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'Cooling-off' and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive

Akhileshwar Pathak

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The Consumer Protection Bill, 2015 has been introduced in the Lok Sabha to replace the Consumer Protection Act, 1986. It proposes new rights for the consumer and reforms in business practices. A significant aspect of the bill is the right of the consumer to cancel a contract, without giving any reason or explanation, within 30 days of its making. A contract once made is binding on the parties. The courts do not interfere with this founding principle as it would bring uncertainties in commercial and business lives. In theory, the legislature has the power to make any law. However, law is supported by precedence and social legitimacy. The right of the consumer to cancel a contract has been termed as 'cooling-off'. We explore the existence of the law on cooling-off in other jurisdictions and its justification in the context of business practices in India.

LAW, IDEAS, AND STRATEGIES

Law is associated with many ideas and has several facets. In this study, we highlight the fact that law comprises both legal ideas and strategies (Pathak, 2002). While the legislators are the authors of law, they do not invent the legal ideas. Legal ideas arise from practices in relation to and in opposition of other ideas in the society. In this play of ideas in society, some ideas become dominant. These ideas get picked up by the legislators and are refined and made as a law. Once enacted, the idea becomes the ruling legal idea, backed by the state. Of course, around the idea, now sanctioned as the law, further play of ideas continues.

While law is about legal ideas, for governance, merely stating the legal ideas is not adequate. The other facets of law are functional, instrumental, and strategic, calculated to produce certain specific effects. Law has to provide specific and detailed directions to the subjects to be meaningful and effective. The details of the law too come from practices. Following Foucault (1980), we argue that, in practice, parties are engaged in strategies and counter-strategies to outflank each other. The play leads to the development and deployment of strategies. Legislators pick up these strategies, refine and adapt them, and turn them into law. Once put in use,

KEY WORDS

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Consumer Contract

the governed come up with strategies to get around these functional imperatives. In response, the state gets back with its counter-strategies to put things in place. Thus, the play of strategies and counter-strategies and the development of law continue. Thus seen, law is a dossier of strategies fashioned in social practices. While the details of the law are to be derived from the legal ideas, at times, the strategies may well stretch the ideas and give rise to new legal ideas. Through these discourses, legal ideas and the functional aspects of law are continually shaped and reshaped.

EUROPEAN UNION DIRECTIVE ON COOLING-OFF

The European Union (EU) is a common market and is mandated to develop common practices among the member states to facilitate and integrate trade and commerce across the Union. This ranges from consumer rights to trade practices. It has passed a directive giving the right to consumers to cancel a distance contract within 15 days (European Union, 1997). A distance contract is one where the parties make a contract, without being physically present, through some means of communication. Online contracts are distance contracts and the directive applies to these contracts. In fact, the predominant application of the directive is on contracts made with e-retailers. However, the legal principles and even the details of the law were developed well before e-retail was born. The electronic medium only provided a new means of communication between the parties who were at a distance.

Mail order was the first form of distance selling, where the buyer and the seller made a contract through post. Mail order started as early as 1855 in the UK (Coopy, O'Connell, & Porter, 2005, p. 14). In a mail order, a seller would widely disseminate its product catalogue to the public. A customer could request for a product which would get delivered through mail. The money could have been paid in advance or at the time of delivery. In the UK, Pryce-Jones set up the first modern mail order in 1861, selling flannel. By the end of the 1870s, he had 40,000 customers and the number grew to 100,000 a few years later (Coopy et al., 2005, p. 15). The expansion of the post office and railway network created the context for the mail-order business to reach the rural areas. Thereafter, the business continued to grow. By the mid-1970s, the mail-order share was 5 per cent of

the total retail sales in the UK. Seven out of 10 households were exposed to the catalogues of one of the five big mail-order companies in any year (Coopy et al., 2005, p. 1).

In the 1980s, in Europe, other means of communication further expanded distance contracts. Print medium came to take different forms, including addressed letter, unaddressed letter, and newspaper advertisements. Telephone became another means of communication, leading to telemarketing. Sellers solicited customers through advertisements on the radio and television. The proliferation of means of communication also brought malpractices in distance contracts. By the late 1980s, the individual EU countries noticed that the customers were enticed to contract with limited information. The EU, as a common market, was mandated to have uniform practices for the benefit of the consumers. It also took up the problem and developed a draft directive (Commission of the European Communities, 1992).

The draft recounted the long history of distance contracting through mail order. The mail-order companies had given the right to the buyer to cancel the order after receiving the goods. The draft noted:

Since the famous mail-order catalogue Bon-Marche was first published in 1865, certain traders have allowed the consumer the right to cancel the contract when he receives the goods.... (Commission of the European Communities, 1992, p. 12)

The companies engaged in mail order gave the option to their customers as a means to ensure them of their products and gain customers. The practice had been in vogue since the implementation of distance selling. This was known as 'money-back guarantee'. The practice was widespread in mail-order selling, but not always in other sectors using new technologies like television and telephone (Commission of the European Communities, 1992, pp. 11–12).

The EU countries had started legislating on the subject (Barratt, 1993). A remedy for the disadvantage of the consumer in distance selling already existed in the right of the consumer to cancel the contract. Denmark introduced a legislation on distance selling in 1987. This included a seven-day 'cooling-off' period, within which the buyer could return the goods and get his money back.

Luxembourg introduced a legislation which gave a 15-day cooling-off period. By the time the EU came to prepare the draft directives, all the 15 member states had a 'cooling-off' period in distance selling, seven by law and eight by voluntary compliance. The idea got readily picked up as a protection for the consumer in distance selling. The principle got included in the final directive, passed by the European Parliament in 1997 (European Union, 1997).

The EU directive is binding on the member states. The member states have to give effect to the directives as a domestic law. The directives find final shape and use in the form of a domestic law. We will take the law in the UK as reference. The UK has the European Communities Act 1972, under which the government is authorized to make regulations to give effect to the EU directives. The regulation is an instrument made by the executive. The UK adopted the directives in the Consumer Protection (Distance Selling) Regulations 2000. The regulation has since been replaced with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. We will refer to the EU directive and regulations of the UK alternately.

IMPLICATIONS OF COOLING-OFF

The right of the consumer to cancel a contract has different implications for sales and service contracts. Thus, we will explore cancelling a contract under two different heads.

Sales Contract

We first take a sales contract. The term used in the regulation for the right of the consumer is 'cancel the contract'. A popular term for the right is 'cooling-off', which is used in the directive (European Union, 1997, p. 8). Another popular description is that the buyer will return the goods and get his money back. A precise expression for this right, in contract law, is termination for convenience. When a contract is terminated, the parties do not have to perform further duties under the contract. A party may have the right to terminate the contract for a breach of a contractual duty by the other party. This is termination for breach. In this case, the party in breach will pay damages for the breach. A termination for convenience is for the benefit of the party and neither party is liable for damages to

the other. The parties put themselves in a situation they would have been in if no contract had been made. Both the parties restore the benefit drawn from the contract. In a sales contract, the buyer would return the goods to the seller and the seller the money. As it is the buyer who wants to cancel the contract, for no fault of the seller, the buyer will bear the cost of returning the goods to the seller. This should be done soon after terminating the contract. Similarly, the seller must refund the money within a reasonable time of the buyer cancelling the contract.

The buyer must return the goods to the seller in as good a condition as he got it. This may or may not be possible for the buyer to do. If the seller is not satisfied with the condition of the returned goods, he can cover the losses. The loss to the seller need not be in any physical damage to the goods. It can be anything that brings down the value of the goods for the seller. More generally, we can say that any depreciation in the goods or diminution in its value should be borne by the buyer. Correspondingly, if the seller delays in returning the money, he must pay the interest.

We can now detail out other aspects of the right of the consumer to cancel a sales contract. The object of the right is to maintain parity with a buyer who is buying goods face-to-face. A distance buyer, unlike an ordinary buyer, does not get to see, touch, or feel the goods. In a distance contract, the consumer can examine the goods only when they are delivered. Therefore, the cooling-off period should start only after the delivery of goods.

How long should the cooling-off period be? A contract once made becomes final on the parties. The cooling-off right suspends this finality for the benefit of the consumer. A long period is to the detriment of the trader. On the other hand, the buyer must be given a reasonable time. The time to be given to the customer is not for an extensive run or use of the goods to find defect in them or their suitability. A buyer in a shop does not get to do this. If the goods turn out to be defective, or not suitable for the contracted purpose, there are other remedies for the buyer. The buyer can terminate the contract for the breach of an implied term and claim damages.¹ The purpose of cooling-off is to give the customer as much opportunity as a buyer in a shop has. The regulation gives 14 days. The Consumer Protection Bill, 2015 gives 30 days to the consumer to cancel a contract. In the

context of India, where the means of communication are still developing and the concept of the consumer cancelling the contract is novel, a 30-day period for cancelling the contract is reasonable.

A significant concern of the law, at the level of policy and detail, is that the trader may claim that the goods are not in the condition he delivered it to the buyer. The consumer would necessarily unpack the goods. This cannot be taken to be diminution of the goods. He will touch, feel, handle, and use the goods. The trader cannot complain about it. The question, however, is: How much handling of the goods should the customer be allowed? The answer would be only as much as a customer would get to handle similar goods in a shop. The consumer should cover losses arising from excessive handling of the goods. The regulation (Consumer Contracts [Information, Cancellation and Additional Charges] Regulations, 2013) defines excessive handling as:

[H]andling...beyond what is necessary to establish the nature, characteristics and functioning of the goods if, in particular, it goes beyond the sort of handling that might reasonably be allowed in a shop.

We can now go through further details associated with the exercise of the rights of the consumer. It is for the consumer to communicate the decision to cancel the contract. To make it clear that the consumer has a right to cancel the contract, and to see that the trader does not evade it, the regulation requires the trader to supply a cancellation form to the consumer. This can be sent electronically or put on the webpage of the trader. The consumer can apply in this or in any other durable form to clearly indicate that he is cancelling the contract. The consumer has to send the intimation before the 'cooling-off' period gets over, though the communication may reach the trader after the cooling-off period.

The trader should return the money without delay. However, the trader can make deduction for diminution in the value of goods. The regulation has fixed it at 15 days of the trader receiving the goods. The reference point has to be the trader receiving the goods. It is only after receiving the goods that he can make out any diminution in the value of the goods. The contract may have provided for the trader to collect the goods from the consumer. However, if the contract has not provided for it, the consumer would send the goods to the trader,

at his own expense, within 14 days of communicating his decision of cancelling the contract.

Service Contract

In a service contract, unlike the sale of goods, there is nothing to touch or feel. A service may or may not be of a kind which can be explored or demonstrated. For example, a person can look at a hotel room before booking it, see a taxi before getting in it, or look at a hospital before consulting it. This is not the same as actually getting a demonstration or experience of the service as experiencing the hospitality of a hotel, getting a taxi ride, or getting a procedure done. The customer experiences things surrounding the service, not the service itself. Furthermore, other services may not even be amenable to this.

In a face-to-face contract, the consumer gets to explore and gather information about the service. In a distance contract, the consumer may have to contend with limited information provided by the trader. However, this information asymmetry is addressed by the requirement of the trader mandatorily providing certain kinds of information. The parity may thus be restored. Why then should the right to cancel a service contract be given? Undoubtedly, seeing a hotel room before contracting and booking a hotel room on the Internet are not the same thing. Deciding to book a hotel room on the basis of a picture is significantly different from actually seeing a room. Seeing a taxi before getting in cannot be substituted by booking a taxi on the Internet. But giving a cooling-off period is not going to bring parity. Nothing short of making a contract face-to-face would. The only way in which parity can be brought about, for example, in the case of a hotel, is to upload a video providing a complete walk-through of the hotel.

Furthermore, even in an ordinary contract, the customer may have no access to things surrounding a contract. For example, a person booking a river cruise could be buying the ticket at the city centre or at a hotel reception. A taxi may have to be booked without seeing the taxi or a driver as in the case of a pre-paid taxi at airports. A cinema ticket is booked at a booking counter, and only then the customer gets access to the premises. Alternately, a person may see a hotel room and book it then and there through a mobile app. A taxi can be examined and prospected for hiring, but the booking

may still have to be done on phone or through a mobile app with the centralized office of the service.

The reason for giving the right to consumer to cancel a service contract is actually, 'cooling-off', to get out of a contract made impulsively. While mail order was prevalent for more than a century, it was principally meant for selling of goods. Even when services started becoming prominent in the economy, by its nature, it was not amenable to be sold by mail order. It could be advertised through mail order but not readily sold through it. It is the new means of communication, like individual mail communication, fax, phone, television, and computers which brought in distance selling of services in the 1980s. The EU noted this in the 1980s itself:

New information technology is being increasingly used for communicating information to consumers, for example, videotext links computer databanks via telephone cables to television sets in the home. These are systems which will permit orders to be passed from the consumer's home to the supplier...While the importance to the consumer of the freedom to acquire goods... cannot be over-emphasised, the service sector is also important. (Commission of the European Communities, 1992, pp. 13-14).

The communication technologies transformed distance contracting through the 1980s. The draft directive on distance contracting, prepared by the EU in 1992 noted:

The major innovation in this market is the widespread use of new technologies both to offer products or services and to obtain the consumer's order. Among the means used to disseminate the offer are the telephone (telephone canvassing), radio, television and home computers.... There are two basic trends: Distance selling is being used for products or services which were formerly not sold in this way (foodstuff, services); more and more firms are marketing their products or services directly by these new methods. (Commission of the European Communities, 1992, p.10).

The reason for talking of goods and services in the same breath in relation to the right of the consumer to cancel the contracts was that a distance contract was 'much more in the nature of an impulsive purchase'. Consistent with this, the draft article, thus, contrasted between goods and services:

Whereas the consumer is not able to see in concreto the product or ascertain the service provided at the moment

when his custom is solicited; whereas the consumer should be permitted to cancel the contract after receiving the product or service. (Commission of the European Communities, 1992).

A consumer entering in a service contract was to be given the right to cancel the contract as he could not fully ascertain the contract he was getting into. It was actually cooling-off, giving an opportunity to the consumer to withdraw from a contract made impulsively. The basis was accepted in the 1997 consumer directive of the EU and has since been continued (European Union, 1997).

We now turn to working out the details of cancelling a service contract. Services have a wide variety and multiple possibilities. A service yet to be provided is amenable to be cancelled. Simply, the service provider need not provide the service. Unlike a sales contract, nothing is to be returned to the service provider. The service may be of a kind that gets consumed irretrievably, for example, a taxi ride or a haircut. Such contracts cannot be cancelled. Other services get performed over a period of time. For example, in the case of a telephone subscription, on cancellation of the contract, the telephone company need not provide the service further. However, the consumer must pay for the part of the service that has been consumed under the contract. The value of the service availed can be calculated on the basis of the total value of the contract. A way out of these difficulties is to defer the provision of the service till the cooling-off period unless the consumer requests for it. This is what the regulation does. If the contract is fully performed, the consumer cannot cancel the contract. If the contract is only partly performed in the 'cooling-off' period, the customer can cancel the contract. However, he will have to pay for the part availed according to the terms of the contract. Consistent with this, the cooling-off period should start when the contract is made.

It would be unfair to the trader or impractical in relation to certain kinds of goods or services to give the right of 'cooling-off' to the consumer. Sale of perishable goods and newspapers is an example of this. Some goods or services may have a fluctuating price. Giving the 'cooling-off' period to the customer in such cases would be to the detriment of the trader. In transportation, hotel, and entertainment industries, a last-minute cancellation by the customer, within the cooling-off period, would mean the supplier going 'empty seat'

(See Hall, 2007).² This will be a complete loss to the service provider. A law dealing with a specific sector may have provided a cooling-off period. It may be best for the sector-specific law to exclusively provide for it. Thus, where appropriate, contracts should be exempted from the application of the law. This is best done by the bill setting out the policy and delegating the power to the Central Government to make rules to provide further details.

All Consumer Contracts

The bill gives the right of cooling-off to all consumer contracts. We can analyse this separately in relation to a sales contract and a contract for service. In the Western world, it has become a standard practice for the retail stores to give the right to the consumer to return the goods and get his money back. As the consumer already has this benefit, the legislature did not have to make a law to this effect. If the consumer protection were to slacken, the current 'return and refund' policy of the retailers, as it happened in the case of distance contracts, would readily get turned into law. Thus, the effective law in the EU countries is that a consumer can cancel any sales contract.

How does a consumer in India fare in relation to a sales contract? In India, leave alone a voluntary return policy, a retailer does not even entertain a complaint of the customer of the goods being defective. The following is a common experience of a consumer, shopping in the best of the stores in metros. The consumer buys an expensive mobile phone, of a reputed brand, and takes it home. The same day, he notices problem(s) with the phone, say, the battery draining out or the sound from the speaker not being loud enough. The consumer is upset with the purchase and approaches the store the same day to return the phone. As the phone is not of merchantable quality, the buyer has the right to return it. The contract is orally made and not subject to any terms. Thus, the manufacturer's warranty that the consumer can only get it repaired and not terminate the contract does not apply. Invariably, the manufacturer would have posted an employee in the shop to promote the brand. The retailer has trade relations with the manufacturer to concede the defect and take it back. And yet, the retailer may refuse to take back the goods and insist the consumer to take it to the service centre of the manufacturer. This is a common experience in the reputed stores in cities, which

spend large amounts on advertising their products.³ One can imagine the plight of the consumer in smaller towns.

An ordinary consumer is expected to have the benefit of examining the goods before buying. A big retail store would have the products on display and a salesman would give the demonstration of the product to the prospective customer. However, the practice may be confined to big retailers in big cities. Most retailers have a limited stock. The retailer would open the box only after the customer purchases the goods. Till then, the retailer would only highlight the features of the product. At other times, the retailer would contract with the customer first and then procure it for him. Thus, like a distance contract, the consumer may not have the benefit of seeing and examining the goods. He may just have to go with the advertisements put up by the manufacturers and the representations made by the retailer.

Unfair and false advertising abound in India. Our laws have evolved, but there is no regulation on false and unfair advertising. The competing companies rival to outdo each other in false advertising. A consumer decides to buy a product on the basis of the advertisements. Only after making a purchase does the consumer realize the misrepresentation. The consumer should be able to set aside the contract, as if it was never made. However, the retailer would refuse to entertain any complaint and disclaim any responsibility by stating that the advertisements were issued by the manufacturer. The law must protect the consumer. Thus, there is a basis for the proposed protection by the bill in the law and practices in other jurisdictions as well as in the business practices in India.

A consumer contract for service is on a different footing. Some contracts, by their nature, would not be amenable to be cancelled. In other contracts, the prices may be dependent on the financial markets or fluctuating, making a cancellation an onerous hardship on the service provider. An example of this kind of a service is a person buying an airline ticket. Such contracts are necessarily exempted from the application of 'cooling-off'. There is much wider precedence for 'cooling-off' in service contracts. The EU has separate directives for consumer protection in relation to the services of banking, credit, insurance, personal pension, and investment. Among others, these services provide a cooling-off period (EUR-Lex, 2008). In the UK, the

Consumer Credit Act, 1974 allows a 14-day cooling-off period in consumer credit (see the Consumer Credit Act, 1974); the Timeshare Act 1992 allows a 14-day cooling-off period in a contract of timeshare. A timeshare contract is where a person buys the right to use a property, typically holiday homes, for a limited period of time each year. The Timeshare Act, 1992 gives the right to the buyer as sales representatives aggressively market the product (House of Lords, 2007). In India, a cooling-off period is provided for insurance contracts. The presumed reason for this is that the insurance agent may have prevailed upon the customer.

The application of 'cooling-off' takes the following shape in a service contract. The trader is not to provide the service till the cooling-off period is over. The customer can choose to get the service earlier by forgoing his right to cancel the contract. In the case of cancellation, the trader only has to return the money to the customer. Thus, in the case of a service contract, the only cost on the trader is the additional paperwork of cancelling the contract and refunding the money.

In India, the experience of a consumer of a service contract, ranging from professional education to financial services, is worse than the case of buying goods. In the absence of regulation, false and unfair advertisements are common. The trader or the agent is not interested in giving a complete or true picture, and indulges in half-truths. The consumer is not encouraged to read

the terms. Even if the consumer reads the terms, as a lay person, he will not be able to make sense of it. Once the consumer has given his money, the only remedy for him is to approach a consumer forum to contest and establish that the contract was caused by misrepresentation. Thus, there is a basis for the proposed protection by the bill in the law and practices in other jurisdictions as well as in the business practices in India.

CONCLUSION

The Consumer Protection Bill, 2015 gives the right to the consumer to cancel any contract. There is support for this bill in the law and practices in other jurisdictions too. In the European Union countries, a consumer has the right of cooling-off in distance contracts. This applies to both, contract for sale of goods and contract for services. The right of cooling-off has been extended to several services even when these are made face-to-face. The right was not extended to face-to-face retail sale as it has become a standard practice for the retail stores to give the right to the consumer to return the goods and get his money back. In India, the trader, leave alone voluntarily giving the right of cooling-off to the consumer, does not even entertain complaints of defect in goods or deficiency in services. The right of cooling-off, proposed in the bill, has basis in the law and practices in other jurisdictions as well as in business practices in India.

NOTES

- 1 After a certain period, the buyer will only have the right to get the goods repaired or replaced and not terminate the contract.
- 2 These questions have become a matter of court judgement and contestation by several industries.
- 3 This is based on personal experience.

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Akhilshwar Pathak is a Professor at the Indian Institute of Management, Ahmedabad, specializing in the field of law. For more than a decade now, he has researched in the field of business law. He contends that as business law is drawn from common law, it is historically generalized common

Hall, E. (2007, September). Cancellation rights in distance-selling contracts for services: Exemptions and consumer protection. *Journal of Business Law*, 683–700.

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sense. Following this position, he reorganizes classical fields of contract law and the law of sale of goods in a new analytical framework. His books include *Contract Law*, *Law of Sale of Goods*, *Special Contracts*, and *Legal Aspects of Business*.

e-mail: akhil@iimahd.ernet.in