

# IMPOSING LIABILITIES ON PERSONS OF INFLUENCE: AN URGENT STEP TOWARDS PUBLIC POLICY MEASURES IN INDIA

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**Abstract:** *The persons of influence in India have always enjoyed extravagant love and demonstration thereof from the Indian Fan Community. It is not wrong to call this community as one of worshippers or devotees for they have elevated such persons to the position of Gods. This position has enabled persons of influence, whether film-stars or religious gurus, to exercise their influence on their devotees in an almost-absolute manner. While the Indian legal scenario has recognised and enforced the rights of these persons of influence in their personalities, it was not until recently that a legal duty was imposed on them for judicious exploitation of their personality to exercise influence on the public.*

*It was only in August 2019 that the Indian Consumer Protection Act made the endorsers liable for endorsing misleading advertisements. Prior to this welcome change in the law, the endorsers had no legal duty towards the public that fell prey to harmful products that were endorsed by them. However, a mere analysis of the new law brings to light many loopholes that need to be addressed for a safer consumer protection regime in India. This research paper, drawing inspiration from relevant laws in Germany, United Kingdom and United States of America, suggests amendments to the law in question and proposes a draft amendment bill in the said lines.*

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## I. INTRODUCTION

*‘With great power comes great responsibility’*

India is a country of diverse cultures and colours. People from all walks of life live together in this humongous sub-continent. Despite their differences, what they all have in common, apart from their nationality, is that they are all “influenced” - some by politicians, some by sportsmen, some by religious leaders and some others by celebrities. In this context it is not wrong to say that the persons of influence hold a position of power. They hold the power to influence and persuade the masses. Unfortunately, they exercise this power without any burden of responsibility. They are, only sometimes, held to be morally responsible for the exercise of the said power. There was no legal sanction, until 2019. The Consumer Protection Act 2019 (Act 35 of 2019) is a brand-new law and perhaps the only legal provision that seeks to impose certain liability on these persons who hold the power to influence.

The Indian population is blinded by the love for these persons of influence. It buys what they endorse, without any enquiry, without any doubt. In such a scenario, the power of influence so exercised becomes almost absolute. The exercise of this absolute power most often than not holds the potential of

being dangerous to the public at large. Given this danger, it becomes imperative to impose certain liabilities on these persons of influence so that the exercise of this power is done in a more judicious and responsible manner by these power-holders.

The first step in this regard is to understand the scope of the phrase “persons of influence”. Then, there is a need to understand which laws will come into the picture when the question of imposing liabilities on these persons arises. The final consideration to be made is to understand if there is a requirement for new laws or will a few amendments in the existing ones suffice for the purpose.

### **A. Persons of Influence**

It is rather difficult to propose a straightjacketed formula to put all persons of influence under one definition. What needs to be understood is that these persons of influence do not have one common profession. Apart from the power of influence that they possess, no other thing is common to them. While some might belong to the Film and Television Industry, some might be political leaders and others, TikTok users. Therefore, encompassing all persons of influence within one closed definition will be unfair, not only to the public of the dynamic Indian society, but also to the persons who will be subjects of such a definition. However, to impose sanctions and liabilities on a broad group of persons, persons of influence in the present case, there needs to be a certain open definition. Such a definition should have elements that are dependent on the facts and circumstances of each case. It is important that the interpretation of such elements should remain the work of the Judiciary. Legislature should not venture into drafting and approving a closed definition.

### **B. Relevant Legal Provisions**

Mostly, the power to influence is a power that is exercised in public platforms such as social media pages and accounts, television and radio channels, etc. It is through these channels that the leaders, celebrities, sportsmen and social media influencers make their endorsements, be it for an advertisement or just to throw their opinions and thoughts to the public. Therefore, the advertising regulations prevalent in the country find their relevance in the current discussion. Furthermore, since the consumers are most affected by the exercise of this power, the consumer protection laws need to be scrutinized. Along with these laws and regulations it is suggested that, the organisations these persons

of influence are members of or subscribe to, adopt by-laws that can regulate their conduct.<sup>1</sup>

### C. Requirement of New Provisions and Amendments in Existing Ones

The advertising regulations prevalent in the country include Cable Television Networks (Regulations) Act 1995 and Cable Television Networks (Amendment) Rules 2006; Drugs and Cosmetics Act 1940; Drugs and Magic Remedies (Objectionable Advertisement) Act 1994; Food Safety and Standards Act 2006; Indecent Representation of Women (Prohibition) Act 1986; Codes for Commercial Advertising adopted by Doordarshan and All India Radio, and most importantly, the Consumer Protection Act 2019. As one can see, there are plenty of Codes, Statutes and Regulations to regulate advertising content in India. In these codes and regulations, one can easily find provisions that are laid out for punishing violators thereof. But what was lacking in these statutory codes was a more intense punishment for such violations made by persons of influence. This void has been attempted to be filled by the new Consumer Protection Act of 2019. Therefore, what needs to be examined now is whether or not this new provision is sufficient for the situation at hand.

## II. HOW THE INDIAN DEVOTEES SEE THEIR GODS

Majority of Indians are living in an epoch where every aspect of their existence is dictated by the actions of persons of influence, be it a Bollywood celebrity, a cricketer or a religious guru. From their appearances to their marriage ceremonies, everything is a reflection of what these influential persons preach. They blindly pursue the endorsements made by these persons of influence. It is not wrong to call these Indians, devotees. Their faith and believe is so strong that they have gone to the extent of building temples and worshipping the idols of these persons of influence as their Gods.<sup>2</sup> This state of affairs just goes on

<sup>1</sup> See Indo-Asian News Service, 'Mika Singh Apologises for his Performance in Pakistan, FWICE Withdraws Ban' *India Today* (India, 22 August 2019) <<https://www.indiatoday.in/movies/celebrities/story/mika-singh-apologises-for-his-performance-in-pakistan-fwice-withdraws-ban-1590163-2019-08-22>> accessed 4 January 2021. [See: Singer Mika Singh was banned by the Federation of Western India Cine Employees (FWICE) for performing at a private function of a relative of Former President of Pakistan General Parvez Musharraf. He was banned for performing in the 'enemy country' despite non-cooperative directives being issued by FWICE in line with the sentiments of the nation after terrorist attacks in the country.]

<sup>2</sup> Deccan Chronicle, 'A temple for Sonia Gandhi, MGR, Rajnikanth, Amitabh Bachchan, Khushboo and others' *Deccan Chronicle* (India, 31 October 2013) <<https://www.deccan-chronicle.com/131030/news-current-affairs/gallery/temple-sonia-gandhi-mgr-amitabh-bachchan-khushboo-and-others>> accessed 4 January 2021; Mimansa Shekhar, 'Telangana Locals Dedicate a Temple to Sonu Sood' *The Indian Express* (India, 22 December 2020) <<https://indianexpress.com/article/entertainment/bollywood/telangana-locals-dedicate-temple-to-sonu-sood-7113226/>> accessed 4 January 2021.

to prove that the impact these persons of influence have on the Indian mass is, beyond a doubt, strong, serious and profound.

The fan community in India is almost mad as a hatter. The following fan stories shine a light on the extent of love and faith the fan community bestows upon the persons of influence:

### A. King Khan – The Bollywood Superstar

A businessman from Lucknow (Uttar Pradesh, India), Vishal Singh, who calls himself Visharukh Khan, has covered every wall of his house and his car with posters of the legendary actor Shah Rukh Khan. He took his wife to “*Mannat*”, Shah Rukh’s residence in Mumbai (Maharashtra, India) for their honeymoon and has even named his children after the characters in Shah Rukh’s movies.<sup>3</sup> This renowned actor has also been receiving a piece of land on Moon as his birthday gift by an Australian Fan.<sup>4</sup> The far reached influence of this actor can also be seen when one looks at the story of the two German ladies who have been following the actor to his international shooting locations for the past many years.<sup>5</sup>

### B. Jayaram Jayalalitha – A Beloved Politician

Another great person of influence is the late politician and former Chief Minister of Tamil Nadu, Jayaram Jayalalitha. Often referred to as “*Adi Prashakti*” - the ultimate powerful Goddess (in Tamil), she inspired a cult following.<sup>6</sup> The immense respect and devotion that her party members have for her has enabled them to carry a photo of her in their pockets in every public appearance, even after her demise. Before presenting the budget in the State Assembly in 2012, the Finance Minister of Tamil Nadu even prostrated before her<sup>7</sup> (like thousands of her other followers did when they saw her or before her

<sup>3</sup> ‘Shah Rukh Khan Birthday Special: Crazy Things that Fans Have Done for the Superstar’ *The Times of India* (Delhi, 2 November 2018) <<https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/photo-features/shah-rukh-khan-birthday-special-crazy-things-that-fans-have-done-for-the-superstar/photostory/61403594.cms>> accessed 4 January 2021.

<sup>4</sup> *ibid.*

<sup>5</sup> ‘These German Women have been Following Shah Rukh Khan for Last 8 Years’ *Deccan Chronicle* (India, 21 April 2016) <<https://www.deccanchronicle.com/entertainment/bollywood/210416/these-german-women-have-been-following-shah-rukh-khan-for-last-8-years.html>> accessed 4 January 2021.

<sup>6</sup> Sudha G. Tilak, ‘Jayalalitha: The “Goddess” of Tamil Nadu Politics’ (*BBC News*, 5 December 2016) <<https://www.bbc.co.uk/news/world-asia-india-37503616>> accessed 4 January 2021.

<sup>7</sup> Mail Today Reporter, ‘Jaya he! Tamil Finance Minister Prostrates Before the Chief Minister Prior to Presenting the Budget in Assembly’ *Mail Online India* (India, 26 March 2012) <<https://www.dailymail.co.uk/indiahome/indianews/article-2120782/Tamil-finance-minister-prostrates-chief-minister-prior-presenting-Budget-Assembly.html>> accessed 4 January 2021.

photo). Irrespective of their age, cast, gender and creed, people lovingly called her “*Amma*” (mother). Her fans cried, even fainted when she had a cardiac arrest, a day before her death.<sup>8</sup>

### C. Mahendra Singh Dhoni – The Captain Who Made India Win the Cricket World Cup

There have been several instances where fans of Dhoni, breaching the security of the Cricket grounds during important matches rushed to touch his feet.<sup>9</sup> In fact, Dhoni is one of those living personalities whose biopic – ‘M.S. Dhoni: The Untold Story’ was produced and released in 2016. It sold as a blockbuster and made a collection of almost INR 2.16 billion.

### D. Baba Ram Rahim – Founder of Dera Sacha Sauda Group

Gurmeet Ram Rahim, a religious leader and the head of *Dera Sacha Sauda* group was found guilty and was convicted for raping two of his female followers. This decision of the court of law was not taken very well by his followers who took to street, rioting. Thousands of his followers rampaged by setting fire to government buildings and attacking petrol stations. This violence had caused twenty-eight innocent men to lose their lives. Six hundred Indian Army men were deployed in the area to help police and paramilitary handle the violent mob. Right before the verdict, when this spiritual guru left his house, he was accompanied by a hundred vehicles’ convoy. To control the violence, internet services and train services had to be shut down in the States of Punjab and Haryana. However, the violence could only be controlled with the release of a video message by the Guru himself who urged his followers to maintain peace.<sup>10</sup>

After reading the above accounts, one can clearly decipher that in India, the fan community is deprived of sense when it comes to showing love for their Gods. It will not be wrong to say that these persons of influence are in the possession of a power. By virtue of this power, they can direct the masses to do or abstain from doing certain acts. This power of influence, if not exercised responsibly, can pose a danger, not only to the well-being of the public

<sup>8</sup> TV5 News, ‘CM Jayalalitha Fans Cry, Faint | Jayalalitha Cardiac Arrest | Amma Health’ (4 December 2016) <<https://www.youtube.com/watch?v=YKa8RW-zCdY>> accessed 4 January 2021; ‘Jayalalitha Supporters in Tears Outside Hospital’ (*The Economic Times*, 4 December 2016) <<https://www.youtube.com/watch?v=SH7gO61ZZqw>> accessed 4 January 2021.

<sup>9</sup> ‘M.S. Dhoni’s Fan Rushes on the Field, Touches his Feet’ (*One India News*, 10 January 2017) <<https://www.youtube.com/watch?v=Xp6Lb9MCx8Q>> accessed 4 January 2021.

<sup>10</sup> ‘Ram Rahim Singh’s Supporters Riot After Rape Conviction’ *Al Jazeera* (India, 25 August 2017) <<https://www.aljazeera.com/news/2017/08/ram-rahim-singh-supporters-riot-rape-conviction-170825114911486.html>> accessed 4 January 2021.

but also to the maintenance of peace, tranquillity, law and order in the society. Given this situation, it is imperative to understand that the persons of influence should not merely have a moral responsibility to exercise their power sagaciously. These persons should be bound by legal responsibilities which can only be imposed upon them by way of imposing liabilities. Any act of non-compliance with such a responsibility should call for strict punitive measures to be undertaken, for the sake of public policy.

### III. RIGHTS OF PERSONS OF INFLUENCE IN INDIA

The persons of influence use their personality to lure the public. Through their image and reputation, they exercise their influence on the people. Even though there are no explicit statutory protection for their images and personality, the Indian Judiciary has, rather aggressively, recognised and protected their personality rights. Most of the reported judgments deal with the rights of celebrities from the Film Industry. But these judgments have set straight the principles and precedents with respect to the image rights.

At this juncture, it is relevant to cast light on a few important judgments that are now law of the land. In *Rajat Sharma v Ashok Venkatramani*<sup>11</sup> an injunction order was passed by the Delhi High Court on 11th January 2019 against Zee Media, directing them to immediately stop of the use of the name of the news anchor Rajat Sharma in their advertisement wherein they used the phrase '*India me ab Rajat ki Adalat band*' (Court of Rajat now closed in India), without the Plaintiff's permission. Here the plaintiff's name was used in a manner in which a direct and obvious reference was made to the plaintiff's famous interview show called '*Aap ki Adalat*' (Your Court).<sup>12</sup>

In another case,<sup>13</sup> the Bombay High Court ordered Singer Mika Singh to pay damages worth INR 10 Lakhs for infringing the personality rights of other singers. The respondent had printed promotional banners without due permission where his picture was larger in size than that of other singers including the plaintiff, Sonu Nigam. The plea taken by the plaintiff was that other artists were shown to have much less prominence with smaller pictures of them than

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<sup>11</sup> *Rajat Sharma v Ashok Venkatramani*, CS (COMM) 15 of 2019, order dated 11-1-2019 (Del).

<sup>12</sup> Prarthana Patnaik, 'Rajat Sharma v/s Zee Media-Delhi HC's Latest Order on Personality Rights' (*SpicyIP*, 16 January 2019) <<https://spicyip.com/2019/01/rajat-sharma-v-s-zee-media-delhi-hcs-latest-order-on-personality-rights.html>> accessed 4 January 2021.

<sup>13</sup> *Sonu Nigam v Amrik Singh* Suit No 372 of 2013, decided on 26-4-2014 (Bom).

that of the respondent.<sup>14</sup> *Mr. Shivaji Rao Gaikwad v M/s. Varsha Productions*<sup>15</sup> is another personality right decision where the respondent was restrained from using the mane and style of the plaintiff, popularly known as Rajnikanth, in its movie ‘*Mai Hoon Rajnikanth*’ (I am Rajnikanth). The court held that the available materials of the film will damage the reputation of the plaintiff.<sup>16</sup> The Indian Courts have also examined intricate matters such as inheritability of right of publicity in recent years.<sup>17</sup>

Keeping the above discussed decisions in view, it is right to conclude that the Indian Jurisprudence recognises personality rights and rights of publicity. It protects the rights of persons of influence over their images. It protects their reputation. Furthermore, the Indian Legal Academia has been writing about the said rights very prominently.<sup>18</sup> Authors have even drafted and suggested legislations which could be enacted and implemented. However, only a very few

<sup>14</sup> Alvin Antony, ‘Celebrity Rights – Is it important in India’ (*Mondaq*, 31 January 2019) <<https://www.mondaq.com/india/trademark/777368/celebrity-rights-is-it-important-in-india>> accessed 4 January 2021.

<sup>15</sup> *Shivaji Rao Gaikwad v Varsha Productions*, 2015 SCC OnLine Mad 158, (2015) 2 Mad LJ 548.

<sup>16</sup> Alvin Antony (n 15).

<sup>17</sup> *Chitra Jagjit Singh v Panache Media*, 2016 SCC OnLine Bom 2364; Shan Kohli, ‘Chitra Jagjit Singh v IPRS’ (*SpicyIP*, 22 April 2016) <<https://spicyip.com/2016/04/chitragajjitsinghiprs.html>> accessed 4 January 2021.

<sup>18</sup> Akansha Jumde and Manoja Yeluri, ‘Emerging Trends in Publicity Rights in India: An Analysis Under the Intellectual Property Laws in India’ Ram Manohar Lohiya National Law University Communication, Media, Entertainment, Technology Journal [2015] 2, 74; Akanksha Jumde and Nishant Kumar, ‘Image Rights of Famous Persons vis-à-vis Right to Privacy: An Analysis under the Intellectual Property Laws in India and Other Countries’ Ram Manohar Lohiya National Law University Communication, Media, Entertainment, Technology Journal [2018] 5, 1; Madhavi Goradia Divan, ‘The Commodification of Celebrities: Rights of Publicity’ *Practical Lawyer* [2009] 16; Niharika Behl, ‘Social Media and IPR Issues’ Gujarat National Law University Journal of Law, Development and Politics [2019] 9, 119; Raman Mittal, ‘Licensing One’s Persona: Analysing the Practice of Personality Merchandising’ *Journal of the Indian Law Institute* [2010] 52, 16; Shreyasi Bhattacharya and Aparna Madhu, ‘An Overview of Celebrity Rights in India’ Rajeev Gandhi National University of Law Financial and Mercantile Law Review [2018] 5, 30; Shrishti Sharma, ‘Sports and IPR’ *Sports and Legislature* [2018] 2, 30; Tabrez Ahmed and Satya Ranjan Swain, ‘Celebrity Rights: Protection under IP Laws’ *Journal of Intellectual Property Rights* [2011] 16, 7 <<http://docs.manupatra.in/newsline/articles/Upload/78DD5FE8-5C07-4075-934D-6917CD6BE868.pdf>> accessed 4 January 2021; Teeshta Bissa and Shishira Prakash, ‘Right not to be Mimicked’ Ram Manohar Lohiya National Law University Communication, Media, Entertainment, Technology Journal [2018] 5, 60; Trupti Panigrahi, ‘The Inheritance of Personality Rights: Writing the Indian Story’ (LLM Dissertation, Queen Mary University of London 2020); Zoya Nafis, ‘Personality Rights – Need for a Clear Legislation’ (*Mondaq*, 8 October 2014) <<http://www.mondaq.com/india/x/345080/Personality+Rights+Need+For+A+Clear+Legislaton>> accessed 4 January 2021.

talk about the corresponding duties that could be imposed on the beneficiaries of such legislations.<sup>19</sup>

#### IV. RESPONSIBILITY AND ACCOUNTABILITY OF PERSONS OF INFLUENCE

When there is a discussion on rights, there has to be at least a mention of its jural correlative, i.e. duties. It is relevant to reiterate the words of eminent Jurist Salmond, which are as follows: ‘A right is an interest recognized and protected by rules of right, that is by legal rules. It is an interest respect for which is a duty, and disregard of which is a wrong.’<sup>20</sup>

When the rights of celebrated personalities over their images are recognised, there has to be a talk about the duty of responsibly exercising the recognised rights. One cannot simply be allowed to use its own image to deceive the public. One cannot be allowed to do things that go against the public policy. When a personality is allowed to commodify his or her image and derive monetary benefits out of it, he or she should not be allowed to mislead the public with such a use of his image. If the use of one’s own image goes against the public policy, it is nothing but unjustifiable for the person to derive benefits out of his or her image.<sup>21</sup>

Ideally, a duty towards the public must be abided by the persons of influence even when they only have a moral obligation. But, the fact of the matter is that there have been several instances where this duty towards the public has not been paid heed to. For the sake of commercial gains, influential persons have, time and again, used their image to convince people to buy what they are selling. A renowned actor of the Indian Film Industry, Amitabh Bachchan, lovingly known as Big B, along with other actors namely Madhuri Dixit and Preity Zinta, has endorsed Maggi, a product that has Monosodium Glutamate (“MSG”) and lead, both lethal for human consumption.<sup>22</sup>

Big B also endorsed Pepsi. Upon being asked by a schoolgirl as to why he promoted something that her parents and teachers labelled as poison, he

<sup>19</sup> Trupti Panigrahi, ‘Celebrity Rights: Towards a New Regime’ (BA LLB (H) Dissertation, Delhi Metropolitan Education, Guru Gobind Singh Indraprastha University 2019).

<sup>20</sup> Rajeev Ranjan, ‘Rights & Duties: A Critical Legal Analysis’ (*Academia.edu*, 6 June 2018) <[http://www.academia.edu/8794413/Rights\\_and\\_Duties](http://www.academia.edu/8794413/Rights_and_Duties)> accessed 4 January 2021.

<sup>21</sup> Alexandra Sims, ‘The Denial of Copyright Protection on Public Policy Grounds’ (2008) 30(5) *EIPR* 189-198 [3].

<sup>22</sup> ‘Maggi Endorsement: Amitabh Bachchan, Madhuri Dixit, Preity Zinta Slapped with Notices’ *The Economic Times* (India, 4 June 2015) <<https://economictimes.indiatimes.com/industry/cons-products/food/maggi-endorsement-amitabh-bachchan-madhuri-dixit-preity-zinta-slapped-with-notices/articleshow/47545894.cms>> accessed 4 January 2021.

instantly withdrew himself from the campaign.<sup>23</sup> But, the damage had already been done. Nevertheless, the actor deserves applause for his realisation. He was also reported saying, 'I tell this to my son Abhishek and to daughter-in-law Aishwarya also ... if you have to endorse a product then you have to conduct your life in such a manner that it does not affect others' lives.' [sic]<sup>24</sup> However, many leading actors and actresses have continued to endorse aerated drinks that have high levels of sugar and can affect the health of people if consumed regularly.

The beloved former Indian Cricket Captain, Mahendra Singh Dhoni acted as the brand ambassador of a real estate firm – Amrapali, which eventually went bankrupt and couldn't complete its housing projects where a lot of public money was invested. Dhoni eventually had to step down after being trolled on twitter for promoting Amrapali.<sup>25</sup> Salman Khan, Shah Rukh Khan and actress Yami Gautam have been promoting the fairness creams. They have been doing so in the aeon where people are dealing with inferiority complex issues because they are unable to keep up with the beauty standards set by these advertisements.<sup>26</sup>

In light of the above-discussed instances, it can be clearly gathered that a mere moral responsibility cannot stop the persons of influence to endorse products that are detrimental to not only the health, but also the general good of the public. Therefore, it becomes imperative to impose a statutory duty on these persons so as make them extra cautious in choosing their endorsements wisely and in a manner that is not harmful to the public. Though the new Consumer Protection Act of 2019 has taken the first step in imposing a statutory duty, the question that still needs to be addressed is, will it suffice for all the situations that have been discussed?

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<sup>23</sup> Aditi Shome-Ray, 'Amitabh Bachchan says Stopped Endorsing Pepsi After Schoolgirl Called it "Poison", Sparks Row' (*DNA*, 3 February 2014) <<https://www.dnaindia.com/entertainment/report-amitabh-bachchan-says-stopped-endorsing-pepsi-after-schoolgirl-called-it-poison-sparks-row-1959115>> accessed 4 January 2021.

<sup>24</sup> *ibid.*

<sup>25</sup> Press Trust of India, 'M S Dhoni ends his contract with Amrapali group after complaints against reality firm' (*India.com*, 15 April 2016) <<https://www.india.com/sports/m-s-dhoni-ends-his-contract-with-amrapali-group-after-complaints-against-reality-firm-1111248/>> accessed 4 January 2021.

<sup>26</sup> Surbhi Gloria Singh, 'Celebs caught in Controversies owing to their Endorsement Deals' (*Business Standard*, 11 November 2016) <[https://www.business-standard.com/article/current-affairs/celebs-caught-in-controversies-owing-to-their-endorsement-deals-11611101647\\_1.html](https://www.business-standard.com/article/current-affairs/celebs-caught-in-controversies-owing-to-their-endorsement-deals-11611101647_1.html)> accessed 4 January 2021; Emami Limited Website <<http://www.emamilttd.in/brands/74/169/fair-and-handsome-fairness-cream-for-men.php>> accessed 4 January 2021; Nivedita Hazra, 'Yami Gautam: The Fair Face of a Dark Narrative' (*Feminism India*, 25 November 2019) <<https://feminisminindia.com/2019/11/25/yami-gautam-the-fair-face-of-a-dark-narrative/>> accessed 4 January 2021.

## V. LAWS AND REGULATIONS AROUND THE WORLD

Before venturing into the discussion of what will be the appropriate solution for the Indian scenario, it is wise to have a look at some relevant laws of a few developed jurisdictions which tackle similar situations.

### A. Germany

The German law tackles the issue with the interplay of its Media Law, Unfair Competition Law and Broadcasting Treaty. While the Media Law, ie, The German Telemedia Act of 2007 (“Telemediengesetz” or “TMG”) provides that communications of commercial nature must be clearly identified as commercial communications,<sup>27</sup> the Law of Unfair Competition, ie, The German Act against Unfair Competition 2010 (Gesetz gegen den unlauteren Wettbewerb, UWG) says that if the commercial intention of a commercial practice is not identified and such an act leads to the consumers being misled, it will be an unfair practice.<sup>28</sup> Additionally, the German Interstate Broadcasting Treaty (Rundfunkstaatsvertrag - RStV) provides that an advertisement must be clearly recognizable as such and must be separated from other content of the offers.<sup>29</sup> This also applies to Facebook, Youtube, Instagram and the like.<sup>30</sup> The Courts in Germany have opined that terms like “*Werbung*” (promotion) or “*Anzeige*” (advertisement) have to be used at the beginning of a post by an influencer who does such marketing of products.<sup>31</sup>

<sup>27</sup> The German Telemedia Act 2007, s 6(1)l.

<sup>28</sup> The German Act against Unfair Competition 2004, s 5a(6).

<sup>29</sup> The German Interstate Broadcasting Treaty 1991, art 58.

<sup>30</sup> Margret Knitter and Corinna Sobottka ‘Influencer Marketing and Labeling Requirements in Germany’ (*Mondaq*, 29 January 2019) <[https://www.inta.org/INTABulletin/Pages/Influencers\\_and\\_Labelling\\_in\\_Germany\\_7401.aspx](https://www.inta.org/INTABulletin/Pages/Influencers_and_Labelling_in_Germany_7401.aspx)> accessed 4 January 2021.

<sup>31</sup> *ibid*; See Constantine Eikel, ‘Influencer marketing in Germany: Courts in Berlin try to Find a Balance between Practicality and Marketing Laws’ (*Media Writes*, 25 January 2019) <<https://mediawrites.law/influencer-marketing-in-germany-courts-in-berlin-try-to-find-a-balance-between-practicability-and-marketing-laws/>> accessed 4 January 2021; Diana Livadic and Madita Brandhorst, ‘Influencer Marketing in Germany’ (*IPSOS*, November 2019) <<https://www.ipsos.com/sites/default/files/ct/publication/documents/2019-11/influencer-marketing-germany-ipsos-2019.pdf>> accessed 4 January 2021; Dr Iija Czernik and Corinna Sobottka, ‘#InfluencerMarketing: Pay Attention Since Influencers are also Liable for Advertising Content’ (*Lexology*, 25 October 2017) <<https://www.lexology.com/library/detail.aspx?g=bf274682-7829-4c92-9799-95d09dd6b84e>> accessed 4 January 2021; Sven Preiss, ‘Germany: Ads in Disguise: Brand Owners and Influencers Beware of German Consumer Protection Laws’ (*Mondaq*, 8 May 2018) <<http://www.mondaq.com/germany/x/699262/Social+Media/Ads+In+Disguise+Brand+Owners+And+Influencers+Beware+Of+German+Consumer+Protection+Laws>> accessed 4 January 2021; KG Berlin, dated 08.01.2019, 5 U 83/18; BGH dated 06.02.2014, I ZR 2/11; OLG Celle dated 08.06.2017, 13 U 53/17.

## B. United Kingdom

The Human Medicine Regulations of 2012 does not allow persons to publish advertisements for medicines that are recommended by celebrities. In simple words, celebrities are banned from making drug endorsements.<sup>32</sup> The CAP Code, i.e., the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing also bans marketers from using celebrities to endorse medicines.<sup>33</sup> As far as the broadcast advertising is concerned, the BCAP Code, i.e., the UK Code of Broadcast Advertising comes into play. Under the BCAP Code, celebrities popular with children may only make factually correct statements with respect to nutrition, safety, education, etc.<sup>34</sup> Upon reading these provisions, the first thing that comes to the mind of a sagacious being is that who is a celebrity within the United Kingdom? The term celebrity is not defined in any law. Further, unlike the United States of America, the United Kingdom does not have any statutes with respect to publicity rights or image rights.

It is relevant at this point to shine a light on the July 2019 ruling<sup>35</sup> by the UK Advertising Standards Authority (“ASA”). ASA recently held that any person having 30,000 followers on social media will be deemed to be a celebrity for the purposes of the above provisions. Whether politicians, sportsmen etc. having no social media accounts are celebrities or whether a person having 29,999 followers on his social media account is a celebrity, is a discussion for another time. What is relevant for the purposes of this essay is that under the UK law, celebrities are not allowed to endorse medicines. It is also relevant to note that ASA has a separate set of guidelines for influencers to regulate endorsements made by them.<sup>36</sup> But, celebrities do not have strict liabilities or penalties for the endorsements that they make. The provisions under the UK law are merely regulatory and lack, to a great extent, the legal force required behind making a person of influence individually and strictly liable.

<sup>32</sup> The Human Medicines Regulation 2012, reg 289.

<sup>33</sup> The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing 2010, s 12.18.

<sup>34</sup> The UK Code of Broadcast Advertising 2010, ss 13.10 and 13.14.

<sup>35</sup> The Sanofi Ruling (Advertising Standards Authority, 3 July 2019) <<https://www.asa.org.uk/rulings/sanofi-uk-A19-557609.html>> accessed 4 January 2021; Hayleigh Boshier, ‘ASA Ruling on Social Media Influencers’ Celebrity Status - What Really Happened...’ (*The IPKat*, 15 July 2019) <<http://ipkitten.blogspot.com/2019/07/asa-ruling-on-social-media-influencers.html>> accessed 4 January 2020; Jon Porter, ‘Having 30,000 Followers makes you a Celebrity, UK Advertising Watchdog Rules’ (*The Verge*, 4 July 2019) <<https://www.theverge.com/2019/7/4/20682087/instagram-twitter-celebrity-30000-followers-advertising-standards-authority-uk>> accessed 4 January 2021.

<sup>36</sup> *An Influencer’s Guide to Making Clear that Ads are Ads* (The Advertising Standards Authority 2018) <<https://www.asa.org.uk/uploads/assets/uploaded/3af39c72-76e1-4a59-b2b47e-81a034cd1d.pdf>> accessed 4 January 2021.

### C. United States of America

The Federal Trade Commission of the United States of America, issued guides concerning the use of Endorsements and Testimonials in Advertisements.<sup>37</sup> Under these guides, the following is required:

- a. An advertiser can only use the endorsement of a celebrity only if it has good reason to believe that the endorser continues to subscribe to the views presented.
- b. Till the advertisement continues to be in the public domain, the endorser must be a bona fide user of the product.
- c. Endorsers are liable for the statements made during the course of endorsements.

## VI. SUGGESTED AMENDMENTS IN THE INDIAN LEGAL SCENARIO

### A. Section 21 of the Consumer Protection Act 2019 – Insufficient Provision

#### (a) *Understanding the Provision*

The Consumer Protection Act 2019 which received President's assent and came into force on the 9th of August 2019 attempts to impose a legal duty on the persons of influence. Under s 21<sup>38</sup> of the said Act, the Central Consumer Protection Authority is empowered to direct an endorser to discontinue or modify an advertisement which is false or misleading<sup>39</sup> and is prejudicial to the interest of any consumer or is in contravention to consumer rights. It may also impose a penalty of up to INR 10 Lakhs on the endorser and up to INR 50 Lakhs for subsequent contravention. The Central Authority may also impose a ban on the endorser from endorsing any product or service for a period which

<sup>37</sup> Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 CFR Pt 255), s 255.1.

<sup>38</sup> The Consumer Protection Act 2019, s 21, 'Power of Central Authority to issue directions and penalties against false or misleading advertisements.'

<sup>39</sup> The Consumer Protection Act 2019, s 2(28): "misleading advertisement" in relation to any product or service, means an advertisement, which—  
(i) falsely describes such product or service; or  
(ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or  
(iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or  
(iv) deliberately conceals important information.'

may extend to one year, if it deems necessary. A further ban of up to three years can also be imposed for a subsequent contravention.

Under sub-s (5) of this provision, an endorser can only be free from any liability if he has exercised due-diligence to verify the veracity of the claims made in the advertisement regarding the product or service he has endorsed.

What actually makes it a little harrowing for persons of influence is the determinants of penalty under sub-s (7) of the said section. While deciding the penalty, the following considerations will be taken into account:

- a. the population and the area impacted or affected by such offence;
- b. the frequency and duration of such offence;
- c. the vulnerability of the class of persons likely to be adversely affected by such offence; and
- d. the gross revenue from the sales effected by virtue of such offence

In the case of a person of influence, these parameters will render a higher result and consequently, there will be a higher penalty. Furthermore, under s 88<sup>40</sup> of the same Act, an endorser can be punished for a term which may extend up to six months and/or with a fine of INR 20 Lakhs for non-compliance of order by Central Consumer Protection Authority (“CCPA”) under s 21.<sup>41</sup>

A mere reading of definitions of the terms “advertisement”<sup>42</sup> and “endorsement”<sup>43</sup> will make it clear that this provision encompasses all mediums of advertisements and does not make any distinction, like in the UK, with broadcast and non-broadcast type advertisements. Further, by including name, signature, likeness and other identifiable personal characteristics, the legislators have

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<sup>40</sup> The Consumer Protection Act 2019, s 88, ‘Penalty for non-compliance of direction of Central Authority’.

<sup>41</sup> The Consumer Protection Act 2019 (n 38).

<sup>42</sup> The Consumer Protection Act 2019, s 2(1) “‘advertisement’ means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents.’

<sup>43</sup> The Consumer Protection Act 2019, s 2(18) “‘endorsement’, in relation to an advertisement, means—

- (i) any message, verbal statement, demonstration; or
- (ii) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or
- (iii) depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement.’

made their intent clear with respect to the fact that the use of personality traits of a person will also make the person liable for the endorsement.

*(b) Understanding its Fallacies*

Undoubtedly, this provision is a welcome step towards imposing responsibility on persons of influence for the endorsements they make. But there are still certain lacunae that need to be addressed, keeping in mind the interest of the Indian Fan Community.

1. Mere Exercise of Due-Diligence Does Not Solve the Purpose

As established in the previous sections, the fan community is so deeply inspired by the persons of influence that they act like devotees. Given this circumstance, a person of influence should not only be responsible for making statements that are true. Rather, it should be an obligation on the persons of influence to endorse what they truly believe in. According to this section, a person can endorse a product or service if the person comes to the conclusion that the claims made are true after exercising due diligence. But, despite the claims being true, some products can be injurious to public health. For example, in the advertisements made for the two-minute wonder snack – Maggi, the endorser-actors claimed that the snack just takes two- minutes to get cooked. This is a true statement.<sup>44</sup> The other true statements which actually show the side effects of the product usage may be marked with a little asterisk symbol with the phrase “T & C apply” having smaller font size. This certainly will make no impact on someone who is deeply influenced. Even if the font size of the caution is increased, it has lesser chances of making any difference to a ‘devotee’. For a devotee, the ultimate word is that of the God!

2. Will the Term ‘Endorsement’ also Include ‘Association’?

There is no solution in the provision for cases where famous persons with identifiable baritone/voice skin/speaking style, for example singers from the music industry, lend their voices for jingles in advertisements. It is a debatable fact that singing a jingle for an advertisement can be equated with an endorsement, especially under the definition so provided in s 2(18)<sup>45</sup> of the Consumer Protection Act 2019. While singing a jingle, a person might not make any claim or make any statement. Sometimes, there might be situations where a person of influence is recognised with the way an advertisement is directed/

<sup>44</sup> Storytellers In, ‘Storytellers Maggi Montage with Amitabh Bachchan’ (India, 13 April 2013) <<https://www.youtube.com/watch?v=yalsrWNIPuU>> accessed 5 January 2021.

<sup>45</sup> The Consumer Protection Act 2019 (n 43).

choreographed. The way a music composition is made for a jingle might tell the audience that it has been made by a certain person. Such contributions are more in the nature of an association than an endorsement. In such scenarios, s 21<sup>46</sup> of the said Act does not prove to be a full-proof safeguard.

### 3. Paid Promotion on Personal Social Media Handles are Different from Advertisements

Many times, persons of influence are paid to talk about a product or service or just present a product or service to their fans. Even though such presentations can mislead the public in the same way as an advertisement can, keeping such presentations in the same pedestal as an advertisement will only impose an unnecessary restriction on commerce and business. Nevertheless, in lines of the German practice, there needs to be some regulation on presentations on personal social media handles to safeguard the public from getting misled.

Therefore, the need of the hour is to adopt suitable practices from foreign jurisdictions and weave them into The Consumer Protection Act 2019 so as to render a better and stronger protection regime for the larger good of the public.

#### *(c) Suggested Amendments*

The Consumer Protection Act 2019 certainly includes within its ambit all kinds of advertising. Therefore, there lies no need to address the issue separately in different advertising regulations. s 21<sup>47</sup> read with s 88<sup>48</sup> of the same Act also provides for punitive measures, hence does away with the need to provide for general punishments under the Indian Penal Code of 1860. Additionally, statutes like Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003, Food Safety and Standards Act 2006, etc. include provisions for a safe and secure regime. Therefore, only by addressing the drawbacks of the Act in discussion i.e. The Consumer Protection Act 2019, the country can proceed towards an infallible system of protection.

Keeping in view the fallacies highlighted, it is imperative to incorporate the following suggestions in the Consumer Protection Act of 2019:

- a. The term 'association' should be included within the definition of the term 'endorsement'.

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<sup>46</sup> The Consumer Protection Act 2019 (n 38).

<sup>47</sup> *ibid.*

<sup>48</sup> The Consumer Protection Act 2019 (n 40).

- b. An endorser should only be allowed to endorse products and services he has used and truly believes in. Therefore, following the U.S. model, an obligation should be imposed on the advertiser to ensure that the endorser is, and remains till the advertisement runs in the public domain, a bona fide user of the product or service.
- c. In case the endorser is promoting a product on their personal social media handles, then, similar to the German model, there should be a clear mention of the fact that it is a paid promotion made just for the sake of commercial interest.

These suggestions are nothing but an extra layer of caution that needs to be exercised for the sake of public good. However, there appears to be no justification for an endorser who is not a person of influence, to abide by these suggestions. It is only fair and just if these obligations are solitarily imposed on persons for influence. Therefore, there is a need to distinguish between an endorser and a person of influence. In most cases it will be clear to the advertiser as to who is a person of influence and who is not. An advertiser is expected to conduct due diligence to determine the fame or influence of a person.

In most cases, people are hired as endorsers because of their fan base and power of influence. In other cases, an endorser will only remain an endorser. However, if he is then discovered to have greater influence, s 21 (7)<sup>49</sup> will automatically act as a hired gun. For example, the “Trivago guy”<sup>50</sup> and the “Airtel girl”<sup>51</sup> were people with meagre social media presence. Their power of influence was therefore nil with respect to the public at large, but with repeated advertisements of the same type and for the same product/service, they became famous and started to get recognised. Their faces became synonymous with the products/services they were endorsing.

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<sup>49</sup> The Consumer Protection Act 2019, s 21 ‘Power of Central Authority to issue directions and penalties against false or misleading advertisements. (7) While determining the penalty under this section, regard shall be had to the following, namely—

- (a) the population and the area impacted or affected by such offence;
- (b) the frequency and duration of such offence;
- (c) the vulnerability of the class of persons likely to be adversely affected by such offence; and
- (d) the gross revenue from the sales effected by virtue of such offence.’

<sup>50</sup> See Sidharth Jena, ‘Who is the Trivago Ad Guy and Trivago’s Marketing Strategy?’ (*Vidooly.com*, April 2019) <<https://vidooly.com/blog/trivago-ad-guy-and-marketing-strategy/>> accessed 5 January 2021.

<sup>51</sup> See Malini Bhupta, ‘Airtel Strikes Gold with 4G Girl Sasha Chetri’ (*Business Standard*, 24 April 2016) <[https://www.business-standard.com/article/management/airtel-strikes-gold-with-4g-girl-sasha-chetri-116042400353\\_1.html](https://www.business-standard.com/article/management/airtel-strikes-gold-with-4g-girl-sasha-chetri-116042400353_1.html)> accessed 5 January 2021.

In such a scenario, the above suggestions will start to apply once they are proved to be persons of influence by the Central Authority. On account of this proposition, the following suggestion becomes consequential:

The phrase “person of influence” should be defined in the Consumer Protection Act of 2019.

Keeping in view the above suggestions, it is concluded that The Consumer Protection Act 2019 requires undergoing an amendment which incorporates these recommendations. A template of such an amendment bill is drafted and proposed in the next section.

**VII. SUGGESTED DRAFT OF THE CONSUMER  
PROTECTION (AMENDMENT) BILL, 2021**

**AS INTRODUCED IN LOK SABHA**

**BILL NO. \_\_\_\_\_ OF 2021**

**THE CONSUMER PROTECTION (AMENDMENT) BILL, 2021**

**A**

**BILL**

*Further to amend the Consumer Protection Act, 2019.*

BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows: —

	1. (1) This Act may be called the Consumer Protection Act 2021. (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.	Short title and commencement.  5
Insertion of new sub-section 2(31A).  Defining “Person of Influence”.	2. In the Consumer Protection Act 2019 (hereinafter referred to as the principal Act), after Section 2(31), the following sub-section shall be inserted, namely: —  '(31A) “Person of Influence” means any person who has an influential presence in the society and is recognised and followed by a significant portion of the population of a region.	10

<p>Amendment of Section 2(18).</p> <p>Insertion of the terms 'or association'.</p>	<p>3. In Section 2(18) of the principal Act, in clause (ii) and (iii), the following terms shall be inserted after the term depiction, namely: —</p> <p>'Or association'</p>	<p>15</p>
<p>Amendment of Section 2(28).</p> <p>Disclosure by person of influence.</p> <p>Bona fide use of product or service by person of influence.</p>	<p>4. In Section 2(28) of the principal Act, (i) after clause (iv), the following clause shall be inserted, namely: —</p> <p>'(v) abstains from making a disclosure which if not made by a person of influence would constitute an unfair trade practice; or'</p> <p>(ii) after clause (v), the following clause shall be inserted, namely: —</p> <p>'Or</p> <p>(v) is endorsed by a person of influence who is not a bona fide user of such product or service; or</p> <p><i>Explanation.</i> - For the purpose of this Act, (a) a bona fide use means usage of the product or service for a continuous period of time. (b) it shall be the duty of an advertiser to run the advertisement so long as it has good reason to believe, after exercising due diligence at regular intervals, that the person of influence has remained a bona fide user of such product or service.'</p>	<p>Definition of "misleading advertisement".</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p>
<p>Insertion of new clause 2(47)(x).</p> <p>Disclosure by person of influence.</p>	<p>5. In Section 2(47) of the principal Act, after clause (ix), the following clause shall be inserted, namely: —</p> <p>'(x) not disclosing expressly that the promotion of a product or service is a paid promotion which is made for commercial purposes only and such promotion is in no way representative of any personal opinion or view, by a person of influence when such a promotion is made on the person's personal social media handles.</p>	<p>Definition of "unfair trade practice".</p> <p>40</p>
<p>Amendment of Section 21.</p>	<p>6. In Section 21 of the principal Act, in sub-sections (1), (2), proviso of (2), (3), proviso of (3) and (5), after the term "endorser", the following phrase shall be inserted, namely: —</p> <p>'Or person of influence making an endorsement'</p>	<p>Power of Central Authority to issue directions and penalties against false or misleading advertisements.</p>

### **STATEMENT OF OBJECTS AND REASONS**

The Consumer Protection Act of 2019 was enacted for protection of the interests of consumers.

1. The new amendment seeks to impose increased duties on persons of influence and advertisers with the aim of protecting the larger interest of the consumers.

The Bill seeks to achieve the above objective.

New Delhi; Name of Member of Parliament

Date: \_\_\_\_\_

### **VIII. CONCLUSION**

The community of “devotees” in India have time and again demonstrated their love for their Gods in the most unimaginable, rather aberrant ways. When something is about their Gods, i.e., the persons of influence, the fans have shown their ardour in outlandish manners. With such blind love, the Indian consumers often become vulnerable to the word of the persons of influence. They fall in trap of the dangers of those products and services their Gods endorse. In this circumstance, the new Consumer Protection Act 2019 was a welcome step in imposing certain responsibilities on endorsers who usually went scot-free for being brand ambassadors of products or services that are harmful for the health and well-being of the public at large, sometimes even fatal. However, a simple scrutiny of the provisions of the said Act reveals that there are still some loopholes that need to be addressed for proper assignment of responsibility on persons of influence.

Taking inspiration from the relevant laws in Germany, United Kingdom and United States of America, it is suggested that the Consumer Protection Act 2019 needs to undergo an amendment. The term “person of influence” needs to be defined and looked at in a separate light from that of an endorser. An endorsement by such a person should also include any type of association with the product or service in question. Persons of influence should not only be and remain bona fide users of the product or service they endorse, but they should also be responsible for identifying an advertisement or promotion as one if they are endorsing a product or service in their own social media account.

Recently, Norway implemented a law that obliges the social media influencers to make disclosures in case they have uploaded altered or modified body

pictures.<sup>52</sup> This extraordinary step taken by Norway to reduce body pressure among young people demonstrates that countries around the world are recognising the power of influencers. Steps are taken around the world to limit the adverse consequences of callous exercise of such power. It is time for India to consider the changes suggested in this article and march towards a safer and happier consumer environment.

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<sup>52</sup> Kieran Press-Reynolds, 'Influencers in Norway will Soon have to Disclose when Paid Posts Include Edited or Manipulated Body Photos' (*Insider*, 2 July 2021) <<https://www.insider.com/norway-law-social-media-influencers-advertisers-disclose-edited-images-2021-7>> accessed 11 July 2021.