

## Deterrence through Laws – Are the laws tightening the noose?



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Since the last decade, India's approach towards introducing reforms has been bifocal with primary focus being on tightening the noose around unsavoury businesses and secondary on improving the ease of doing business. However, in wake of the ongoing COVID-19 pandemic and the advent of the era of deglobalization, the current mandate of the Government of India ("GoI") seems to be salvaging life and livelihood and protecting tangible and intellectual properties at the country level by introducing / amending laws.

Fifteen months behind the clock when countries across the globe were formulating strategies to mitigate the consequences of COVID-19 pandemic, our neighbouring adversary seemed to be on a spree to acquire businesses of foreign countries. To deter such opportunist intent and to tighten the noose, the Department for Promotion of Industry and Internal Trade, GoI vide Press Note 3<sup>1</sup> of 2020, imposed stringent restrictions on incoming foreign investments from countries which share land border with India.

The Digital India programme of GoI endeavours to transform India into a digitally empowered society and knowledge economy<sup>2</sup>. With the ongoing COVID-19 pandemic, the world has become more digital than ever before. Momentum is witnessed for implementing data protection laws, which not only provides protection to the fundamental right to privacy but also deter data fiduciaries from collecting personal data unlawfully. To this end the Personal Data Protection Bill ("PDP Bill") has been proposed in 2019<sup>3</sup>. Additionally, the Ministry of Electronics and Information Technology has issued a revised report on December 16, 2020 with the intent to have a distinct governance framework for protection of non-personal data in India<sup>4</sup>.

The recent proposed amendments to the Consumer Protection (E-Commerce) Rules, 2020 tightens the noose by not only widening the reach of the rules beyond online retailers to food delivery and ride-hailing entities but also lays down provisions on facades including flash sales, details of country of origin of the products listed, cancellation charges and explicit consumer consent, adequate disclosures for cross-selling, prohibition on (a)

indulging in mis-selling of goods or services; (b) manipulating search results; (c) abuse of position by entities that hold a dominant position in any market, etc<sup>5</sup>.

Further, to address the concern regarding leakages in cybercrime law, GoI is going to come up with a new National Cyber Security Strategy. According to Lt. Gen. (Dr.) Rajesh Pant, National Cybersecurity Coordinator, Prime Minister's Office, GoI, "the strategy would holistically cover the entire ecosystem of cyberspace in India". It shall also provide guidance on aspects such as cyber audit, building new indigenous capabilities, data as a national resource, and so on<sup>6</sup>.

Considering the dearth of comprehensive data protection framework in India implementation of the PDP Bill should be expedited. Revamp of the Information Technology Act, 2000 (last amended in 2008), is also the need of the hour, to bring the legislation up to speed with the advanced global digital landscape. Given the increasing importance and value generation capacity of the data economy, GoI should make more tangible efforts towards tightening the noose on the data protection framework.

On the financial markets side, a lot has already been said and written on how the regulators are trying to deal with the challenges posed by financial frauds. According to the Financial Stability Report published by the Reserve Bank of India ("RBI"), the gross NPA ratio of all scheduled commercial banks may increase from 7.5% in September 2020 to 13.5% by September 2021<sup>7</sup>. One of the key factors leading to an increase in NPAs is the increased incidence of fraud and fraudulent diversion of funds by the borrowers. In this regard, RBI has issued the Master Direction on Classification and Reporting by Commercial Banks and Select Financial Institutions, which seeks to enable the effective dissemination of information on frauds by RBI<sup>8</sup>. The most crucial piece of legislation enacted to deal with the resolution of NPAs is the Insolvency and Bankruptcy Code, 2016 ("IBC"), since it provides a framework for time-bound insolvency resolution along with shifting control of assets from debtors to creditors. It is noteworthy to mention that GoI's measures have enabled banks to recover bad debt amounting to Rs. 5.5 lakh crores, of which about Rs. 1 lakh crores were recuperated from accounts that were technically written off<sup>9</sup>.

The Companies (Amendment) Act, 2019, has strengthened corporate governance by making compliances much stricter for companies. For instance, Section 212 of the Companies Act, 2013 ("**Companies Act**"), now enables GoI to approach NCLT for disgorgement of any undue advantage or benefits taken by company officials in pursuance of a fraud. Similarly, Section 90 of the Companies Act now requires every

company to take steps to identify an individual as a significant beneficial owner. As an exemplary step, in the recent past, over 3.8 lakh non-compliant companies have been struck off under the Companies Act<sup>10</sup>. Also, the recently introduced Companies (Auditor's Report) Order, 2020 and Companies (Audit and Auditors) Amendment Rules, 2021 have paved way for (a) enhanced due diligence and elaborate disclosures by the auditors in their audit report especially in relation to financial management of a company; and (b) heightened corporate, financial and general reporting norms and has quickened the process of initiating actions against defaulting or non-compliant companies.

On the flip side, untightening of noose on several laws has also been witnessed as Gol has introduced various structural reforms to recuperate the economic loss caused by COVID-19 pandemic. For instance, to provide a sigh of relief to companies struggling to stay afloat amid the pandemic, Gol suspended provisions of IBC that prescribed thresholds for initiating insolvency proceedings<sup>11</sup>. With similar intentions, RBI also announced a slew of measures to ensure easy availability of credit and liquidity in the economy<sup>12</sup>. SEBI has also dispensed various compliances and has granted relaxations in timelines for making various compliances to SEBI regulated entities<sup>13</sup>. As opposed to stricter approach adopted earlier in affixing criminal liability, the Companies (Amendment) Act, 2020, inter-alia, decriminalized various compoundable offences under the Companies Act to facilitate ease of doing business and ensuring effective disposal of cases for law abiding corporates.

Tightening of laws need to be coupled with effective, timely, and robust justice delivery systems. Increasing number of judicial vacancies, surmounting pending cases and courts functioning only partially has thrown a spanner

at works<sup>14</sup>. To contain spread of COVID-19 in India, stringent guidelines were enacted whereby the judicial benches were constituted only to hear matters of "extreme urgency" and the clock for determining limitation period was paused till further direction.

Additionally, on April 4, 2021, the Ministry of Law and Justice promulgated an ordinance notifying the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021<sup>15</sup>, which proposes at abolishing certain existing appellate bodies and shifting their functions to other existing judicial bodies. This may widen the time frame between submission and disposal of cases as most of the existing judicial bodies already have vacant judicial positions and excessive pendency of cases. As of July 29, 2021, more than 58 lakh cases are pending in High courts across India<sup>16</sup>. In 2019, Supreme Court had raised its concern that whether amalgamation of tribunals could increase the litigations, which in the absence of adequate infrastructure or budgetary grants, would overburden the judiciary. It noted the absence of such judicial impact assessment and directed the central government to undertake an exercise to assess requirements and make sufficient resources for each Tribunal<sup>17</sup>. Trust the concerns of the Supreme Court have been taken into consideration while promulgating the said Ordinance.

COVID-19 pandemic has put lawmakers around the world including those of India in a quandary being unable to strike the right balance between reviving shrinking economies and putting a leash on delinquent persons / entities. The legislature cannot solely be burden with this herculean task. The proof of the pudding is in the eating. Legislative, judicial, and executive authorities need to collectively rise-up to the occasion and deliver with a more collaborative and calibrated approach in the current scheme of events.

<sup>1</sup> Press Note 3 of 2020 | [https://dipp.gov.in/sites/default/files/pn3\\_2020.pdf](https://dipp.gov.in/sites/default/files/pn3_2020.pdf)

<sup>2</sup> <https://www.digitalindia.gov.in>

<sup>3</sup> Data Protection Bill, 2019 | [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373\\_2019\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf)

<sup>4</sup> Revised Draft Non-Personal Data Governance Framework, PRS Legislative Research, January 04, 2021 | <https://prsindia.org/policy/report-summaries/revised-draft-non-personal-data-governance-framework>

<sup>5</sup> [https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments\\_eCommerce\\_Rules2020.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments_eCommerce_Rules2020.pdf).

<sup>6</sup> Huma Siddiqui, "A New National Cyber Security Strategy Coming Soon: National Cyber Security Coordinator", Financial Express, June 05, 2021, <https://www.financialexpress.com/defence/a-new-national-cyber-security-strategy-coming-soon-national-cyber-security-coordinator/2284413/>.

<sup>7</sup> Financial Stability Report, Reserve Bank of India, January 2021 | <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1168>.

<sup>8</sup> RBI - Master Direction on Frauds – Classification and Reporting by Commercial Banks and Select FIs dated July 1, 2016 | <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/MD28A4C421E7F7724C07B38E3C6207F3548E.PDF>.

<sup>9</sup> Tarkesh Jha, "Govt-Led Reforms such as IBC resulted in recovery of bad loans worth Rs. 5.5 Lakh Crore: Report", Swarajya Mag, July 28 2021 | <https://swarajyamag.com/insta/govt-led-reforms-such-as-ibc-resulted-in-recovery-of-bad-loans-worth-rs-55-lakh-crore-report>.

<sup>10</sup> "Over 3.8 lakh companies struck off under companies law in 3 years: Govt", The Hindu, 23 September, 2020, <https://www.thehindu.com/business/Industry/over-38-lakh-companies-struck-off-under-companies-law-in-3-years-govt/article32675159.ece>.

<sup>11</sup> Insolvency and Bankruptcy Code (Amendment) Act, 2020 | <https://www.ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>.

<sup>12</sup> COVID-19 related measures by RBI | [https://www.rbi.org.in/scripts/bs\\_viewcontent.aspx?Id=3894](https://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=3894).

<sup>13</sup> COVID-19 related measures by SEBI | <https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListingAll=yes&cid=71>

<sup>14</sup> Also, read the article "Supreme Court at Crossroads" authored by Mr. Atul Sharma at <https://www.financialexpress.com/opinion/supreme-court-at-cross-roads/2278847/>.

<sup>15</sup> [https://prsindia.org/files/bill\\_track/2021-04-04/Tribunals%20Reforms%20Ordinance%202021.pdf](https://prsindia.org/files/bill_track/2021-04-04/Tribunals%20Reforms%20Ordinance%202021.pdf).

<sup>16</sup> National Judicial Data Grid (High Courts of India), as accessed on July 29, 2021 | <https://njdg.ecourts.gov.in/hcnjdgnew/>

<sup>17</sup> Rojer Mathew versus South Indian Bank Ltd & Ors., 2019 (369) ELT3 (S.C.), Supreme Court of India, November 13, 2019 | [https://www.sci.gov.in/pdf/JUD\\_4.pdf](https://www.sci.gov.in/pdf/JUD_4.pdf).