


# Opinion

THURSDAY, JULY 11, 2019



## Let RBI deduct SEB dues from state govt accounts

SEB dues as high as 9 months in some cases; coal PLFs falling as power supply not rising as fast as capacity, will crash further

**THOUGH THE MINISTRY** of power is generally quick to come down on news/analyses that suggest all is not well with the sector even after the Uday reforms package—this saw banks slash lending rates to state electricity boards from around 14% to 8.5%—a recent presentation by power minister RK Singh to power sector officials of various state governments suggests that the problem is quite severe. For one, the central government wants to create an oversight committee to ensure state electricity regulatory commissions (SERCs) do their job properly. While it is not clear what powers such a body will have, or whether the centre can even mandate such bodies unilaterally, according to an Icra report, while the median tariff hike at the all-India level was 8% in FY15, this fell to 4% in FY16 and FY17, and then to 3% in FY18 and a mere 1% in FY19, a year in which SEB losses rose 44%, to ₹21,658 crore as compared to ₹15,049 crore in FY18; and just 15 SERCs have passed orders for tariff hikes so far in FY20, adding up to hikes of around 0.9%. It is hardly surprising, then, that the gap between the costs and tariffs of electricity are rising.

Nor is it clear than the central government can do anything to force SERCs to discontinue the practice of creating what are called 'regulatory assets'. When certain costs need to be passed on to consumers but the SERC feels these will result in a very high hike in tariffs, some of these are parked away as 'regulatory assets'; these are, in a sense, IOUs from the state's consumers to government-owned state electricity boards (SEBs). Till FY16, or the period before Uday started, India had ₹92,500 crore of 'regulatory assets' and these rose to ₹117,000 crore till FY19, the ministry's presentation acknowledges; these are around ₹135,000 crore right now. Apart from saying that SERCs must hike tariffs to repay these IOUs within a few years, if the Centre bans fresh IOUs, as the presentation recommends, this means power tariffs will have to rise sharply each year. As a result of tariffs not being hiked adequately, on a regular basis, the presentation acknowledges that while SEB dues to power generators are around 90 days on average, it is a whopping 9 months in some states and for some power generators.

While talking of how the power sector's dues to banks are ₹1.74 lakh crore and the slow pace of resolving stressed assets, the central power ministry flags another serious problem, that of falling capacity utilization levels. With SEBs too cash-strapped to buy enough power—when each unit of power is sold at a loss, SEBs have a vested interest in not growing supplies aggressively—the plant load factor (PLFs) of thermal units has fallen consistently over the decade, from 77.5% in FY10 to 61.1% in FY19. Worse, with 130,000 MW of renewables capacity likely to come up by 2022, it is estimated that day-time PLF of coal-based plants could fall below 50% in 4–5 months of the year; that could trigger another round of stressed assets. The problem with all power sector packages so far, including Uday, is that state governments have been given generous financial aid—Uday forced banks to slash interest rates—without any onerous reform commitments. It is time to ensure that all their dues—to banks, power producers, etc.—are automatically deducted from their accounts with the RBI; anything else less drastic will be cosmetic.

## No bilateral concessions

Madhya Pradesh power tariff-case holds valuable lessons

**GIVEN HIGH INFRASTRUCTURE** costs in India, or rigid labour laws and even high tax rates, governments find it easy to work out bilateral deals with big, or new, investors. That practice, however, could increasingly be challenged legally as preferential power tariffs are being done right now in Madhya Pradesh. The case dates back to 2016, when the MP State Electricity Regulatory Commission (MP SERC) had approved differential tariffs for new industrial units. The regulator had given a rebate of ₹1 per unit or 20%, whichever was lower, on energy charges for new connections in the industrial category. After this was challenged in 2017, the central appellate tribunal for electricity, APTEL, struck down the differential tariffs, saying this was a matter of providing differential incentives to existing and new users in the same category of large consumers. Hopefully, the Supreme Court, where the case is being heard now, will do the same.

The state government has apparently justified the lower tariff to new companies on the grounds that the older companies would have received some other sops as well in the past. In that case, what the government needed to do was to extend those same sops to the new units. It is, in fact, quite surprising that the state electricity regulator allowed the rebate, even if it was at the prodding of the state government. But, all too often, state and central governments attempt to lure new investors with sops or offer financial support to a certain set of companies. A good case in point is the central government's support, in terms of the EPF contributions for workers, in new textile and leather units. Obviously firms need incentives to hire workers, especially when minimum wages as well as statutory imposts are so high; others need lower power tariffs because India charges industrial units roughly double what it costs to produce the electricity, or concessional taxes because India's corporate tax rate is much higher than that in competitor countries. Concessions also need to be given to make up for India's higher infrastructure costs.

With more legal challenges likely to bilateral concessions, the government—at the Centre and the states—has no option but to make the business environment more friendly; in other words, have irreversible and lenient regulation, flexible labour laws and ensure clearances are speedy and that all contracts are honoured. If it is easy to do business, companies don't really need any sops. Similarly, when there is a flaw in the policy environment, fix it for everyone. The central government did well not to grant Apple the import duty concessions it wanted to increase its manufacturing in India, but it is clear the current phased-manufacturing-programme—this uses high import duties to discourage imports—for mobile phones isn't working either; the solution, then, is to look at a better policy to encourage genuine mobile phone manufacturing in India, and apply this for all manufacturers.

## SourNOTE

Tamil filmmakers “notify” a ban on reviewers who judge their films harshly from press events and screenings

**PRODUCERS FROM THE** Tamil film industry have said that any film critic or reviewer judging a movie, its cast or crew too harshly—or, in the words of the producers' unions, “more negatively than warranted”—shall be banned from future industry events, including screenings, success parties, etc, along with being served a legal notice. This move, reports say, is aimed at reducing the unmanageable costs production houses have to bear while organising press events for their films, a large portion of which goes towards paying, and catering to media persons who come to such events—a practice now discontinued by film industry elsewhere. Although the notice doesn't seem to have any legal standing—critics and reviewers agree that published negative reviews alone don't make the general public develop an unfavourable opinion of the film—the attempt to curb free expression and rather immature counter-move are not only wildly irresponsible but also laughably absurd.

Today, for most of the multiplex-going public, the decision to watch a movie is based on the opinions it garners on social media, not on any one critic's take. Would the producers' unions then want all individuals voicing negative opinions against a movie to be banned from watching their movies in the future? Besides, while this declaration was made with regard to local film critics and reviewers, the fact is that technology has invalidated all notions of geographic isolation of ideas and conversations—an individual sitting in a multiplex in Delhi is as capable of influencing the opinions and decisions of her friends in Tamil Nadu as any local film critic. While the poor wording of the notice has since been apologised for, and a modified addendum to the statement released, this controversy presents the perfect opportunity for the Tamil film industry to review their own filmmaking practices to realise that it isn't the review of a film that makes it a commercial failure but many factors such as content, production quality, etc,

## CHOKING INVESTMENT

THERE IS NO APPARENT BASIS FOR TAXING FPIS DIFFERENTIALLY BASED ON THEIR LEGAL STATUS. THE MOVE WILL CERTAINLY IMPEDE INDIAN CAPITAL MARKETS' ABILITY TO ATTRACT FRESH FLOWS

# How FPI taxation hurts small investors & FDI

**FPIs, WITH INVESTMENTS** in Indian equity markets of around \$450 bn, are a critical source of capital for the growth of the Indian economy. FPIs play a large role in helping the government reach its ambitious target of divestment and fund India's current account deficit. Unfortunately, India's unstable and unpredictable tax regime is giving them pause. Frequent changes in taxation and regulations, and the imposition of new surcharges without a formal consultative process are tarnishing the perception of Indian capital markets among FIIs.

The imposition of long term capital gains (LTCG) taxes in last year's budget has already taken its toll on FPI interest in India. We have not yet seen the full impact because, since the imposition in last year's Budget, markets in India have been depressed. Once markets recover, the full brunt of the imposition of the capital gains taxes and surcharges will become evident. India must head this off.

Equity markets are an important barometer on the state of the economy. Today, a large retail population invests savings in equities. Equity markets are important for raising resources for companies and for private equity funds exiting private companies. A problem for one constituency of the market is thus a problem for all, because of the interconnectedness of financial markets.

If India aspires to replicate China's economic success, an investor-friendly policy framework is a prerequisite. India stands alone, perhaps the only country in the world that taxes the income of foreign residents from the income earned on the sale of shares. Most countries exempt FPIs from taxation in their jurisdiction. The current regime makes investing in India less competitive and goes against global best practices.

The MSCI India index has delivered a compounded five-year annual return of 3.5%, (far) less than the returns delivered by China (estimated 7%) and the US (estimated 18%). Last year's Budget

**NANDITA AGARWAL PARKER**  
President, Asset Managers Roundtable of India

imposed a tax on FPIs' LTCG at the rate of 10% plus a surcharge, taking it to 10.9%. The latest Budget raises this tax to 14.92% for FPIs set up as non-corporate bodies. This raises the effective rate of capital gains tax on FPIs constituted as non-corporate entities vis-à-vis those organized as corporate entities or firms. For instance, the effective peak tax rate on short term capital gains tax on sale of equity shares for a FPI constituted as a company will be 16.38%, whereas the corresponding rate for a FPI organised as a trust will be 21.37%.

Imposing LTCG created several operational challenges dissuading genuine FIIs from investing in India. In order to mitigate any friction on account of taxation, the government should revert to the earlier regime of exempting FPIs from LTCG taxation. Taxing LTCG strikes at the heart of the fund management business.

First, capital gains are not an income, they are not something that come to you regularly. Second, the current tax regime goes against the nature of the business of fund management, especially for foreign funds, which are open-ended. Over the course of the year, the FPI fund entity has to estimate and pay the tax, making it difficult to calculate the NAV of a fund, leaving it subject to interpretation and unfairly penalising some investors. The problem arises because the taxable entity in India is the “fund” and it is not possible to attribute the taxes paid to the underlying investor.

The fund can't issue a tax credit certificate to each individual investor to claim the credit for the taxes paid in India. This leads to a situation where the investor would be taxed twice on

the same income, once in India and the second time in their country of residence. The taxes are effectively an expense for the investor and would make a sharp dent on their returns from Indian markets.

In addition, around 50% of the world invests passively via index funds/ETFs. Returns on index funds/ETFs in India are unable to replicate the returns on the index because the index does not have any taxes in it. Thus, all India index funds are underperforming their benchmark index, making them even more uncompetitive compared to their global counterparts. Most US pension funds are not subject to capital gains tax in the US, so taxing their capital gains in India eats into their returns without giving them the ability to get a tax credit.

Moreover, in a year when the rupee depreciates, the FPI fund entity would be paying taxes on notional gains in rupees while the fund would be losing capital in dollars. These issues create substantial hurdles for new foreign portfolio flows.

Additional surcharges on capital gains tax worsen the situation.

A significant proportion of FPIs, an estimated 40%, and (about 95%) of Cat III AIFs are set up in non-corporate form and represent small investors through pension plans or otherwise. This has the potential to cause negative impact on small investors and, therefore, be very disruptive for the capital markets. As things stand, these pooling vehicles have

not been able to provide adequate returns from Indian markets.

Our research shows there is no other tax jurisdiction that targets non-corporate entities such as “trust” structures. Why this mistrust of trust structures in India when the NIIF was itself set up by the Government of India as a trust? (May be, UTI too). Most pension funds (global FPIs) and Category III AIFs (India-based pooled funds) are set up in the form of umbrella trusts with segregated schemes to effectively ring fence liabilities (on similar lines as ‘mutual funds’ in India). These are global standards used by large and small institutions for ease of doing business and consistency.

Admittedly, a differential surcharge is currently applicable to corporate vehicles vis-à-vis others. With the proposal to now increase the surcharge, the impact

on the effective tax rates for FPIs (driven by their legal status) is highly significant. In addition, given that this change will be effective April 1, 2019, in the case of open ended funds, where investors have already exited, the implementation of the higher tax will create additional challenges. Such a high delta in effective tax rates, in our opinion, is

possibly unintended and certainly not desirable. It results in an arbitrage between FPIs, driven by their legal status, and thereby has the potential to tarnish India's reputation as a country with stable tax policy for foreign investors.

There is no apparent basis for taxing FPIs differentially based on their legal status. The higher surcharge will impact a number of large foreign mutual funds and pension funds investing in the Indian markets for the long term, which are typically organised as non-corporate vehicles in their home countries. This will certainly impact the competitiveness of Indian capital markets and impede their ability to attract fresh flows.

## LETTERS TO THE EDITOR

### Malnutrition malaise

There is nothing which is of more significance for survival, if not a decent living, than nutrition. Obviously, there is nothing worse than malnutrition to make the chance of survival bleak. There is no sight more distressing than anaemic children. There is no denying the fact that hunger and starvation persist in our country. Malnutrition stunts the growth of children and renders them incapable of growing into full-fledged adults. The circumstances in which you are born define and decide your life. Children born in impecunious circumstances suffer most from malnutrition. It is all the more reason for the state to intervene to provide adequate nutrition to all. Providing food security should be the top priority of the government. Funds for food to all yield great returns, helping in unlocking the citizens' full potential and strengthening the country's workforce. Governance can be termed 'good' only when it banishes hunger and starvation from our land. We all wish that India becomes a \$5 trillion economy and a superpower. But, then, we cannot leave the problem of malnutrition faced by the impoverished masses unaddressed.

— G David Milton, Maruthancode

### Temporary reprieve

The coalition government in Karnataka has earned a temporary reprieve with the Speaker K R Ramesh Kumar deeming eight of the 13 resignations submitted to his office by coalition MLAs invalid. The erring legislators have been given two days time to seek an appointment, appear before him in person and submit their resignations in the “prescribed format”. While the move has helped the coalition to buy more time it is apparent that the coalition is fighting a losing battle.

— N J Ravi Chander, Bengaluru

● Write to us at feletters@expressindia.com

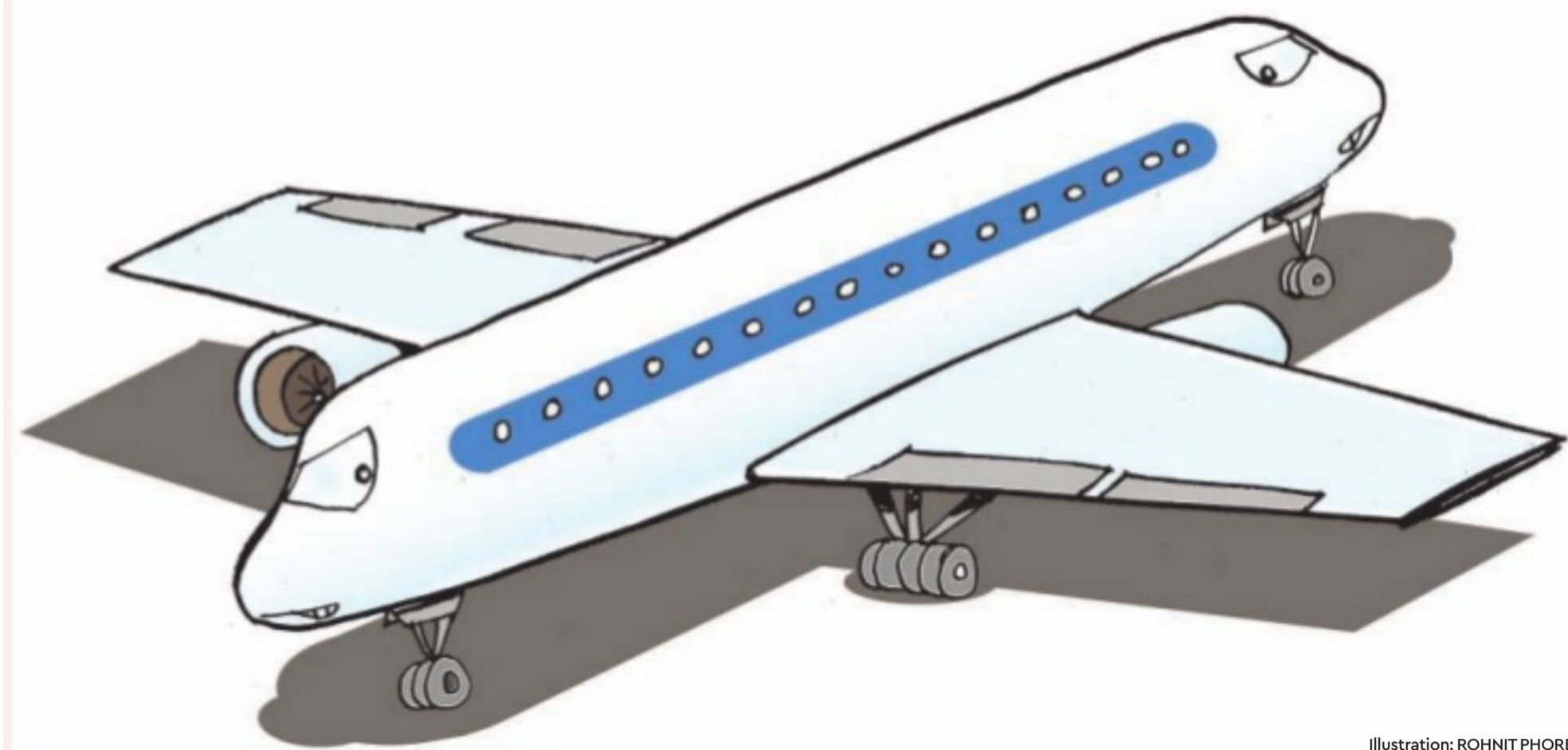


Illustration: ROHINIT PHORE

**HETAL DALAL**

The author is chief operating officer, Institutional Investor Advisory Services (IIAS)

# Now, IndiGo flies into turbulence

With two of the largest airlines in doldrums, IndiGo's addition to the pack is worrisome

**T**HE RECENT ALLEGATIONS of the Gangwal faction (RG group) against the Bhatia faction (IGE group), both promoters of InterGlobe Aviation Limited (IndiGo) with almost equal shareholding, revolved around three broad issues: (a) the Articles of Association (AoA) give the IGE group superordinate powers, (b) related-party transactions between IndiGo and the IGE group were not conducted in a transparent manner, (c) the board decided not to convene an extraordinary general meeting (EGM) at the behest of the RG group, even though they have the legal right to it. The mere suggestions of these—independent of which faction is correct—raises concerns over corporate governance standards at the board level.

Corporate governance at IndiGo can be strengthened. At a very basic level, the size of the board at six directors allows greater board control to the IGE group by virtue of their board nomination and executive director appointment rights (exhibit 1). The median size of boards in India is between 9 to 10 members, and therefore board expansion will create room for more independent directors. Rakesh Gangwal, who was appointed to the board in June 2015, was not a member of any of the board committees—which effectively means that the same set of 5 people formed every board committee. The engagement of IndiGo's directors post-IPO, reflected in poor attendance levels, was another element of concern: promoters together had attended less than 50% of the board meetings (exhibit 2). It is only in FY18 that attendance levels increased—perhaps as the Kotak Committee proposed harsh re-election criteria for absentee directors or that the differences had started to simmer. The root allegation made by the RG group is that of managing conflict of interest. This is reflected in IndiGo's audit committee

**The battle between the two sets of promoters may not have affected operations just yet. But we have yet to see an instance where governance issues don't eventually work their way into balance sheet challenges**

composition, which included an executive director since its listing—Aditya Ghosh while he was still around, and then Rahul Bhatia once he took over as interim CEO—until recently (exhibit 3). We believe having executive directors as members of the audit committee creates a conflict of interest that could best be avoided—more so, seeing that the main issues being raised are those of related-party transactions.

Investors must question the need for related-party transactions in the first instance. Why should allied services required by the airline be owned and provided by promoter-controlled entities? It is essentially the same question that Sun Pharma's investors are asking of Aditya Medisales. Such operating structures add a layer of opacity and create investor mistrust at the first inkling of wrongdoing. While the IGE group can continue to assert that the related-party transactions are a non-issue, such structures have often been the cause of financial leakages in other companies in the past.

IndiGo, in a sense, is the test case for what a differential voting rights (DVR) environment will look like. One of the concerns over DVR is that it could result in management entrenchment. In IndiGo's case, the disproportionate voting rights (because the RG group must vote with the IGE group) provides enabling conditions for board capture—which is perhaps reflected in the board decision to not acquiesce to hosting an EGM. The RG group will now have to use its privileges under regulation and host the EGM on its own (exhibit 4).

Investors recognise the difference between leadership (having someone at the helm who is accountable) and management/promoter entrenchment. But holding disproportionate power can be detrimental to stakeholders. It is in this context that SEBI needs to think long and hard once again about its decision to allow DVR. Independent of SEBI's decision on this, stock exchanges, too, must not allow companies to list on their platforms under these circumstances.

With two of the largest airlines in doldrums, IndiGo's addition to the pack is worrisome. The battle between the two sets of promoters may not have affected operations just yet. But we have yet to see an instance where governance issues don't eventually work their way into balance sheet challenges. It may be a while before lenders and

investors trust them enough to give them access to capital. Most will ask them to sort out their internal battle first. Essentially, this means that if the airline wants to buy or lease more aircraft to take advantage of the open slots, it will find it that much more difficult. Existing lines with banks may see some contraction if lenders believe the governance issues will impact credit quality. Some of these risks are now at the horizon. Investors must fasten their seat belt; this has the makings of a bumpy ride.

## Eventually, we will be an ageing country

**NEHA CHAUHAN**

The author is senior technical advisor, Advocacy &amp; Accountability, International Planned Parenthood Federation (SARO)

Demographic dividend won't stay with us forever; we need to act now

**P**OPULATION IN MANY countries across Asia and parts of Europe is ageing rapidly, with the number of older people projected to double by 2050. Luckily, for India, the demographic dividend that started in 2005-06 will last till 2055-56. This span is long due to differential population parameters and behaviour among different states. Simply put, demographic dividend can be considered as a period of potential boost in economic productivity that can result due to larger number of working-age population (16-64) in comparison to non-working age share of the population. The impact of the dividend, however, depends upon good health, quality education and skills, job opportunities and a lower proportion of young dependents for existing population.

The India Ageing Report by UNFPA states that "the current percentage of elderly population is expected to rise from 6% (2019) to around 19% by 2050 and though the growth rate of the elderly population dipped slightly in the 1960s and 1980s, it was always higher than the general population and the difference between the two has widened over the period. Undoubtedly, therefore, relatively young India today will turn into a rapidly ageing society in the coming decades."

Another aspect of changing population parameter is the feminisation of ageing. Data shows that sex ratio of elderly population increased from 938 women to 1,000 in 1971 to 1,033 in 2011 and is projected to reach 1,060 by 2026, with 48% of women falling under widowed category in comparison to 15% of men. This points towards a growing category of widowed and highly dependent category of old women.

Feminisation of ageing is not a phenomenon that cannot be dealt from the perspective of better living and health conditions. Healthy ageing will require a life cycle approach that starts early in the childhood and implemented throughout the course of life spanning across adolescents, young people, adulthood and older populations, and can be termed in relation to sexual activity, including before sexual maturity, when sexually mature and unmarried, and after the fertile period. Often, the lifelong effects of sexuality and reproductions such as multiple pregnancies, inadequate support during pregnancy, at the time of childbirth, and in the post-partum period make women more vulnerable to health issues in older age.

Income insecurity adds to the vulnerability of older population. India's occupation structure reflects that elderly are mostly engaged in the informal sector, with no post-retirement benefits. The government has made incremental progress on issues specific to ageing especially with its National Policy on Older Persons and its flagship Integrated Programme for Older Persons. There are other initiatives such as welfare funds, to take care of the basic needs of senior citizens, particularly food, shelter and healthcare to the destitute elderly. The question, however, is whether the welfare mode for elderly population is enough to maintain the dividend as well as a healthy and productive population?

There are examples from Russia and Thailand, where efforts for elderly-friendly communities and health systems are crucial parts of the strategy for older people. In addition to welfare measures, similar to those in India, some of the key components that are part of the strategy are efforts for stimulating of active long life, using knowledge, skills, labour potential of older generation for economic development, creating avenues for engaging in voluntary employment, adopting housing and transport for elderly, government-supported behaviour change communications to enhance solidarity between generations, and improving medical and social care catering to geriatric needs. There are numerous other innovative examples from other rapidly-ageing or aged societies from across the world.

Finally, an ageing India may appear to be a distant issue, but considering its rapid pace and scale, it requires immediate remedy not just at the policy level, but also in our health, education, employment and physical infrastructure systems.

**An ageing India may appear to be a distant issue, but considering its rapid pace and scale, it requires an immediate action**

### Exhibit 1: Rights of the IGE group and the RG group in IndiGo's Articles of Association (AoA)

Where either of the groups wishes to transfer their shares to a third party, the other group (non-transferring party) will have the right of first refusal (shares can be purchased by the group or any person nominated by it) or a tag along right.	along right will not apply to shares acquired by the groups after the IPO.	appoint the Chairman of the Board. (Clause 17.1)
Prior consent of the other (non-transferring) party will be required in case IGE or the RG group wants to transfer their shares to a competitor or to any person in a manner that will trigger an open offer.	None of the groups can acquire shares in a manner that will trigger an open offer.	RG Group has the right to appoint 1 non-executive director not liable to retire by rotation. (Clause 17.1)
The right of refusal of the groups	If the minimum public shareholding limit increases, the groups will be obliged to sell their respective stakes proportionately.	IGE has the right to appoint the MD/CEO/President of the company (Clause 17.4)
	IGE has the right to appoint 3 non-independent directors, 1 among these shall not be liable to retire by rotation. IGE also has the right to	Presence of 1 director each nominated by IGE and RG group is necessary to constitute quorum for board meetings (Clause 20.2)—the groups can waive this requirement.

Source: IndiGo's AoA; IIAS research

### Exhibit 2: IndiGo's directors' board meeting attendance

Director	FY16	FY17	FY18
Rahul Bhatia (Promoter)	30% (3/10)	38% (3/8)	50% (4/8)
Rohini Bhatia (Promoter)	50% (5/10)	25% (2/8)	75% (6/8)
Rakesh Gangwal (Promoter)	14% (1/7)	50% (4/8)	63% (5/8)
<b>Average attendance of promoters</b>	<b>33%</b>	<b>38%</b>	<b>63%</b>
Devadas Mallaya	100% (10/10)	88% (7/8)	100% (8/8)
Aditya Ghosh	90% (9/10)	100% (8/8)	100% (8/8)
Anupam Khanna	80% (8/10)	63% (5/8)	100% (8/8)
<b>Average attendance of the entire board</b>	<b>63%</b>	<b>60%</b>	<b>81%</b>

Note: Rakesh Gangwal was appointed to the board on June 25, 2015. Source: Annual Reports

### Exhibit 3: Composition of IndiGo's audit committee

Director	Category	2016	March 31, 2017	2018	Sept 30, 2018	Mar 31, 2019
M Damodaran	Independent Director	—	—	—	—	Chairperson
Devadas Mallaya	Independent Director	—	—	—	—	Chairperson
Aditya Ghosh	Executive Director	—	—	—	—	Member
Rahul Bhatia	Interim CEO/Executive Director	—	—	—	—	Member
Anupam Khanna	Independent Director	—	—	—	—	Member
Anil Parashar	Non-Executive Non-Independent Director	—	—	—	—	Member

Note: M Damodaran joined the board in January 2019 and Anil Parashar joined the board in October 2018; Source: Corporate Governance filings on BSE

### Exhibit 4: Procedure for calling EGM: Sec 100 (2) of Companies Act

- The Board shall call an EGM on the requisition made by shareholders.
- In the case of a company having a share capital: holding not less than 10% of the paid-up capital of the company on the date of receipt of requisition.
- In the case of a company not having share capital: holding 10% of the total voting power on the date of receipt of the requisition.
- Members should provide requisition to call EGM in writing or by electronic mode 21 days prior to proposed date of EGM.
- The notice should specify place, date, day and hour of the meeting & contain business to be transacted at the meeting. It is not mandatory to provide an explanatory statement for proposed resolutions. The requisitionists may disclose the reasons for proposing resolutions. The meeting should be convened at registered office or in the same city where registered office is situated on working day.
- Notice shall be signed by all requisitionists or by a requisitionist authorised in writing by all other requisitionists and delivered at registered office of the company.
- If the Board does not, within 21 days from the date of receipt of such requisition, proceed to call an EGM on a day not later than 45 days from the date of receipt of such requisition, EGM can be called and held by the requisitionists themselves within a period of 3 months from the date of requisition and reimburse any reasonable expenses from directors in default for holding the meeting.
- The EGM shall be called and held in same manner as any other meeting held by the Board.

## REGIONAL CAFE: TAMIL NADU

**I**LAYARAJA CAME INTO the Tamil film industry in 1976, and became its demigod. He is possibly the world's most prolific composer, having composed over 7,000 songs, provided film scores for more than 1,000 films, and performed in more than 20,000 concerts. He brought freshness into film music, provided hits constantly till he slowed down with the rise of AR Rahman and a slew of new composers. He continues to be worshipped by his fans, who are legion, and who refer to him as the maestro.

The composer has been highly litigious in the past few years, fighting for the rights over his music. His complaint is that he has not received his rightful dues and has been cheated over royalty payments. In 2010, he lodged a complaint with the Chennai police that a private firm had commercially exploited his music without his knowledge. The Echo Recording Company, with which producers of various films had entered into agreements, had not paid him royalty. They had sold the music rights to other companies illegally.

He managed to get injunctions against several companies from using his music. The composer also filed cases against karaoke apps, TV, FM channels, film director Shankar (of 2.0 fame) and whoever he thought had wronged him.

There was a wave of shock when he served a legal notice on singer SP Balasubrahmanyam (SPB), who has given a huge number of hits with the composer when

## Ilayaraja, music and copyright

Confusion over copyright is not going to go away any time soon

**SUSHILA RAVINDRANATH**

sushila.ravindranath@expressindia.com



he was performing concerts in the US. SPB had to stop performing songs composed by Ilayaraja. This created a huge controversy, and it was time for the Tamil music industry to discuss how royalties should be shared between musicians, lyricists and singers. Everybody was confused about who owned the song. The confusion has persisted ever since.

Legal opinion was divided. Many copyright lawyers felt that Ilayaraja's position was untenable. Performers have their own copyrights as per law. The singer is entitled to perform. The composer may be entitled to his share of the royalty. They say the Indian copyright law is a sticky subject. You can find everything you want to find in it, with almost every stakeholder finding

clauses and rules that justify her motive. In most cases, such claims lead to a torrent of confusion and litigation.

The Copyright (Amendment) Act, 2012, brought in sweeping changes to the existing Copyright Act, 1957. These changes include mandatory royalty-sharing provisions, statutory licensing regime for broadcasters, a new scheme for copyright societies, a safe harbour provision for internet intermediaries, etc.

Copyright societies are formed to collectively administer the works of authors and owners of such works. It is not practical for every author or owner to keep a track of all the uses of their work. When a person becomes a member of national copyright society, her work is expected to



be kept under better vigilance. Collection of all the royalties for the usage of the work becomes easier.

The business of providing licence for any dramatic, artistic, musical or literary work incorporated in cinematic or sound recording form should be carried out only through a copyright society duly registered under this Act. The period for registration granted to a copyright society is five years and it can be renewed before expiry of this period or at the end of it.

In India, songwriters and their publishers would assign or transfer to an organisation, such as the Indian Performing Right Society (IPRS), their right to authorise the public performance of their songs. In return, the IPRS would collect a

fee for every musical performance and distribute the money equally between songwriters and the owner (publisher) after deducting a service fee. Tamil film producers sell music rights to music companies who work with the IPRS. Whoever performs Ilayaraja's music pays the IPRS in consultation with his lawyer, which settles his dues. With so many parties involved in creating music, many grey areas remain.

Many hearings later, the Madras High Court delivered its verdict recently. Both the composer and his fans claimed that the judgment is a great victory for him. The Court ruled that he owned 'special moral rights' over his songs. It also entitles him to restrain or claim damages in respect of any distortion, mutilation, modification or

other act in relation to his work if such distortion, mutilation or modification would be prejudicial to his honour or reputation.

The judge held that Echo Recording, the defendant, too had the right to exploit the rights over the sound recordings obtained by it from various producers. According to legal opinion in substance the judgment confirms absolutely the rights of producers as owners of "sound recordings" in films, prior and post the 2012 amendment. The only limitation that is placed on the producer is the exploitation of the musical work in a manner other than as expressed in the sound recording, for example as a standalone instrumental piece. Similarly, the composer stands restricted in expressing the musical work as a sound recording in any other manner, for example as a song with different lyrics in another film.

According to a copyright lawyer, authorship is different from ownership. What Ilayaraja has got is his right over authorship. This judgment is no great triumph for composers as producers retain the rights. The rights of composers are balanced in the 2012 amendment granting irrevocable statutory entitlement to royalties for composers. Ilayaraja's gains by this are not substantial as the bulk of his work has been prior to the amendment.

With technology changing so fast and music being delivered through so many channels, confusion over copyright is not going to go away any time soon.