting up web sites and web forums in support of Al-Qaeda and distributing video material filmed by the Iraqi insurgency. Tsouli has been called the "world's most wanted cyber-jihadist", and his conviction was the first under British law for incitement to commit an act of terrorism through the internet.

the Holy Land Foundation for Relief and Development, all these foundations used fraudulent means to finance terrorist organizations in the Middle East.[25] Planning and training like virtual training camp are the next crucial steps taken by the terrorist.

A recent example of the use of social media by terrorist organizations is ISIS who is using social media for the recruiters, as they are release videos in order to target people.[26] India is also one of the countries who have suffered as 23 Indians had gone to join ISIS in order to fight against the organizations.[27] They generally target young individuals, womens by the name of religion.

The most recent example is a video of a journalist beheaded by the ISIS in order to convey their message to the people.[28] Social media has played an important role in the evolution of Al-Qaeda inspired terrorism. The Potential audience is vast in number and most of them used the internet, Al-Qaedaand other terrorist organization have showed their online presence on twitter, facebook, Instagram etc.[29]

Furthermore, ISIS also has the app which is released by them and can be downloaded, so that users can get the latest updates and news which is relevant to the organizations. The app named as "The Dawn of Glad Tidings" was detected and suspended later. The app was available on the goggle android and was promoted online by the ISIS. Tweets, hashtags, videos, images, links, comments could be monitored by the users once they download the app.[30] All these facts examine, how cyber terrorism and social media can be exploited by groups like ISIS when we talk about converges of virtual space.[31]

CYBER EXTREMISM AND RADICALIZATION

Cyber Terrorism through the internet and social media used by the extremist groups not only leading to exploitation but also creating "online hate."[32] It is through the social learning theory the terrorist organizations like ISIS promote violence as their strategy. The theory postulate about how the person can get attracted by the deviant behavior of the other groups.[33] It was through the theory the extremist were enticing people to facilitate attacks and recruitment.[34] The theory comprehends that it is through the deviant behavior the individuals thought is provoked which leads into the transformation of people like Andrew Ibrahim, who was a violent extremist.

---

[25] *Supra* note 22.
[26] Brian Blakemore, *Policing Cyber Hate, Cyber Threats and Cyber Terrorism* (Rout ledge, 2016).
[27] Robert W. Taylor, Eric J. Fritsch, John Liederbach, Michael R Saylor and William L. Tafoya, *Cyber Crime and Cyber Terrorism* (Pearson, 4th Edition, 2018).
[28] *Ibid*
[29] *Supra* note 26.
[30] *Supra* note 27.
[31] *Ibid.*
[32] Aver Lekin and Daria Ilkina, "*Comparison of Cyber Crime*" (Ted Rogers School of Management, Ryerson University, 2016).
[33] *Ibid.*
[34] R Ferrera Gerald, *Cyber Law Text and Cases* (Cengagae, 2012).

(Desmond, 2002)

At present, online extremism is an issue which is getting more and more attention. It is through the online extremism how young individuals are getting fascinated and there is fear of joining Isis in Iraq or Syria.[35] Extremists are using internet for radicalization, communication, recruitment, propaganda.[36] The Internet has become a medium through which threats are emerging all over the world and become difficult for the government to trace or detect them. The former president of USA Barak Obama also said that there should be new strategies to deal with the terrorist threats, in order to deal with the terror need to understand what terror and threat is and separate communities should get engage to deal with the terrorist propaganda.[37]

Radicalization can be defined as "to become more radical in their political or religious beliefs."[38] Terrorist radicalization is a complex occurrence of the people embracing their views or ideas or opinions that often lead to terrorist activities. The European Commission defined radicalizationas:[39]

"*complex phenomenon of individuals or groups becoming intolerant with regard to basic democratic values like equality and diversity, as well as a rising propensity to use means of force to reach political goals that negate and or undermine democracy*"

The European radicalization also stated that terrorist radicalization does not constrict to one ideology.[40] Recruiters exploit various factors like discrimination, xenophobia, social marginalization, criminality etc to opportune radicalization.[41] It is through the radicalization violent acts are embraced by the individuals or terrorist organizations.[42] Through online radicalization and other disrupt able portal like a dark web which gave the extremist various techniques and ideas to attack planning, gather information in relative anonymity.[43] This suggests that technology is not only helping in a terrorist organization to radicalize individuals but also acting as an enabler once, and helping terrorist to deals with all techno hurdles.[44]

---

[35]*Ibid.*
[36]*Supra* Note 34.
[37]M. Zakaria Siddiqi "Cyber Terrorism: Global Perspective"*The Indian Journal of Criminology and Criminalistics*, 2001, Volume 12, May-August).
[38]*Ibid.*
[39]European Commission, "Migration and Home Affairs Glossary" *available at*: https://ec.europa.eu/home-affairs/elibrary/glossary/r_en(last visited on February 19th, 2020).
[40]Talat Fatima, "Cyber Terrorism: The International Menace-Concept and Responses"*Indian Journal of International Law*, Volume-46, Apr-June, 2006.
[41]*Ibid.*
[42]*Supra* note 26.
[43]*Supra* note34.
[44]*Supra* note 19.

CONCLUSION

In summary, the virtual space is the one which plays an important role while terrorist organizations like ISIS tactics emerged when it comes to radicalization, propaganda, recruitment or funding. It is clearly evident social media and the internet became a primary mechanism worldwide can be used the terrorist organizations in different ways which can lead to its different effects. Groups such as ISIS have become particularly reliant on social media platforms to recruit members to join their cause and to spread their message of hate through gruesome images of murder victims and menacing messages that hint at imminent acts of violence. However, it is also been increasingly used for illegal acts which have given force to the Government's attempts at censoring social media. Where on the one hand, the misuse of social media entails the need for legal censorship, on the other hand, there are legitimate fears of violation of civil rights of people as an inevitable consequence of censorship.

However, the present cyber laws of India are neither appropriate nor adequate in this respect. An analysis of the existing IT laws[45] shows that there is unaccountable and immense power in the hands of the Government while dealing with security in the cyberspace. Even then, it is not sufficient to check the misuse of social media.

Hence, specific legislation is desirable to regulate social media. However, there are many practical difficulties which may arise while doing so. There is a very thin line which demarcates the enjoyment of one's right and the violation of the enjoyment of else's right in the process.

Similarly, hate speech, racist remarks, religious sentiments have different meanings for different people. Keeping all this in mind, it is suggested that the Government should form a Committee including technical experts to look into all the possible facets of the use and misuse of social media and recommend a suitable manner in which it can be regulated without hindering the civil rights of citizens.

[45]The Information Technology Act, 2000.

THE CONTROL CONUNDRUM: A STUDY ON THE PROPOSED DEFINITION OF 'CONTROL' UNDER THE DRAFT COMPETITION (AMENDMENT) BILL, 2020

Surya Saxena
Assistant Professor, School Of Law,
Delhi Metropolitan Education, Noida

Hartej Singh Kochher
Assistant Professor, ICFAI Law School, Hyderabad

ABSTRACT

The Ministry of Corporate Affairs had constituted a Competition Law Review Committee (CLRC) in 2018 to review the competition law framework, in order to ensure that the Act *"is in sync with the need for strong economic fundamentals".* The CLRC submitted its report in July, 2019 and advocated for multiple changes in the Act, to keep it in sync with the ever changing and developing economic realities and implementation issues. Taking these considerations into account, the Ministry of Corporate Affairs has come out with a Draft Competition Law (Amendment) Bill, 2020, laying out the proposed changes. Amongst other changes, the Draft law proposes to change the definition of '*control*' with respect to '*combinations*' in the Act. This paper is a study of this proposed change. The authors have made an attempt to evaluate and study the current definition, and the decisional practices of the Competition Commission of India (CCI) as regards applying the definition, the new proposed definition, and the reasoning behind it as given by the CLRC. Finally, the authors will give their suggestions as to whether the *'decisive influence'* or *'material influence'* standard should be adopted while assessing as to what actions/practices relating to a combination bestow control.

Keywords: Competition, MRTP, Acquisition, Merger, Amalgamation, Securities, etc.

INTRODUCTION

The financial and economic policies of India went through noteworthy changes post liberalisation of the Indian economy in the year 1991.[1] A series of legal reforms that were introduced then, were directed towards deregulation of various industries and giving a boost to private businesses in our country.[2] In this backdrop, a High level Committee on Competition Policy and Law ("*Raghavan Committee*") was given the task to restructure the anti-trust law that were in operation during that time i.e. The Monopolies and Restrictive Trade Practices Act, 1969 ("*MRTP Act*").

The Raghavan Committee after noting that the MRTP Act, 1969 was inadequate for fostering

[1] *The statement of new economic policy or the IPR of 1991*, (Visited on: 20.04.2020) https://dipp.gov.in/sites/default/files/IndustrialPolicyStatement_1991_15July2019.pdf.

[2] Charan D. Wadhwa,*Political Economy of post 1991 reforms in India South Asia*,23, JOURNAL OF SOUTH ASIAN STUDIES, 207-220(2000).

competition in the markets and curbing the anti-competitive practices, recommended large scale reforms to align the anti-trust law with the new domestic economic policies and global best practices.[3] Based on these recommendations in 2002, the Parliament of India enacted the Competition Act, 2002 ("*Competition Act/Act*") replacing the archaic MRTP Act, 1969. The primary goal of the Act being "*to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India*".[4]

The Act intends to restrain any activity that could harm or potentially harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. Therefore, the rubric of the Competition Act has four broad compartments: (a) cartelizing behaviour of the firms, (b) abuse of dominant position, (c) mergers and acquisition and (d) competition advocacy.

In the years since the Act came into operation,[5] it has substantially contributed in the development of competition jurisprudence and fair play practices in the Indian markets. However, over the last decade, markets have grown at a tremendous pace and there has been a paradigm transition in the way businesses operate and interact. Keeping this development in mind, the Ministry of Corporate Affairs ("*MCA*") had constituted a Competition Law Review Committee ("*CLRC*")[6] in 2018 to ensure that the Act *"is in sync with the need for strong economic fundamentals".*[7]

The CLRC submitted its report in July, 2019 and advocated for multiple changes in the Act, to keep it in sync with the ever changing and developing economic realities and implementation issues. Taking these considerations into account, the MCA has come out with a Draft Competition Law (Amendment) Bill, 2020 laying out the proposed changes.[8]

The Draft law proposes to change the definition of '*control*' with respect to '*combinations*' in the Act, and this paper is a study of this proposed change. The authors have made an attempt to

---

[3] *Report of High-Level Committee on Competition Law under the chairmanship of S.V.S. Raghavan,*(Visited on 21.04.2020)
https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

[4] The Competition Act Preamble (2002).

[5] The Act came into operation in the year 2009 since some of its provisions were challenged as being unconstitutional in the case of Brahm Dutt v. Union of India, AIR 2005 SC 730.

[6] The Competition Law Review Committee ('CLRC') was constituted on 1st October, 2018 and submitted its report on 26th July, 2019.

[7] *OECD Economic Surveys India,* Volume no. 2007/14(Visited on 27.04.2020)
https://wikileaks.org/gifiles/attach/9/9003_india_07.pdf (2007).

[8] *Draft Competition (Amendment) Bill, 2020,* (Visited on 28.04.2020)http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.

evaluate and study the current definition, and the decisional practices of the Competition Commission of India ("*CCI*"), the Competition regulatory body, as regards applying the definition, the new proposed definition, and the reasoning behind it as given by the CLRC. Finally, the authors will give their suggestions as to whether the *'decisive influence'* or *'material influence'* standard should be adopted while assessing as to what actions/practices relating to a combination bestow control.

MERGER CONTROL REGIME IN INDIA

Background

Competition law chiefly deals with ex-post regulation, which essentially means intervention by a competition authority after abuse has taken place. However, while dealing with combinations, competition authorities in many jurisdictions also lay down ex-ante regulation, to prevent adverse effects on competition. The aim of this ex-ante regulation is to object to such mergers which may restrict the level of competition in, or are otherwise harmful to, domestic markets.[9] In this respect, the term 'merger' is not restricted to simply mergers of companies but encompasses various forms of corporate restructuring like mergers, amalgamations, etc.[10]

The Indian merger control regime came into effect on June 1st, 2011 with Sections 5 and 6 of the Competition Act, 2002 being notified. Prior to 2011, there was no statutory obligation to notify any anti-trust authority in India (or to seek approval from such authority) before finalising any corporate restructuring.[11]

As per the broad scheme of Section 5 and 6 of the Competition Act, a combination (i.e, an acquisition, merger or amalgamation) must be notified to and approved by the Indian competition regulatory body, the CCI, in case it breaches the prescribed asset or turnover thresholds and does not qualify for any exemptions.[12]

There are no specific laid down standards for evaluating whether a combination causes or is likely to cause an appreciable adverse effect on competition ("*AAEC*") within the relevant market in India. But the legislation governing competition law has enumerated certain factors which are looked into by the commission for assessing the potential result after the combination

[9] ABIR ROY&JAYANT KUMAR, COMPETITION LAW IN INDIA(2nd Ed., Eastern Law House, 2018).

[10] DAVISH WHISH AND RICHARD BAILEY, COMPETITION LAW830 (9th Ed., Oxford University Press, 2018).

[11] The Combination Regulations, 2011 expressly included what are commonly referred to as 'transitional provisions' These provisions state that the guidelines will only apply to combinations where binding documents are executed on or after June 1, 2011.All pending transactions prior to the stipulated dates are not notifiable, reducing 'uncertainty' and 'compliance burden' of the parties.

[12] The Competition Act2002§ 6(1).

comes into existence.[13]

To further substantiate, we could take a hypothetical example of a scenario wherein two telecom companies, namely ABC Ltd. and XYZ Infocom decide to merge into a single entity. Presently, ABC Ltd. holds 40% of the market share while XYZ Infocom has a coverage of 30%. Post-merger, the combined market share of the entity would amount to a consolidated 70%, which is a substantial portion. Now, the company can adopt a strategy wherein it reduces the tariff charged by it initially after its inception, in order to attract more customers. Because of the combined balance sheet and the huge pool of resources of the two companies, they are able to sustain in the market even with very low revenues on account of the cheap tariff/pricing strategy that is being implemented. But this pricing can make it difficult for the other market players to compete and survive.

Once the merged entity has enlarged its customer base, it can exorbitantly increase the tariff and leave customers with no choice but to pay higher prices as the other service providers have exited the market because of surmounting losses and a diminishing customer base.

This will lead to removal of a vigorous and effective competitor or competitors in the market and will result in the parties to the combination being able to significantly and sustainably increase prices or profit margins. This example can succinctly display the need for merger control provisions and a regulatory body to sustain competition in the relevant market.

WHY IS DEFINING CONTROL IMPORTANT IN COMPETITION LAW?

The definition of 'control' becomes important because of the 'combination regulation' mandate of the CCI. This mandate ensures that a combination is not entered into, by any person or enterprise, "*which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.*"[14]

What exactly is a 'combination' is not defined by the Competition Act. It merely states that: "*the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises/and persons or enterprises*" if certain

[13] The Competition Act 2002, § 20(4) specifically talks about certain factors which the commission will have to enquire into while determining 'AAEC' including actual and potential level of competition, extent of barriers to entry into the market level of combination in the market degree of countervailing power in the market extent of effective competition likely to sustain in a market etc. AAEC, is for the uninitiated, legalese for 'affecting competition' in the market.

[14] The Competition Act 2002§ 6(1).

conditions are satisfied.[15] Hence, a combination can be affected in either of three ways –

- by way of an acquisition;
- by way of a merger; or
- by way of an amalgamation.

Thus, what we get is an inclusive definition of what exactly constitutes a 'combination'.

The Act, however, does define other terms, which can give us a fair idea as to why the definition of 'control' would achieve primacy in the discussion surrounding Section 5 and 6 of the Act. Under the scheme of the Act, 'acquisition' is defined as *"... directly or indirectly, acquiring or agreeing to acquire—*

- *shares, voting rights or assets of any enterprise; or*
- *control over management or control over assets of any enterprise.*"[16]

Thus, by virtue of the above, it is discernible that, if there is an acquisition of control over management of any enterprise or an acquisition of control over assets of any enterprise, such an instance would be classified as an 'acquisition' under the Act. And, on such classification, such instances would be falling under the inclusive definition of a 'combination' under the Act.

Discerning an acquisition, is relatively straightforward, if there is an acquiring of shares, voting rights or assets by a person or an enterprise. These involve objective determinations based on facts. These facts being share purchase agreements, which lead to voting rights, or perhaps preference shares which start carrying voting rights due to non-payment of dividend.[17] The objectivity arises from the fact that these are quantifiable transactions. The same goes for acquisition of an asset. This can be objectively determined by ownership resulting from a sale agreement.

For example, if A, a person, acquires 10 equity shares of a company XYZ Pvt. Ltd., having only equity share capital, totalling to 100 equity shares, by virtue of a share purchase agreement, he acquires 10% equity shares. This results in A having 10% voting rights in XYZ Pvt. Ltd.

---

[15] The Competition Act 2002 § 5. The CCI, as a regulatory body, cannot be expected to review all the combinations taking place in the economy and hence, these conditions set out monetary thresholds under different circumstances, in terms of asset/turnover values, which, if crossed, require a mandatory notification to the competition regulator. As per § 20(3), these thresholds are revised every two years. The different circumstances pertain to – cases of acquisition resulting in combinations (§5(a)), cases in which control is acquired over an entity when one is already having direct/indirect control over an entity engaged in providing a similar or identical good/service (§ 5(b)) and cases of mergers and amalgamations (§ 5(c)). The monetary thresholds are on the basis of the combined asset or turnover value of the entities involved or on the basis of the asset or turnover value of the group to which the two entities would belong after the combination.

[16] The Competition Act 2002§ 2(a).

[17] The Companies Act 2013 § 47.

Now, carrying the example further, B, another person, decided to buy a manufacturing plant of XYZ Pvt. Ltd., through a sale agreement which would result in change of ownership. Resultantly, B would acquire the particular asset of XYZ Pvt. Ltd.

In both these examples, it is objectively uncomplicated to determine the 'acquisition'.

However, a quandary arises as to the interpretation of Section 2(a)(ii) of the Act, wherein it is stated that an acquisition also comprises of "*acquiring or agreeing to acquire*[18] *control over management or control over assets of any enterprise".*

Taking another example, Company B, a wholly owned subsidiary of Company A, purchased an asset. Ostensibly, it would be Company B, which would appear to have control over the asset. But, in actuality, by lifting the corporate veil, we would conclude that the ultimate 'control' over the purchased asset, would rest with Company A.

Clearly, such adjudications are difficult. But greater difficulty would arise in determining what exactly constitutes 'control over management'. What exactly would come under the realm of 'management'?

AMBIGUOUS DEFINITION OF CONTROL

Explanation (a) to Section 5 of the Act, clearly states that for the purpose of this very Section, *"control" includes controlling the affairs or management by-*

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise."

Again, what we get is an inclusive definition and not an exhaustive one. Focusing on the phrase '*control includescontrolling the affairs or management*' one realizes the ambiguous nature of the definition. On contrasting this with the objective determinations that were possible to *'test'* an acquisition of shares, voting rights or assets by a person or an enterprise, one can conclude that the same is not possible within the confines of the definition of control as provided.

Instead of an objective standard, it portrays a subjective standard. A standard that will vary and has to be formulated for each set of facts individually. A standard, that might be different as to the interpretation of a particular set of facts from person to person. Person 1 might interpret a certain set of facts to constitute control but Person 2 might interpret those very facts to not.

[18] *"Agreeing to acquire"* is a reference to the fact that the transaction cannot actually be given the go ahead or cannot be said to be concluded, till such time the CCI clears the proposed combination. A notice has to be given to the CCI and there is a standstill provision laid out under § 6(2A) of the Act. This time period gives the CCI a reasonable opportunity to study the combination and take a view as to whether it may or may not lead to an appreciable adverse effect on competition. The standstill provision states that the parties must not give effect to a combination or any part thereof, before an order under § 31 of the Act has been passed by the CCI or until expiry of 210 days from the date of giving notice to CCI, whichever is earlier.

Let us take these instances: is appointing a watchman to the main manufacturing plant of the enterprise an act that can be classified as control? Is appointing a company secretary of the enterprise an act that constitutes control? Is deciding to fire a low rung employee, an act that represents control?

There can be subjective variations of the answers. They will be varying from person to person.

Also, if we add more facts to the scenarios, the answers might again change/vary. These additions may be related to the size of the enterprise (both in assets and turnover terms), scale of operations, vertical integration, type of business, level of decentralization in decision making, form of enterprise (partnership, company, LLP, Statutory Company) etc.

What exactly does '*controlling the affairs and the management*' entail? What is "affairs"? What is included in "management"? These terms are not defined in the Act. Hence, there are no guiding 'definitions' as to interpret them.

Also, Section 5 of the Competition Act, by way of an 'explanation', defines control for the purpose of Section 5 only. Hence, we have read 'control' wherever mentioned, as per the '*controlling the affairs and the management*' standard. But, Section 5 also mentions the term 'acquisition' and as discussed before, one of the qualifications to be classified as an acquisition is- '*acquiring or agreeing to acquire control over management'.* Hence, within one Section 5, we have two different standards.

'Acquiring or agreeing to acquire control over management' can be classified as an 'acquisition' [According to Section 2 (a)] and as 'control' [as per Explanation (a) to Section 5.] Meanwhile "*controlling the affairs*" can only be classified as 'control' (as per Explanation (a) to Section 5).

DEFINITION OF CONTROL IN OTHER LAWS

Competition Act is not the only statute which has defined the word 'control'. There are other frameworks as well where the term finds a mention. Firstly, it is defined in the Companies Act:

""control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner".[19]

Thus, as per the definition of 'control' under the Companies Act a threefold inclusive criterion is established. A person satisfying any one of these three criterions can be said to have control. The three criterions being[20]:

[19] The Companies Act § 2(27).

[20] The right can accrue to a person through: i) Shareholding ii) Management rights iii) Shareholders agreements iv) Voting agreements v) In any other manner.

- Right to appoint majority of the directors or,
- Right to control the management or,
- Right to control the policy decisions

The Securities and Exchange Board of India (Substantial Acquisition of Shares And Takeovers) Regulations, 2011 has an identical definition of 'control',[21] setting the same standards as the Companies Act. The Insurance Act, 1938[22] and the Consolidated FDI Policy Circular of 2017[23] offer the same definition of control as well.

Thus, it is only the Competition Act which is an outlier with a different definition in the Indian legal framework. In these inclusive definitions of other laws there are two types of determinations which can be made. One is objective, which is related to the appointment of the majority of directors. This is again, something we can quantify. A number that can be adjudicated/determined/established.

But the other determinations are both subjective, i.e. the right to control the management and the right to control the policy decisions. Similar concerns as are already discussed in the foregoing parts of this study, arise in these determinations.

COMPARISON WITH COMPETITION LAW

When we compare the two distinct definitions of control i.e. the one given under competition law and the second given in other laws,[24] we see that the definition given under the Competition Act, is broader and hence, takes on a wider ambit. It is broader as the phrase '*controlling the affairs'* is of a wider connotation than "… *to control the management or policy decisions… ".* This was noted by the SEBI as well in a discussion paper while discussing the definition of 'control'. The exact words being – "*The expression "affairs and management" may be of much wider connotation than the expression "management or policy decisions". There could be a situation wherein by controlling "the affairs and management" in a company, a person may be in a position to control "management or policy decisions" but it may not always be the case.*"[25]

---

[21] *The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011,Regulation 2(e) (2011)* (Visited on: 30.04.2020)https://www.sebi.gov.in/legal/regulations/apr-2019/securities-and-exchange-board-of-india-substantial-acquisition-of-shares-and-takeovers-regulations-2011-last-amended-on-july-29-2019-_40714.html.

[22] The Insurance Act, 1938Explanation to § 2(7A) (b).

[23] Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, *Consolidated FDI Policy*, (Effective from August 28, 2017) mentioned in Chapter 2: Definitions paragraph 2.1.8 (Visited on: 1.05.2020) https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_0.pdf.

[24] The definitions given under other laws are substantially the same, with a few minor changes. But, the three categories under one of which one must fall remain the same.

[25] SEBI,*Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations*(Visited On: 1.05.2020) https://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf.

Thus, the resultant effect of this disparity in definitions is that CCI gets a wider jurisdiction while trying to establish control for the exclusive purpose of combinations. Also, CCI as a regulator cum adjudicator functions on different standards as compared to other bodies tasked with interpreting control.

Let us examine a situation wherein an appeal from a CCI order is made to the National Company Law Appellate Tribunal ("*NCLAT*") and another case pertaining to 'control' under the Companies Act is also appealed to NCLAT. In one case the NCLAT will have one standard to define control and in the other a broader determination. This, unfortunately, will again cause ambiguity. Also, the same set of facts might not lead to a determination of control under one statute but might lead to a determination of control in another.

This, coupled with the fact that terms like 'affairs', 'management' and 'policy decisions' are in their own right, personalized in interpretations. To understand the decisional practices of the CCI while dealing with 'control' we will have to take a look at the various orders passed by the Commission.

DECISIONAL PRACTICES OF CCION 'CONTROL'

In a combination order[26] to approve an acquisition, the CCI considered the subscriptions of Zero Coupon Optionally Convertible Debentures ("*ZOCDs*"), which were optionally convertible into equity shares of the target companies,[27] within a period of ten years from the date of subscription, as a condition that was enough to constitute control.

ZOCDs fell within the definition of shares[28] as provided under the Act, and hence this was an acquisition under Section 2(a)(I).

The CCI stated that if all these ZOCDs were converted, then, the acquirer would hold more than 99.99 percent of the fully diluted equity share capital of each of the target companies. Hence, this would have led to "*decisive influence over the management and affairs*" of the targets. And, this in turn would have constituted 'control' under the Act. The facts also showed that these targets had subsidiaries as well, and hence, over the subsidiaries, it would be indirect control.

Therefore, the CCI adjudicated based on a scenario wherein all the ZOCDs were converted. This was not what existed at the time of the combination but, what could eventually be. And what would be the impact of that eventuality on the control dynamics of the entities involved.

---

[26] CCI order dated 28.05.2012 in Combination Registration No. C-2012/03/47, *Reliance Industries/TV 18.*

[27] The ZOCDs were being issued for six companies. Collectively referred to as 'target companies', as the acquisition by the acquirer was targeted at them.

[28] *"Any security which entitles the holder to receive shares with voting rights"* is a share as defined under The Competition Act 2002 § 2(v)(I).

It is interesting to note that the verbiage used in the order is "*decisive influence over the management and affairs*" but the Act only uses the phrase "*controlling the affairs and the management*".

In the Ultra Tech- JAL order,[29] the Commission discussed the issue of control in depth, but there were no determinative findings on the issue.[30] The observations of the Commission while trying infer control through the test of being able to control and manage the affairs an enterprise was:

"In competition law practice, control is considered as a matter of degree. However, all degrees and forms of control nonetheless constitute control. The international jurisprudence considers 'material influence' as the lowest form of control with other higher forms such as de facto control and controlling interest (de jure control) in that order."

The Commission concluded that even a single Director could have '*material influence*' over the affairs of an enterprise and "*a single Board seat is also highly relevant to competition assessment and needs to be disclosed by the parties*." This Board seat was on a disclosed competitors Board and hence, even though the Commission did not rule emphatically on the control aspects, it stated that '*material influence*' by the Board member, as he was involved in policy discussions oh high level issues, and "*competition distortions from access to competitively sensitive information*", could not be ruled out. Hence, the lowest form of control – '*material influence*', was to be considered while adjudication involving competition matters.

In another order[31] approving a combination, the CCI, joint control over an enterprise was determined by way of the shareholding pattern of the entity, the shareholders agreements and the right to appoint Directors to the board. Ability to block special resolutions, consent for strategic commercial decisions and hiring/terminating key managerial personnel were markers delineated to constitute control.

The issue of joint control was addressed again in the Century Tokyo Leasing Corporation and Tata Capital Financial Services combination.[32] The way the Business Partnership Agreement was structured, was taken into account.

Strategic affairs, business plans, budgetary approvals, appointment of Key Managerial Personnel and getting into a new line of business were to be approved by a four-member supervisory committee, which would include nominated members by both parties in a 3:1 ratio. And, the consent of one of the nominated members of each party was necessary for a decision to

[29]CCI order dated 10.04.2015 in Combination Registration No. C-2015/02/246, *Ultra-Tech/JAL*.

[30]This was because this particular order dealt with non-furnishing of material information and the combination had already been approved.

[31]CCI order dated 9.08.2012 in Combination Registration No. C-2012/06/63. *SPE Holdings/MSM India.*

[32]CCI order dated 4.10.2012 in Combination Registration No. C-2012/09/78, *Century Tokyo Leasing Finance Corporation/Tata Capital Financial Services Ltd.*

pass as per the Business Partnership Agreement.

Hence, in both the decisions pertaining to joint control, the precedence was given to the documents which established the relationship between the parties and the rights flowing from the way they were structured.

In the Jet-Eithad combination,[33] the CCI interpreted the effect of the Shareholders Agreement, Investment Agreement and the Commercial Cooperation Agreement between the parties to mean 'joint control'. Etihad by way of the Investment Agreement had acquired a 24% equity stake in Jet and the right to nominate two out of six shareholder Directors. This included the right to nominate the Vice-Chairman to the Board of Directors. These rights were treated by the Commission "as significant in terms of Etihad's ability to participate in the managerial affairs of Jet".

Also, the terms of the Commercial Cooperation Agreement meant that the parties would frame a cooperative framework as regards procedure to – joint pricing, joint marketing, joint route and schedule coordination amongst others. Etihad could also suggest candidates for senior management to Jet as per the Agreement.

The CCI ultimately concluded that by virtue of all the Agreements entered into by the parties, and the *'governance structure'* envisaged therein, Etihad had established joint control over the *'assets and operations of Jet'.*

Finally, in an ambiguous combination order[34] delivered by CCI, the Acquirer had purchased equity stake of a mere 4.99% as a financial investor, in the ordinary course of business. But, by virtue of an agreement, there were certain matters on which no decision could be taken, without the prior written consent of the Acquirer. Some of these matters being - entering into joint ventures, sale/liquidation of significant strategic investments, change in the nature of current business activities, etc. The consent requirement was hence, construed by CCI, as joint control, without explicitly delineating the reasons thereof. It also construed indirect joint control over the entity by the Acquirer by virtue of another agreement between the parties to the combination, without providing the details of such an agreement and the clauses thereof.

Hence, contrasting this order with the Jet-Etihad order, we can see that the actual equity shareholding is of no concern to the CCI. But what takes precedence are the agreements between parties, their structuring and the rights flowing from them.

Also, there is no 'one size fits all' approach of the CCI. Each determination can be seen to be made

[33]CCI order dated 12.11.2013 in Combination Registration No. C-2013/05/122, *Etihad Airways PJSC/Jet Airways (India) Ltd.*

[34]CCI order dated 5.03.2015 in Combination Registration No. C-2015/01/243, *Caladium Investment PTE Ltd./Bandhan Financial Services Ltd.*

on the peculiar facts and circumstances of each case. This obviously results from the ambiguous definition of control itself in the Act. Vague definitions lead to uncertain applications.

There is no specific mention as to how 'control' is reached/acquired. Just a blanket usage of the term 'control' finds more usage. There is also no guidance as to whether control is being acquired over the 'affairs' or over the 'management' or both. No distinction seems to be made out between the two in the orders. Various different terminologies have been referred to as well, like '*decisive influence'* and *'material influence'*- both vary in their degrees. While the former, is representative of the highest degree of control, the CCI has itself stated the latter to be the lowest level of control. But, no attempt has also been made to actually define the two different terms. The discussion only pertains to the varying degrees and not interpretations.

NEW DEFINITION OF CONTROL

The CLRC in its report stated the different jurisdictions have taken under consideration/ relied upon both the decisive influence as well as the material influence standard to ascertain control.

In the Indian competition law regime, the Committee suggested that adopting a *'decisive influence'* standard, could restrict notifiability in certain cases which may potentially hinder the competition.

For example, acquisition of joint or negative control, acquiring informational rights, acquisitions not done in the ordinary course of business etc. may not be captured by the standard of decisive influence.

Addressing the aforementioned concern and noting that the recommended definition of control would not only impact the notifiability, but also the substantive competition assessment, the committee has put forward the idea of introducing a '*material influence*'standard for ascertaining control.

The Committee further discussed the twin benefits that this would serve - one, of bringing certainty to the meaning of control under Section 5 of the Act and two, of retaining the CCI's powers to assess a wide range of combinations that may impact the competition in India by causing AAEC.

The Draft Bill aims to settle the control conundrum in Indian competition jurisprudence by proposing a definite test for assessing control over an enterprise or group.

The proposed definition of control as per the latest amendment bill which has been added to Explanation (a) of Section 5 is as follows:
Explanation. — For the purposes of this section, —
"(a) "control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group; or

(ii) one or more groups, either jointly or singly, over another group or enterprise;"[35]

GUIDANCE ON MATERIAL INFLUENCE AS PER CLRC REPORT

In the case of UltraTech-JAL,[36] the CCI defines material influence as "*the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc.*"

It was further submitted that the technicalities of what may be deemed as 'material influence' may be provided in subordinate legislation. Another important facet that came up after deliberations was that the subordinate legislation can enlist some minority rights, acquiring which would not confer material influence and hence no control would be made out. Certain indicative factors for ascertaining *'material influence'* that have been specified by the CCI are shareholding, special rights, status and expertise of an enterprise or person, board representation etc.[37] This expansive approach adopted by the CCI is exclusively aimed at determining a broader yardstick to meet the notification requirement and thereby assess the AAEC post transaction.

The report recommends that the introduction of a 'material influence' standard for determination of control would be suitable rather than 'decisive influence' therefore *substantially lowering the thresholds for determining control*.But the report fails to elucidate an explanation of 'material influence'.

Over the past few years, the CCI has specifically identified certain categories of rights that may be construed to confer 'control'. CCI's interpretation is quite wide (partly owing to the lack of clarity in the statute) and also captures certain standalone minority investor protection rights. For example, veto/affirmative rights regarding amending of chartered documents[38] and changing dividend policy[39] which have been held to amount control typically do not confer control on their own, and are merely rights given to the investors to ensure that they remain aware about the company's operations.

CONCLUSION AND SUGGESTIONS

As per the opinion of the authors, the standard of material influence will cause a lot more combinations to be notified to the CCI, also, the Commission will be able to cast a wider net, as far as jurisdictional aspects are concerned. These two points have been considered by the CLRC as well.

---

[35] *Supra* Note 8.

[36] *Supra* Note 29.

[37] Ibid.

[38] CCI order dated 9.09.2014 in Combination Registration No. C-2014/07/192, *Alpha TC Holdings Pte Limited/Tata Capital Growth Fund.*

[39] *Supra* Note 34.

The problems that arise with the 'material influence' standard is - that even if investment in an entity is made, purely in the nature of a financial investment, without intending to acquire control, the investment maybe scrutinized by the CCI. This will again need a standstill compliance and delay investment processes. An investment might not qualify as 'control' under other legal frameworks, it might under the Competition Act. Hence, investment deals will have to take cognizance of this lower threshold of control.

Going by the reasoning in the Ultra Tech- JAL order, the Commission was of the opinion that even one board member was enough for there to be 'material influence', even though, there was no determinative finding on control. This might perturb investors. The one Board member they might be able to appoint by virtue of their investment in the company without being desirous of acquiring control, might be construed as 'material influence'. The Board member's presence might only be there to keep an eye on the goings on in the company and safeguard the investment. Investor protection rights have also been held by the CCI as amounting to control under the Act.

The CCI has already stated that 'material influence' is the lowest standard/form of control that can be envisaged. Hence, if passed, the new definition of control would lead to multiple 'could be' inquiries i.e. there could be control, it would have to be checked. This again will lead to delays in the investment procedures being completed. If the standstill provisions are not complied with in such circumstances, the parties might have to face gun-jumping penalties under Section 43A of the Act.

What is needed is clarity. A list of investor protection rights, which would not amount to control, and an enumeration of a percentage of Board members an investor can have to be not construed as 'being in control'. We would suggest that having one Board member, purely as a watchdog on the conduct of the enterprise should definitely not amount to control. Even if the affirmative vote of such a Director is needed for matters laid out in the investor protection rights, it should not be regarded as control. Further, if a Board member along with his Persons Acting in Concert[40] is not able to block special resolutions, i.e. hold more than 25% of the voting rights, then, the mere presence on the Board should not amount to control.

This would not have been required if a higher threshold of control was chosen. Since, the bar is so low, in essence, the lowest, a lot of exemptions need to be carved out. The obvious problem that will result is that these exemptions will not be able to foresee all possible scenarios which may merit exemptions. Hence, this list of exemptions will need to be constantly updated.

With inherent vagueness without guiding factors, the term 'material influence', will enable subjective determinations on control. Hence, a determinative list of exemptions is imperative.

[40] As per § 2(1)(q) of Securities And Exchange Board Of India(Substantial Acquisition Of Shares And Takeovers) Regulations, 2011 Persons Acting in Concert means persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

NOMINATION POLICY IN BANKING AND INSURANCE INDUSTRY

Snehanshu Bhowmick
Advocate
Delhi High Court

Divya Nandwani
Assistant Professor
JEMTEC, School of Law

ABSTRACT

Nomination is the process whereby a person so named in the contract as nominee becomes entitled to receive the amount in the event of the death of the concerned person mentioned in the contract. Nomination facility is regarded as an ideal tool to mitigate the hardships of common persons in settlement of claims in the event of death of the account or policy holder. Nomination is optional for bank customers and the facility is available on a voluntary basis. But the nomination facility in insurance contracts is compulsory so as provide the benefit of insurance policy to the nominee of the policy holder in the event of the death of the beneficiary. Nomination policy does not affect the rights of the legal heirs of the deceased. This paper focuses on the general concept of nomination in banking laws and insurance laws. An effort has been made to discuss the relevant provisions related to nomination in this paper.

Keywords: Nomination, Banking, Insurance Policy, Bank Account, Depositors, etc.

INTRODUCTION

Nomination is the process whereby a person so named in the policy becomes entitled to receive the policy amount in the event of the death of the account or policy holder. It assumes a special importance in the insurance policies because it is considered to be a simple way to ensure easy payment of policy money in the case of a death claim. Nomination, in insurance policy may be done at the time of commencement of the policy by giving particulars of the nominee in the proposal form. It may even be done later by giving notice in a prescribed form to the insurer and endorsing it on the policy bond. The policy holder can similarly change nomination any number of times during the term of the policy. Whereas, nomination facility in banking industry is regarded as an ideal tool to mitigate the hardships of common persons in settlement of claims in the event of death of the account holder. Nomination is optional for bank customers and the facility is available on a voluntary basis. This facility, if availed, would ensure smooth settlement of claim to the nominee. Nomination is solely for the purpose of simplifying the procedure for settlement of claims of the deceased depositors and does not take away the rights of legal heirs on the estate of the deceased. The concept of nomination was inserted in banking system. Nomination is solely for the purpose of simplifying the procedure for settlement of claims of deceased depositors and does not take away the rights of legal heirs on the estate of the deceased. The nominee would be receiving the claimed amount from the bank as a trustee of the legal heirs.

Nomination facility is intended only for individuals including a sole proprietary concern. Nomination is optional for bank customers and the facility is available on a voluntary basis. This facility, if availed, would ensure smooth settlement of claim to the nominee.

NOMINATION UNDER BANKING LAWS

Nomination under banking laws has been defined as provided by the Banking Regulations Act, 1949 under three major areas which are as follows:

1. Nomination for the payment of depositor's money,
2. Nomination for return of articles kept in safe custody with banking company,
3. Nomination in respect of safety lockers.

The provisions regarding nomination in these major areas of banking system has been given under Banking Regulation Act, 1949 along with rules as provided by the Banking Companies (Nomination) Rules, 1985 and the Co-operative Banks (Nomination) rules, 1985.

NOMINATION FOR DEPOSITORS' MONEY

Section 45-ZA of the Banking Regulation Act, 1949 states that:

1) Where a deposit is held by a Banking Company to the credit of one or more persons, the depositor, or as the case may be, all the depositors together, may nominate, in the prescribes manner, one person to whom in the event of the death of the depositor or the death of all the depositors, the amount of deposit may be returned by the Banking Company.
2) Notwithstanding anything contained in any other law for the time being in force or in any deposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking Company, the nominee shall, on the death of sole depositor or, as the case may be, on the death of all the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
3) Where the nominee is a minor, it shall be lawful for the depositor making the nomination to appoint in the prescribed manner any person to receive the amount of deposit in the event of his death during the minority of the nominee.
4) Payment by a Banking Company in accordance with the provisions of this section shall constitute a full discharge to the Banking Company of its liability in respect of the deposit:

Provided that nothing contained in this sub-section shall affect the right or claim which any

person may have against the person to whom any payment is made under this section.

NOMINATION FOR ARTICLES IN SAFE CUSTODY

Section 45-ZC of the Banking Regulation Act, 1949 reads as under:

1) Where any person leaves any article in safe custody with a Banking Company such person may nominate, in the prescribed manner, one person to whom, in the event of the death of the person leaving the article in safe custody, such article may be returned by the Banking Company.
2) Where the nominee is a minor, it shall be lawful for the person making the nomination to appoint in the prescribed manner any person to receive the article deposited in the event of his death during the minority of the nominee.
3) The Banking Company shall, before returning any articles under this section to the nominee or the person appointed under sub-section (2), prepare in such manner as may be directed by the Reserve Bank of India from time to time, an inventory of the said articles which shall be signed by such nominee or person and shall deliver a copy of the inventory so prepared to such nominee or person.
4) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such article, where a nomination made in the prescribed manner purports to confer on any person the right to receive the article from the Banking Company, the nominee shall, on the death of the person leaving the article in safe custody, become entitled to the return of the article to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

Provided that nothing contained in this section shall affect the right or claim which any person may have against the person to whom the article is returned in pursuance of this sub-section.

NOMINATION FOR CONTENTS OF SAFETY LOCKERS

Section 45-ZE of the Banking regulation Act, 1949 states that:

1) Where an individual is the sole hirer of a locker from a banking Company, whether such locker is located in the safe deposit vault of such Banking Company or elsewhere, such individual may nominate one person to whom, in the event of the death of such individual, the Banking Company may give access to the locker and liberty to remove the contents of the locker.
2) Where any such locker is hired from a Banking Company by two or more individuals jointly, and, under the contract of hire, the locker is to be operated under the joint signatures of two or more of such hirers, such hirers may nominate one or more persons

to whom, in the event of the death of such joint hirer or hirers, the Banking Company may give, jointly with the surviving joint hirer or joint hirers, as the case may be, access to the locker and liberty to remove the contents of such locker.

3) Every nomination under sub-section (1) or sub-section (2) shall be made in the prescribed manner.
4) The Banking Company shall, before permitting the removal of the contents of any locker by any nominee or jointly by any nominee and survivors as aforesaid, prepare, in such manner as may be directed by the Reserve bank from time to time, an inventory of the contents of the locker which shall be signed by such nominee or jointly by such nominee and survivors and shall deliver a copy of the inventory so prepared to such nominee or nominee and survivors.
5) On the removal of the contents of any locker by any nominee or jointly by any nominee and survivors as aforesaid, the liability of the Banking Company in relation to the contents of the locker shall stand discharged.
6) No suit, prosecution or other legal proceeding shall lie against a Banking Company for any damage caused or likely to be caused, for allowing access to any locker, and liberty to remove the contents of the locker, in pursuance of the provisions of sub-section (1) or sub-section(2), as the case may be.

Section 45-ZE, of Banking Regulation Act, 1949 does not confer on a nominee any title in the locker or in its contents. Section 45-ZE provides that access may be given to the nominee to the locker along with liberty to remove the contents to enable the nominee to deliver vacant possession of the locker and the relevant law cannot be expected to vesting or transmission of interest in such contents in the nominee.

EFFECT OF NOMINATION

Section 45-ZB of the Banking Regulation Act, 1949 reads as under:

No notice of the claim of any person, other than the person or persons in whose name a deposit is held by a Banking Company, shall be receivable by the Banking Company, not shall the Banking Company be bound by any such notice even though expressly given to it:

Provided that where any decree, order, certificate or other authority from a court of competent jurisdiction relating to such deposit is produced before a Banking Company, the Banking Company shall take due note of such decree, order, certificate or authority.

If other claimants to the deposit give a notice to the banking company and even if it has received the notice, it is not bound by it. Such notice cannot be put on record. The nominee is entitled to payment notwithstanding any such notice. The banking company is, however, bound to take the

notice of any such claim where any decree, order or certificate or other authority from a court of competent jurisdiction relating to the deposit has been produced before it.

The nominee of a deceased mother claim full rights over the money lying in the account, to the exclusion of the full brother. It was held that a nominee merely gets the right of the depositor to receive the money lying in his account. The Act 1949 is in no way concerned with the question of succession. Money receivable by the nominee remains a part of the estate of the deceased person which would devolve according to the law of succession applicable to him as decided in case of Ram Chandertalwar v. Devender Kumar Talwar.[1]

In case of Bharathi Amma v. Canara Bank,[2] the heirs applied to the bank to give them particulars of the account of the deceased. The bank refused to do so because there was a nominee. The Court said that the prayer of the legal heirs was not for directing the bank to disburse the amount in the account of the deceased husband. It was only to enable her to approach a court of law to obtain succession certificate. The petitioner was held entitled to the relief sought. The bank was directed accordingly.

NOMINATION UNDER INSURANCE LAWS

In Insurance business, nomination is the process whereby a person so named in the policy becomes entitled to receive the policy amount in the event of the death of the policy holder. It assumes a special importance in life insurance policies because it is considered to be a simple way to ensure easy payment of policy money in the case of a death claim. Section 39 of the Insurance Act, 1938 governs nomination of an insurance policy. Accordingly, nomination may be done at the time of commencement of the policy by giving particulars of the nominee in the proposal form. It may even be done later by giving notice in a prescribed form to the insurer and endorsing it on the policy bond. The policy holder can similarly change nomination any number of times during the term of the policy. The right to nominate, vests only with a policy holder that too on a policy in order to be valid, can only be a joint nomination by the joint holders. Nomination so notified to the insurance company should be registered by it in its records. Nomination does not confer any right on the nominee if the policy holder is alive but if he dies before the policy expires, the nominee would be legally recognised as the person entitled to the payment of the policy amount. Death of the nominee would lead to automatic revocation of the nomination. Nomination, however, is not allowed in the case of children's policies, until the child attains majority. In case of other policies where the nominee is a minor, an appointee has to be appointed to receive the policy amount in the event of the policy holder's death. No nomination is allowed under a policy financed from HUF funds.

1 AIR 2010 10 SCC 671

2 IV 2013 BC 296

In absence of nomination, the payment of claim may be delayed due to involvement of legal proceedings. The claimant will have to present succession certificate or letters of administration from a competent court of law. It involves delay and expense. To avoid this delay and expense, nomination of policy is essential. A nominee in common parlance is understood as a beneficiary who has been so nominated to receive the benefit of a moveable asset on the death of the person who is the owner of such asset and who has named the nominee in the relevant document. Nomination facility can be availed by an individual for assets/ facilities like insurance policy, bank account, locker, society, demat account, shares, NSC, post office, mutual fund, PF, PPF and gratuity. Nomination is usually done solely for the purpose of simplifying the procedure for settlement of claims of the deceased and is an ideal tool to reduce hardships during the settlement of claims in the event of death of the person who has done the nomination.

The legal position of a nominee has always been accepted to be that of an agent or trustee and nomination is not considered to be a method of testamentary succession as an alternate to a will. High Court in India have held in different cases that a nominee is only an agent to receive the amount when due and it remains the property of the assured during his lifetime and on death, forms part of his estate subject to the applicable law of succession.

The provisions of nomination are laid down in section 39 of Insurance Act, 1938, as follows:

1. The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death[3]
2. Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer.[4]
3. The insurer shall furnish to the policy-holder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceed one rupee for registering such cancellation or change.[5]
4. A transfer or assignment of a policy made in accordance with section 38 shall

3 Sub-Section (1) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)
4 Sub-Section (2) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)
5 Sub-Section (3) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)

automatically cancel a nomination:[6]

Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment no payment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.

5. where the policy matures for payment during the life-time of the person whose life is insured or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy, holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.[7]

6. Where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured the amount secured by the policy shall be payable to such survivor or survivors.[8]

7. The provisions of this section shall not apply to any policy of life insurance to which section 6 of the married Women's Property Act, 1874 applies or has at any time applied.[9]

EFFECT OF NOMINATION

The nominee shall get the policy amount in the event of the death of the policy-holder before the maturity of the policy. The Act, 1938 expressly provides that a transfer or assignment of the policy cancels the previous assignment. The amount is payable to the holder of the policy or his heirs or legal representatives or holders of succession certificate etc. in case the nominee dies before the policy matures for payment.[10] The policy- holder retains complete power of disposition of the policy money except only when the policy-holder dies before the maturity of the policy in the lifetime of the nominee. The nomination provides that the money is payable to the nominee and it need not look to the legal representatives of the deceased insured. In D.M. Mudaliar v. India insurance and Banking Corporation (1957), it was decided that the nomination does not more than make the nominee a receiver to receive the money from the insurer without deciding the question of title. In case the court held that "The effect of nomination is not to clothe

[6] Sub-Section (4) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)
[7] Sub-Section (5) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)
[8] Sub-Section (6) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)
[9] Sub-Section (12) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)

the nominee with beneficial interest in the policy or the money payable thereunder, but to clothe him or her only with the power to revive the money under the policy from the insurer without prejudice to the question of title to the money. Consequently, it confers on the nominee a bare right to collect the policy money when the money becomes payable and by such nomination and the collection of the money, the nominee does not become the owner of the money payable under the policy and he or she is liable to make it over to whomsoever is entitled to the same under the law. Therefore, the mere use of the word "nominee" or "assignee" in section 14 of the Act does not decide the title to the money."[11]

EFFECTS OF NOMINATION IN CASE OF DEATH

If there are more than one nominees and a nominee or more than one nominee's dies after the person whose life is insured but before the amount secured by the policy is paid, the amount secured by the policy shall be payable to the heirs or legal representatives of the nominee or nominees or the holder of a succession certificate or as the case may be.[12] A nomination indicates the person who is to receive the money in the event of the death of the assured before maturity. He is only a recipient of the money, but not the owner of the money. The money belongs to the estate of the deceased and is unable as part of it.[13] The Calcutta High Court took lead to point this out in Krishna Lal v. Pramala Bala Devi,[14] even before the Insurance Act was passed. The wife of the deceased, who was the nominee, sought to recover the proceeds, but the creditors of the assured counter-claimed it. It was held that the money was a part of the estate of the deceased policy holder and his creditors could proceed against the policy money. The court relied upon the decision in Cleavor v. Mutual Reserve Fund Life Association,[15] where under the policy the money was payable to the assured's wife. If living, otherwise to his legal representatives, it was observed that the husband might have altered the destination of the money at some time and might have dealt with it by will or settlement. Thus, no interest would have passed to wife by reason of merely being named in the policy. The court observed that the language of Section 39(1) makes it absolutely clear that the nomination contemplated therein was nomination to receive the money secured by the policy in the event of the death of the insured.There are detailed provisions made in Section 39 which provides for the registration of the nomination with the insurer, subsequent cancellation or change of such nomination and giving notice in writing of such cancellation or change to the insurer.

---

[10]Sub-section (4) of Section 39 of the Insurance Act, 1938 (Act 4 of 1938)

[11]Controller of Estate Duty, Madras v. Estate of PitchaiThambi, 1976 TNLJ 393: 1978 111 ITR 711 Mad

[12] Sub-Section (8) of Section 39 of Insurance Act, 1938 (Act 4 of 1938)

[13] Jagat Nandini v. Inder Pal, 1986 60 Comp Cas 272 All

DIFFERENCE BETWEEN NOMINATION IN INSURANCE AND NOMINATION IN BANKING

The concept of nomination has been inserted under various laws such as insurance and banking but the application of these laws are different. The major difference of the application of laws related to nomination under insurance law and nomination under banking law are as follows:

1) Under insurance law, the nomination is only with respect to the amount of the policy, whereas under banking law, there are three ways of nomination which are nomination for depositor's money, for return of articles kept in safe custody of banking company and finally for the safety lockers,
2) Under insurance law, the nominee act as an agent of the deceased and claim the money of a policy as an agent whereas under banking law, the nominee act as a trustee for the depositor's money,
3) Under insurance law, the nominee cannot claim the amount if the policy holder dies before the maturity of the payment, the money then forms the part of his estate and belongs to his heirs or legal representatives whereas under banking law, the depositor's money belongs to nominee if the depositor dies,
4) Under insurance law, where both the nominee and assured dies, then the amount of policy belongs to the heirs or legal representatives of the nominee whereas under banking law, where both nominee and depositor dies, the money of the account can be claimed by the heirs or legal representatives of the depositors only after obtaining the succession certificate.

CONCLUSION & SUGGESTIONS

The concept of nomination simplifies the procedure of the settlement of the claim of the amount left behind by the deceased. The provisions of nomination included under banking and insurance laws helps the authority to maintain the account properly. Under banking laws nomination can be provided for three different facilities provided by the bank such as locker facility, money deposit in the account, and articles kept the safe custody. Whereas nomination in insurance policy is provided for the amount against risk covered in the policy which was decided at the time of making the insurance policy. Change in nomination under both the laws can be done multiple times during the existence of the policy. It does not affect the rights of the successors of the deceased. Though the laws related to nomination is flexible but there is still scope for improvement in the claim process as usually in India the claim processes are complex and takes a lot of time to settle the dispute among nominee and successors of the deceased. The laws related to settlement can be improved by making the settlement procedure easier. It has been made clear by the provisions that legal heir has the right to make the claim on the amount left by the deceased

and nominee merely receives the amount as trustee from the concerned authority whether bank or insurance company. Banks and Insurance companies provides different policies with respect to nomination and it is made applicable on different persons like HUF, Minor, Individuals known to deceased, etc. Thus, there is much flexible provisions are available with respect to nomination policy under banking and insurance laws so as to make the process of the settlement easier after the death of the account or policy holder.

NOTES

NOTES