

## REAL ESTATE (REGULATION AND DEVELOPMENT) BILL, 2013– SOME MISSING LINKS

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### Abstract

The Real Estate Sector is emerging in the public spotlight as prominent societal and economic concern. The recent developments have evinced that there is a stunning need of streamlining the legal system covering Real Estate Sector. Housing price inflation, property right protection, regulating real estate agents, promoters and builders, environment sustainability and much importantly, to provide more housing to low- and medium income urban families is core issues confronted with this sector. In the backdrop of the core issues attached to Real Estate Sector, the government of India has decided to come out with regulatory mechanism by passing Real Estate (Regulation and Development) Bill, 2013. The purpose of this article is, under the context of missing links of the Bill, to analyze the ability of basic policy assumption governing the Real Estate Sector and to determine the profitability of the Bill in accomplishment of its avowed purposes. The author is of the opinion that a thorough review of the past and current operations of the Real Estate Sector reveals the new Bill could bring remarkable changes in improving the efficiency of the government in regulating the Real Estate Sector. To achieve this end, restructure and revision of the Bill in terms of insertion and deletion of the provision should carefully be done by the government as the present Bill could scale the reliability and relevance of the system down.

**Keywords:** Real Estate, Housing, Bill.

### Introduction

Over the past few decades, the demand for housing has increased manifold importance. Access to adequate housing can be a precondition for the enjoyment of several human rights, including the rights to work, health, social security, vote, privacy or education.<sup>1</sup> Safe, secure and adequate housing is a fundamental

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<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing - Fact Sheet No. 21/Rev.1*, at 9 (Nov.2009).

need of man. Housing is a key input in economic, social, and civic development.<sup>2</sup> Realizing the gravity of the problem of the housing, right to housing has been recognized under international<sup>3</sup> as well regional<sup>4</sup> human rights law as the basic right of the individual. In the line with the international human rights law, various States have also carved their legal system so as to encompass right housing as the fundamental right of the citizens.<sup>5</sup> The Indian judiciary has demonstrated commendable interest towards right to housing and interpreted this right under the context of right to life provided under article 21 of the Constitution.<sup>6</sup> Paradoxically, in spite of significant increasing trend of housing<sup>7</sup> on account of government's efforts through various schemes, it has not been able to cope up with the increasing housing demands.

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<sup>2</sup> National Housing Bank, *the Report on Trends and Progress of Housing in India* 100 (2013).

<sup>3</sup> See art. 25 (1) of Universal Declaration of Human Rights, 1948, 217A (III), UN Doc A/810 at 71 ; art. 11 (1) of International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3; art. 17 of International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 ; art.27 (3) Convention on the Rights of the Child, 1989, 1577 UNTS 3 ; art.21 of Convention relating to the Status of Refugees, 1951, 189 UNTS 137 ; art. 5 (e) (iii) of Convention on the Elimination of All Forms of Racial Discrimination, 1965 665 UNTS 195; art. 14 (2) (h) Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13 (CEDAW); Art. 43 (1) of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, A/RES/45/158 ; art. 28 (1) Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006, A/RES/61/106, Annex II. See also, Para 8 of the Vancouver Declaration on Human Settlements, 1976; para.39 of the Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action, 1996; para.6 of Declaration on Cities and Other Human Settlements in the New Millennium, 2001; General Comment 7 of the UN Committee on Economic, Social and Cultural Rights, 1991.

<sup>4</sup> art.2 (1) *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Nov.4, 1950, ETS 5; art.22 of *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 Nov.22, 1969.

<sup>5</sup> art.26 of the Constitution of the Republic of South Africa, 1996; Section 35 of Constitution of the Republic of Fiji, 2013; art.14 (2) of Constitution of the Republic of the Philippines, 1987; art. 28(e) of the Constitution of the Republic of Indonesia, 1945; art.2 (3) (m) of Constitution of Bosnia and Herzegovina, 1995; art.97 of the Constitution of the Republic of Latvia, 1998; art.32 (1) of Constitution of the Federal Democratic Republic of Ethiopia, 1994.

<sup>6</sup> See *P.G. Gupta v. State of Gujarat and others* 1995 Supp. (2) SCC 182 ; *Olga Tellis v. Bombay Municipal Corporation* AIR 1985 SC 2039; *Sudama Singh and Others v. Government of Delhi and Anr.*, and *PK Koul v. Estate Officer and Ors.; Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, (1997) 11 SCC 121.

<sup>7</sup> According to Ministry of Housing and Urban Poverty Alleviation the growth rate in the number of households for the period 1971-1982, 1981-1991, 1991-2001 and 2001-2011 are 53.43%, 38.91%, 31.92% and 46.88% respectively. See Ministry of Housing and Urban Poverty Alleviation, *Report of the Technical Group on Urban Housing Shortage (TG-12) (2012- 17)* at 21 (September 2012).

On the other hand, the global population is witnessing tremendous growth of urbanization since last couple of decades.<sup>8</sup> The massive growth of urbanization, in line up with global trend, results in incidental stress on ability of the government of India to cope up with emerging challenges. One of such smart byproduct of the urbanization is the unconventional migration from rural to urban area. It is stated that ‘...the stride of migration from rural to urban areas is accelerating numerically. By 2050, about 70 per cent of the population will be living in cities, and India is no exception. It will need about 500 new cities to accommodate the influx.’<sup>9</sup> This accelerated growth of the urbanization has severely affected the capacity of the government to ensure right to housing for its citizen in hassle free manner. As high urbanization rate, coupled with high rate of migration from rural areas are stressing, the limited urban infrastructures, sub-optimal usage of urban land has resulted in raising cost of per unit of built-up area. In addition, lack of growth in housing development capacity with respect to construction capability, labour availability, construction material, and housing affordability is likely to pave the way for some major considerations for the government to provide an enabling framework for housing development.<sup>10</sup> Taking advantage of the situation, the private players have taken over the Real Estate Sector [RES] with no concern for the consumers.

The RES being a major economic driver of the country has very interesting history behind it.<sup>11</sup> Shradhanjal Parida has quoted two major reasons for the unprecedented development of the RES in India. The first reason is the expanding industrial sector has created a surge in demand for offices building and dwellings. The

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<sup>8</sup> According to United Nations Study, globally, more people live in urban areas than in rural areas, with 54 per cent of the world’s population residing in urban areas in 2014. In 1950, 30 per cent of the world’s population was urban, and by 2050, 66 per cent of the world’s population is projected to be urban. See United Nations, *World Urbanization Prospects - 2014* at 2 (2014).

<sup>9</sup> CREDAI (Confederation of Real Estate Developers’ Associations of India) Smart Cities at 3, available <http://www.credai.org/sites/default/files/Conclave-2014-Report-smart-cities.pdf> (Retrieved on 8<sup>th</sup> July 2015).

<sup>10</sup> CREDAI, *Housing for all: Reforms Can Make it Happens Soon* 13 (Nov. 2014). available <http://www.credai.org/sites/default/files/Credai-Housing-for-all.pdf> (Retrieved on July, 8, 2015).

<sup>11</sup> See generally, Robert J. Shiller, *Historic Turning Points in Real Estate*, 1 EASTERN ECONOMIC JOURNAL 13 (Winter, 2008); Marc A. Weiss, *Researching the History of Real Estate Development*, 3 Journal of Architectural Education 38-40 (1984); Celik, Zeynep and Diane Favro, eds, *Urban History in the 1980s*, 3 JOURNAL OF ARCHITECTURAL EDUCATION (1984-) at 4-9 (1988). ; Marc A. Weiss, *Real Estate History: An Overview and Research Agenda*, 2 THE BUSINESS HISTORY REVIEW 241-282 (1989).

significant development of the manufacturing sector at the rate of 10.8 percent in 2006-07 out of which a growth of 11.8 percent is the root cause for this uncommon situation of the country. The second reason is the liberalization policies of government have decreased the need for permission and licenses before taking up mega construction projects. The liberal attitude of the government towards Foreign Direct Investment [FDI] in RES since 2002 has further widened the scope of the real estate industry in the country.<sup>12</sup> Further, according to Competition Commission the growth in the residential real estate market in India has been largely driven by rising disposable income, a rapidly growing middle class, fiscal incentives like tax concessions, conducive and markedly low interest rates for housing loans and growing number of nuclear families. The residential sector is expected to continue to demonstrate robust growth, assisted by rising and easy availability of housing finance.<sup>13</sup>

There is a close nexus between housing crisis and RES of the country. The RES, though not fully subsidized as much as government, plays a vital role in fulfilling the aspiration of the people for having their own shelter. According to the Competition Commission of India [CCI] the growth in demand due to rising income and expenditure levels, increasing phenomenon of nuclear families and perception of investment in RES as secure and rewarding has far outstripped the supply of residential housing.<sup>14</sup> The process of the housing is substantially complicated by the RES as the business and practice followed by these entities are highly illogical with public good. The unprecedented approach of the sector in providing housing facility is inhibiting healthy development of urban India. Addressing of these complications is an arduous task for developing country like India. As the problem of the housing scarcity<sup>15</sup> and cost of the housing<sup>16</sup> in urban area

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<sup>12</sup> ShradhanjaliParida, Real Estate in Indian Context-Opportunities and Challenges, 2 ABHINAV NATIONAL MONTHLY REFEREED JOURNAL OF RESEARCH IN COMMERCE AND MANAGEMENT 83 (Feb, 2013).

<sup>13</sup> *Belair Owners Association v. DLF Limited, HUDA, and Ors*, Case No. 19/2010, Aug.12, 2011, para.1.2.

<sup>14</sup> *Id.*, para 1.3.

<sup>15</sup> According to National Housing Bank report during 2014-2015, the Allocation for National Housing Bank increased from 6,000 to 8,000 crore to support Rural housing and 4,000 crore allocated to NHB from the priority sector lending shortfall with a view to increase the flow of cheaper credit for affordable housing to the urban poor/EWS/LIG segment. Besides, 7,060 crore is provided in the current fiscal for the project of developing "one hundred Smart Cities". National Housing Bank, *The Report on trends and Progress of Housing in India 2014* at 109(2014).

is aggravating in the country, the government of India has decided to get rid of the situation by drafting the Real Estate (Regulation and Development) Bill, 2013 [hereinafter RERDB] governing RES to address the complications surrounding the housing. The present paper is an attempt to review the intended legal provisions of RES and test the efficacy of the RERDB in addressing the glaring issues attached to Indian housing sector and Real Estate Business [REB].

## **Background of the RERDB**

Under the context of significant growth of the RES since last few decades, the most of the countries have created and adopted their own regulatory authorities to protect the interest of the stakeholders of the sector.<sup>17</sup> The legal regime relating to RES in India is subjected to plethora of laws since 19<sup>th</sup> century.<sup>18</sup> The net effect of these laws has been that a large number of real estate transactions have been accomplished without adequate standard and professionalism. There is no law which lays down the general principles for builders, promoters and Real Estate Agents [REA] to follow. The lack of regulatory mechanism is one of the prominent factors that led the Central government to think of revitalization of the RES of the country. As stated above, the legal framework governing REB in India is a little uncommon. Constitutionally, the acquisition and requisitioning of the property, though, is a State subject,<sup>19</sup> in practice, both Central as well as State governments

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<sup>16</sup> According to National Housing Bank Residential housing prices in 18 cities have shown increase in prices in this quarter ended June, 2014 (April-June, 2014) over the previous quarter ended March, 2014 (Jan-March, 2014). Maximum increase was observed in Pune (3.9%) followed by Coimbatore (3.5%), Indore (3.3%), Guwahati (3.2%), Patna (2.7%), Kolkata (2.4%), Ahmedabad (1.9%), Vijayawada (1.9%), Mumbai (1.8%), Chennai (1.7%), Ludhiana (1.4%), Bhopal (1.3%), Kochi (1.2%), Jaipur (1.0%), Faridabad (1.0%), Bengaluru (0.9%), Nagpur (0.6%) and Bhubaneswar (0.5%). Contrary to this, 6 cities have shown decline in prices over the previous quarter with maximum fall observed in Chandigarh (4.4%) followed by Meerut (3.6%), Delhi (3.0%), Surat (2.4%), Dehradun (2.1%), and Lucknow (0.5%). National Housing Board, *ANN.REP, 2013 – 2014*, at 181 (2014).

<sup>17</sup> For example, in Alberta Real Estate Council of Alberta (RECA), under its Real Estate Act, 2000; the Real Estate Council of Ontario established under the Real Estate and Business Brokers Act (REBBA), 2002; the Estate Agency Affairs Board under the Estate Agency Affairs Act, 1976; Washington D.C Real Estate Commission, in Queensland Australia, the Property Agents and Motor Dealers Act, 2000.

<sup>18</sup> Such laws are- Indian Contract Act, 1872, Transfer of Property Act, 1882, Registration Act, 1908, Special Relief Act, 1963, Urban Land (Ceiling And Regulation) Act (ULCRA), 1976, Land Acquisition Act, 1894, The Indian Evidence Act, 1872, Rent Control Act, 1947.

<sup>19</sup> The Constitution of India, Seventh Schedule, List III—Concurrent List, Entry 42.

are acting as appropriate authorities to regulate RES. The incidental activities attached to REB and power of the Central government to exercise its authority over these subjects, though RES governed by State laws has enabled both State as well as Central government to regulate the issue under their respective legislative domain. Accordingly, the different dimensions of the RES are governed by the different level of the government in the States. In urban India, the various facets of REB is regulated by the urban local authorities.

From the regulatory perspective of real estate agencies, town and country planning Acts regulate land use and development of real estate agencies. Whereas, the Consumer Protection Act, 1986 aims at protecting the interest of the customer against deficiency in services provided by the real estate entities. The unhealthy competition of the real estate entities are regulated by the Competition Act 2005. The great source of compassion and common sense backed application and interpretation of law in the cases such as *Apartments Co-operative Housing Society Limited and Ors v. Municipal Corporation of Mumbai and Ors*,<sup>20</sup> *Priyanka Estates International Pvt. Ltd. v. State of Assam*,<sup>21</sup> pertaining to relationship between buyer and seller of the REB triggered a need of the revitalization of the law relating to real estate transactions in India.

Similarly, the CCI in *Belaire Owners Association v. DLF Limited, HUDA, and Ors*,<sup>22</sup> strongly emphasized the need of the regulatory authority for REB in the country. Further, the Committee on Streamlining Approval Procedures in the RES vehemently advocated for the transparentize of the RES in India.<sup>23</sup> Thus, the inadequacy of laws and regulations are result in domination of the certain anti-social elements and illegal developments in the housing sector. It was pointed out three decades back that “The absence of appropriate laws and regulations for the real estate business and trade strengthened the position of the

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<sup>20</sup> AIR 2013 SC 1861.

<sup>21</sup> AIR 2010 SC 1030.

<sup>22</sup> Case No. 19/2010, Aug.12, 2011.

<sup>23</sup> The Committee suggested that “The Committee reinforces the need to have a Real Estate Regulatory Authority which will ensure regulation and planned development in the real estate sector; ensure sale of immovable properties in an efficient and transparent manner and also protect the interest of consumers in the real estate sector and establish an Appellate Tribunal to adjudicate disputes” See the Ministry of Housing and Urban Poverty Alleviation , *Report of the Committee Of Streamlining Approval Procedures For Real Estate Projects In India – Key Recommendations* 74 ( Jan. 2013).

middlemen. The business operations were underpinned by contacts developed with politicians and bureaucrats at a cost which could easily be passed on to the final purchasers of the property. Through regular pay-offs and offers of prized investments, the long arm of the law could thus be kept at bay, advance information obtained, files cleared promptly, and irregularities condoned<sup>24</sup>.

Under the context of the above cited developments, the Ministry of Housing and Urban Poverty Alleviation [MHUPA] had prepared a Model Real Estate Regulation and Development Bill, in 2009 to regulate and promote real estate sector and ensure appropriate protection for consumer. Finally, with few changes The RERDB was introduced in Rajya Sabha on Aug.20, 2013 and was referred to Parliamentary Standing Committee on Urban Development [PSCUD] on Sept.9, 2013 for examination and Report. The PSCUD had sought public opinion through a press release and analyzed the memoranda and suggestions received from various stakeholders/experts such as Confederation of Indian Industry [CII], Federation of Indian Chambers of Commerce and Industry [FICCI] and Associations working in the field of real estate on various provisions of the RERDB. The Committee had the briefing of the representatives of the MHUPA on the RERDB on Oct.8, 2013. The PSCUD heard the views of some of the NGOs working in the field of Real Estate. The PSCUD also took oral evidence of the representatives of the MHUPA, Ministry of Finance (Department of Financial Services, Department of Revenue), Reserve Bank of India, State Bank of India, Bank of India, Punjab National Bank, National Housing Bank, Ministry of Consumer Affairs, Ministry of Law and Justice (Department of Legal Affairs and Legislative Department) and sought clarifications on various issues that were brought to their notice by various stakeholders during their sittings held on Nov.6 and Dec.12, 2013 respectively.<sup>25</sup> Finally, the PSCUD submitted its report on Feb.12, 2014 with certain recommendations. On May 6, 2015 the Bill has been referred to the Select Committee of the Rajya Sabha to have a further scrutiny.<sup>26</sup>

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<sup>24</sup> Arun Kumar, *Real Estate as Business*, 50 ECONOMIC AND POLITICAL WEEKLY 1984 (Dec, 1982).

<sup>25</sup> Parliamentary Standing Committee On Urban Development ,*The Real Estate (Regulation And Development) Bill, 2013, Thirtieth Report 7* ( Feb., 2014).( hereinafter PSCUD 2014).

<sup>26</sup> The reason for reference of the Bill to the Selection Committee of RajyaSabha as cited by the Minister Of Urban Development Shri M. Venkaiah Naidu is that “There is a lot of criticism from outside that somehow or the other this Bill is getting delayed, and some people went to the hon. Supreme Court and the

## **Salient features of the RERDB**

As lucidly outlined under the preamble of the RERDB the primary objective of the RERDB is to establish the Real Estate Regulatory Authority [RERA] for regulation and promotion of the RES. The RERDB is also intent to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers of RES. The RERDB further intent to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the RERA and for matters connected therewith or incidental thereto.<sup>27</sup> The scheme of the RERDB has been prepared so as to achieve the above mentioned objectives in adequate and appropriate manner. The major characteristics of the RERDB are as follows.

## **Registration of REA<sup>28</sup> and Real Estate Projects [REP]<sup>29</sup>**

The RERDB mandates that the REA, engaging in the REB covered under the RERDB are to be registered with a RERA.<sup>30</sup> The person being registered under the RERDB can only book, sell, offer for sale or invite person to purchase in any manner any plot, apartment or building as the case may be in any REP. The

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Supreme Court directed the Government to take a decision within six weeks. Keeping that in mind, the Government has brought forward a Bill balancing the interest of consumers as well as the need for housing on a massive scale. Keeping in view the objective of housing for all by 2022, every step is being taken to see to it that the interest of the consumers is protected. But when I came to the House and heard my colleagues from different sides in the House, they wanted the Bill to be referred to". Uncorrected Debates of RajyaSabha on May.6, 2015, 1 NBR-GS/1A/11.00, available at <http://164.100.47.5/debatenew/newshow.aspx> (retrieved on Dec.10, 2015).

<sup>27</sup> See the Preamble of Real Estate (Regulation and Development) Bill, 2013 [hereinafter RERDB].

<sup>28</sup> "Real Estate Agent" - means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called. *Id.*, §.2 (zh).

<sup>29</sup> "Real Estate Project" - means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of a colony into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or buildings and includes the development works thereof. *Id.*, §.2 (zi).

<sup>30</sup> *Id.*, §. 3.



RERDB, however, excluded certain project from the registration with RERA.<sup>31</sup>

The RERDB has also made appropriate procedural provisions relating to filling of the application with RERA,<sup>32</sup> statutory compliance to be complied with by the promoter for the registration, granting of the registration,<sup>33</sup> extension of the registration<sup>34</sup> and revocation of the registration<sup>35</sup> and lapse of or on revocation of registration<sup>36</sup>. Much importantly, the RERDB has categorically outlined the functions to be performed by the REA in such a way that the interest of the allottees should be protected and transparency in the REDB must be maintained.<sup>37</sup> In line with REA, the RERDB inserted specific provisions on functions, duties of the promoter, advertisement or prospectus, advance to be taken, adherence to approved plans and project specification, transfer of title, amount and compensation.<sup>38</sup>

### **Rights and Duties of the Allottees**

The great amount of care and concern for customer taken by the RERDB is certain basic rights conferred on customer. The RERDB conferred upon the allottees right to information, stage wise time schedule of completion of the project, claim the possession of the real estate, claim the refund amount, to have necessary documents,<sup>39</sup> and right to legal representation.<sup>40</sup> The duties of the allottees includes to make necessary payments in the manner and

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<sup>31</sup> The following projects have been exempted from the compulsory registration of the projects.

- a) where the area of land proposed to be developed does not exceed one thousand square meters or the number of apartments proposed to be developed does not exceed twelve, inclusive of all phases, or an area or number of apartments as notified by the Central Government on recommendations from the appropriate Government, which may be different for different States or Union territories but not more than one thousand square meters or twelve apartments, as the case may be;
- b) where the promoter has received all requisite approvals and the commencement certificate for the development of the real estate project prior to commencement of this Act;
- c) for the purpose of renovation or repair or re-development which does not involve re-allotment and marketing of the real estate project. *Id.*

<sup>32</sup> *Id.*, §. 4.

<sup>33</sup> *Id.*, §. 5.

<sup>34</sup> *Id.*, §. 6.

<sup>35</sup> *Id.*, §. 7.

<sup>36</sup> *Id.*, §. 8.

<sup>37</sup> *Id.*, §. 10.

<sup>38</sup> *Id.*, Chapter IV§. 11-16.

<sup>39</sup> *Id.*, §. 17(1) to 17(5).

<sup>40</sup> *Id.*, §. 48.

within the time as specified in the said agreement and shall pay at the proper time and place, the proportionate share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, to pay interest, to participate towards the formation of an association or society or co-operative society of the allottees, or a federation of the same.<sup>41</sup>

### **Real Estate Regulatory Authorities (RERA)<sup>42</sup>**

The RERDB seeks to establish RERA's at the State level for the regulation and development of the RES. It aims to: (a) ensure consumer protection, and (b) standardize business practices and transactions in the RES. The RERA consist one chairperson and not less than two whole-time members of the authority are to be appointed by the appropriate government on the recommendations of a Selection Committee. The Selection Committee should consist of such persons and in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the members in urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration.

The mandate has been imposed on authorities to make suitable recommendations to the appropriate government or the competent authority in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive RES.<sup>43</sup> Similarly, the RERDB mandates that certain functions which are vital and incidental to the RES <sup>44</sup> are to be performed by the authorities in addition to power of investigation,<sup>45</sup> issuing of directions<sup>46</sup> and impose and recovery of penalties.<sup>47</sup>

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<sup>41</sup> *Id.*, §. 17(6) to 17(9).

<sup>42</sup> *Id.*, Chapter V§. 14.

<sup>43</sup> *Id.*, §. 29.

<sup>44</sup> *Id.*, §. 30.

<sup>45</sup> *Id.*, §. 31.

<sup>46</sup> *Id.*, §. 32.

<sup>47</sup> *Id.*, §. 34.

### **Central Advisory Council (CAC)**

Another institutional mechanism ensured under the RERDB is Central Advisory Council. The RERDB prescribes that the Central government may by notification, establish CAC consisting of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Planning Commission, National Housing Bank, Housing and Urban Development Corporation, five representatives of State governments, five representatives of the RERAs. The function of the CAC is to advise and recommend the Central government on matters concerning implementation of the Act, major questions of policy, protection of consumer interest, foster the growth and development of the RES and on any other matter as may be assigned to it by the Central government.

### **Establishment of Real Estate Appellate Tribunal [REAT]**

The adjudicatory authority ensured under the scheme of the RERDB is constitution of REAT to hear any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under the RERDB. To greatest possible extent, the diversity and expertness of this institution has well maintained under the RERDB by requiring the government to appoint a qualified person as Chairperson and Members of the REAT.

In the case of a judicial member he/she should be held a judicial office in the territory of India for at least seven years or has been a member of the Indian Legal Service and has held the post in Grade I of that service or any equivalent post for at least three years, or has been an advocate for at least fifteen years with experience in dealing with real estate matters. Similarly, in the case of a technical or administrative member, he should be a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least fifteen years in the field. Besides, the independency of the REAT is well ensured under the RERDB by contemplating specific term of office, salary and allowances, process for removal of Chairperson and Member from office.

## **Penal Provisions**

Non-registration of project and as REA under the RERDB,<sup>48</sup> willful failure to comply with orders of RERA by promoter,<sup>49</sup> to comply with orders of REAT by Promoter,<sup>50</sup> to comply with orders of RERA by allottee,<sup>51</sup> to comply with orders of REAT by allottee<sup>52</sup> are offensive activities and attracts penal provisions of the RERDB.

## **Evaluation of RERDB**

The new RERDB offers a plenty of opportunities for promoters, REAs, builders and allottees to conduct their business with fair, reasonable and equitable manner. However, a huge shortage of adequate provisions in the new RERDB so as to revamp the new legislative system in a majestic form persists. The massive growth rate of RES complexities has led to demand for better design of the RERDB with comprehensive legislative provisions. This part of the paper would be dealing with such missing links of the intended RERDB.

## **Registration of REAs and REPs**

The very definition of the “Building” has been subjected to severe criticisms as it has been confined only to the residential estates and omitted commercial and industrial building from the preview of the RERDB. The RERDB says that “Building” includes any structure or erection or part of a structure or erection which is intended to be used for residential or other related purposes.<sup>53</sup> The recent trend of the RES is that it is not only actively involving the construction of the residential purposes, instead they are undertaking huge commercial as well as industrial buildings simultaneously. This kind of the business may affect the quality of services provided by the RES on account of which right to safe and affordable housing might be deprived. It was opinion of the Secretary, Department of Financial Services, Ministry of Finance that

“since banks are financing all types of projects, there was no reason to exclude these projects. Probably it will be appropriate that it should have an all-encompassing definition including

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<sup>48</sup> *Id.*, §. 51.

<sup>49</sup> *Id.*, §. 55.

<sup>50</sup> *Id.*, §. 56.

<sup>51</sup> *Id.*, §. 57.

<sup>52</sup> *Id.*, §. 58.

<sup>53</sup> *Id.*, §.2 (i).

residential, commercial and industrial projects. Many a times in commercial complexes the people seek funding from bank. But the Builder leaves it incomplete and uses the funds elsewhere. If these people can also be covered under the Bill it would be fine”<sup>54</sup>

Accordingly, the definition of the ‘Building’ as proposed by the Ministry includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or other related purposes. This comprehensive legislative intention is evident in the Act enacted by the Maharashtra Housing (Regulation and Development) Act, 2012.<sup>55</sup> The Haryana Real Estate (Regulation and Development) Act, 2013 also stipulates inclusive definition consisting of other commercial as well as industrial purposes. The Act says that “Building” includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or other related purposes.<sup>56</sup> The new legal system has not paid any concern towards this issue.

### **Model Agreement [MA] Concept**

The RERDB mandates that every promoter while applying an application to the RERA for registration of the REP, he has to enclose certain documents. One of such document to be enclosed by the promoter is copy of the agreement entered into with the customer. In fact there was a proposal to insert a MA in the RERDB so as to maintain uniformity of the MA across the country. The PSCUD emphasized the importance of the MA concept by expressing the desire that the MA should include the provision regarding the quality of materials and technology that would be used at different stages of construction. Also, it should be obligatory for the RERA to ensure strict compliance of the Rules and regular monitoring of the same.

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<sup>54</sup> PSCUD 2014, *Supra* note 25 at 13-14.

<sup>55</sup> The Act has defined the terms layout and flat to mean include other commercial as well as industrial buildings. According Section 2 (q) “layout” means the schematic planning and, — (i) development of more than one building, except for building accessory to the main building, proposed on any land; or (ii) development or redevelopment of any tract of land admeasuring two thousand square meters or more in a residential or commercial or in an industrial zone, including its division or sub-division into plots. Similarly, according to Section 2(m) “flat” means a separate and self-contained set of premises used or intended to be used for residence, office, show-room, shop, godown or for carrying on any industry or business and the premises forming part of the building and includes an apartment.

<sup>56</sup> Haryana Real Estate (Regulation and Development) Act, 2013, §. 2 (g).

The proposal, however, dropped by the PSCUD on account of the suggestion given by the MHUPA has apprised the committee that the MA is to be provided for by Rules. It is evident, however, from rule making power of the government as evinced under the RERDB that there is no place for the MA under the RERDB. This blatant negligence may result in disfigurement of the core concern of the intended law.

### **Exemption from the Registration**

The MHUPA has exempted certain projects from the registering with the RERA established under this Act. The controversial exemption is exclusion of projects smaller than 1,000 square meters or 12 apartments from its purview. It is a great concern that Indian RES has traditionally been dominated by a number of small regional players with relatively low levels of expertise and financial resources.<sup>57</sup>

The PSCUD was of the opinion that this would lead to the exclusion of a large number of small housing projects. It recommended that lowering this limit to 100 square meters and three apartments. It was also the suggestion suggested by the MHUPA. The reason given by the MHUPA for this exclusion was as follows

“The reason behind not proposing to register properties below the specified threshold is that the construction company or developer generally develops such properties, with buyer engaged on a day-to-day basis. Interface between the buyer and the promoter is not missing in small development, however, as in the case of large developers, access to persons or information is generally very difficult. It means, information asymmetry is more in large projects.”<sup>58</sup>In fact it was opposed as assertive argument, by the MAUPA by saying that: "The need for transparency and disclosure is needed for projects where there is no monitoring possible in person by the buyers. In case of small sized projects, the buyers are engaged in monitoring on a day-to-day basis, by making on the spot visits, regular engagement and involvement with the construction etc."<sup>59</sup>

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<sup>57</sup> ShradhanjaliParida, *supra* note 12 at 82.

<sup>58</sup> SCUD 2014, *Supra* note 25 at 23.

<sup>59</sup> *Id* at 24.

The view of the MAUPA, however, strongly opposed by the National Housing Bank (NHB)<sup>60</sup> and Ministry of Finance<sup>61</sup>. By consolidating the opinions the PSCUD came to the conclusion that if the small projects have been exempted from the purview of the RERDB where the area of the land is less than 1000 sq meter or where a building does not have more than 12 flats, the large number of small housing projects will escape from the purview of this law and, therefore, the middle class allottees will suffer.<sup>62</sup>

### **Single Window System and Digitization of Records**

The PSCUD emphasized the need of enumerating a new provision to allow RERA to give directions to the State governments to establish a single window system for providing licenses and clearances for REPs. The PSCUD recommended for this provision under the context that the real estate developers need to run after various departments of the appropriate Government for getting clearances for their projects. The PSCUD further pointed out that the RERDB does not prescribe any time-line for the appropriate government for giving clearances to the projects of the promoters/builders. These factors are also responsible for making delays in the completion of the projects. The PSCUD feels that this is the biggest bottleneck faced by the promoters for getting clearances from the Government.<sup>63</sup> As the liability clause for promoter has been inserted in the RERDB, in case, he fails to complete or is unable to give possession of an apartment, plot or building, it was appropriate for the MHUPA to insert the new provision according to the recommendation of the PSCUD. However, the RERDB has no room for this provision through with

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<sup>60</sup> The suggestion of NHB on the issue was that "Yes, the NHB is in agreement with various provisions of the Bill. It is however, further suggested that clause 3 may be amended thereby ensuring applicability of the Bill on area of land proposed for residential construction up to 100 square meters and/or number of apartments to be developed (not exceeding 3 numbers) instead of 1000 sq. mtrs. (Apartments not exceeding 12 in numbers) as proposed in the original Bill. Similarly, amendments in clause 3 may be considered so that SPVs/Projects undertaken in smaller areas of land through bifurcation of the whole land by the builders should be considered as One Single Project under the provisions of clause 3 of the Bill. This will ensure strict applicability of this clause." *Id* at 25.

<sup>61</sup> Secretary, Department of Financial Services, Ministry of Finance deposed as under: "Hon'ble Chairman has mentioned minimum limit of 100 Sqm, it is a good idea. It may be a bit burdensome for regulatory authorities but definitely it will be in the benefit of consumer. If an individual even constructs 3 flats commercially, there is no harm in regulating. In my opinion it should not be twelve. This is our suggestion." *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id* at 66.

the new system could act to detrimental to the interest of promoters.

### **Digitalization of Land Records**

The land dealing marks a new turning point for real estate business and practice in the country. The fraudulent activities of the lands subjected RES demonstrates the need of urgent procedural reform to the conveyancing process. Stringent legislative measures should be introduced to minimize the potential for such fraudulent activities. It is suggested by the PSCUD that RERA should be allowed to give directions to the relevant authorities to digitize land records in order to ensure that the same land is not sold to several individuals. The PSCUD was of the view that

“...there are so many litigations in this sector all over India. In most of the cases, there is no clarity on the title of the land owners. In many a case, the same land /house/flat is being sold to many individuals. As a result, the individual or the allottee is subject to manifold problems. To mitigate these problems and to ensure smooth functioning of Real Estate Regulatory Authority, the Committee are of the strong view that the entire land should be digitalized.”<sup>64</sup>

In spite of this recommendation which is hassle free tool for the facilitation of the RES, same has been ignored in the RERDB. Commenting on Clause 73<sup>65</sup> of this RERDB, the PSCUD reviewed that the power of appropriate government to make rules is too excessive and same is to be curtailed. The legislators have not turned towards this suggestion. The issue, nevertheless, has not been addressed in its true sense as the new law shut down different ways of reaching out to digitalization of land dealings.

### **Definition of Carpet Area**

The RERDB defines carpet area as net usable floor area of an apartment, excluding the area covered by its walls.<sup>66</sup> In order to maintain the clarity of the term Carpet Area, the SCUD recommended for the definition of Net Usable Floor Area. The PSCUD recommended that

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<sup>64</sup> *Id* at 76.

<sup>65</sup> This clause listed as many as 31 subjects upon which appropriate government has authority to make rules so as to carry out objectives of the Act.

<sup>66</sup> RERDB, *supra* note 29 §. 2(j).



“The definition of 'net usable floor area' should be included under clause 2(d) which may construe that net usable floor area means to include the area sold to the allottee for his individual use, which includes living room, bedroom, kitchen area, lavatory(s), bathroom(s), balcony/verandah if covered, any area for the residence of domestic help within the apartment, and covered parking or any other type of independent use ancillary to the purpose specified.”<sup>67</sup>

This vision of the SCUD has been omitted under the RERDB. In addition, the Gross saleable Area /super area as suggested by the National Real Estate Development Council (NAREDCO) and plinth area as insisted by the Andhra Pradesh Builders Federation have weighed down under the scheme of the RERDB.<sup>68</sup>

### **Lack of Comprehensive Regulation of REAs**

The RERDB requires REAs, facilitating the sale of a project covered by the RERDB, to register with a RERA. The PSCUD instead recommended that all REAs include properties from agriculture, industry, residential and commercial sectors be required to register with a RERA. The PSCUD traced out that there are no provisions for registration of agents who are selling properties not registered under the RERDB, lack of any training for REAs, no well-defined guidelines and minimum eligibility criteria for registration of REAs. The PSCUD are dissatisfied over the reply of the MAUPA on the issue that these are implementation aspects and are to be specified by delegated legislation. The sensitivity of enrolment of REAs is so enormous, and the consequences of making inappropriate provisions on registration of REAs so dangerous, that if those unregistered involved in the real estate activities.

### **Model Code for Training and Guidelines and Minimum Eligibility Criteria of REAs**

The PSCUD emphasized the need of a model code of training for REAs to be included in the RERDB. It was said that “..... the minimum eligibility criteria and other guidelines along with the ‘model code for training of real estate agents’ should be clearly mentioned in the Bill. This model code can be followed by

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<sup>67</sup> PSCUD, *supra* note 25 at 16.

<sup>68</sup> *Id* at 15.

all the regulatory authorities across the country with suitable changes according to the local needs.”<sup>69</sup>

These essential components being undividable part of the emerging REBs have ignored by the RERDB. The suggestions have aired by the MHUPA by saying that "These are matter of implementation details, which can be provided under delegated legislation."<sup>70</sup> Model Code for Training and Guidelines which define successful performance would be a framework for inculcating observable skills, behaviors and attitudes the impact the quality of work that REAs do. It can strengthen agents to know and be able to do their job in better manner. The absence of Model Code for Training and Guidelines and Minimum Eligibility Criteria of REAs in the Bill may slowly and steadily struck down the very objectives of the Act.

### **Automatic Approval of the Projects**

Under the RERDB, if RERA fails to grant registration or reject the application of a project within 15 days of receiving it, the project will be approved automatically. The SCUD seconded the view expressed by the RBI and insisted for automatic approval after 30 days of application. The rationality as expressed by the RBI was that

“.....we feel that the time limit of 15 days granted in the Bill, does not appear to be sufficient. The Authority may not be able to make a reasonable assessment of the project and take a decision on its eligibility for registration within the time stipulated. It is, therefore, for consideration whether it may be provided that if not if nothing is heard from the Authority within a period of one month or so, the registration is deemed to have been granted. This will facilitate the registration Authority to call for relevant information before granting registration if it is required”.<sup>71</sup>

The system need to attentive focus on understanding and removing barriers attached to management of projects. There is a strong belief that rigorous scrutiny and observation that is deployed at the right times, will significantly improve the quality of the projects. The short term based automatic approval of the project may not ensure that project is well scrutinized and complied with all relevant statutory obligations.

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<sup>69</sup> *Id* at 50.

<sup>70</sup> *Id* at 47.

<sup>71</sup> *Id* at 39.

## **Appeal in Case Of Revocation**

The RERDB requires that appeals against revocation of registration be decided in 90 days.<sup>72</sup> The PSCUD expressed that this will prove to be burden on the customers of the projects, as in present scenario most of the customers purchase the flats through bank loans. Accordingly, PSCUD suggested for the reduction of this period for 45 days.<sup>73</sup> Further, the PSCUD suggested for the provision of suitably compensating the customers of projects affected due to revocation of registration of the project and subsequent delays in the construction due to appeal period.<sup>74</sup> The appropriate remedy clause needs to be supported by the sufficient and effective compensation clause. The new scheme has to introduce wide use of the policy tools to ensure that the victim of the deficient service has the opportunity to undertake remedial clause that allow them to determine the course of their own. The rigorous scrutiny of the RERDB, nonetheless, indicates that the new system has not made any provision on compensation and period of 45 days has been sidelined in the RERDB.

## **Time Limit for Completion Certificate**

The promoter has the responsibility to obtain a completion certificate from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees.<sup>75</sup> The defective part of this provision is that there is no fixed time for issuing completion certificate. The observation of the PSCUD on the issue was that

“The Committee are of the view that no doubt it should be the responsibility of the promoter to obtain completion certificate from the relevant competent authority and make it available to the allottees or to the associations of allottees, but if no time frame is fixed for the competent authorities to issue such completion certificate, it can be used by the promoter as a plea for unnecessarily delaying the furnishing of documents to the allottees. Therefore, the Committee strongly recommends that a

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<sup>72</sup> RERDB, *supra* note 29 clause 8.

<sup>73</sup> PSCUD, *supra* note 25 at 44-45.

<sup>74</sup> *Id* at 45.

<sup>75</sup> RERDB, *supra* note 29 §. 11(4).

suitable time limit should be specified for competent authority to provide completion".<sup>76</sup>

The MHUPA has made striking departure from the recommendation of the PSCUD under the pretext that local Authorities are covered within the State List of the 7<sup>th</sup> Schedule, towards which the Central Government does not have the powers to make laws.<sup>77</sup> It is, though hart to imagine, the fact that on the one hand legislature wishes to set out standards norms as panacea of the problem; on the other hand they launch expensive campaign to defeat the noble objectives of the law by omitting these kinds of their bounded duties.

### **Structural Defects**

The unique feature of the RERDB is that in case any structural defect in the construction, if such development is brought to the notice of the promoter within a period of two years by the allottees from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within reasonable time, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under the proposed legislation.<sup>78</sup> The inherent and lurking defect attached to RERDB, in view of some of the stakeholders,<sup>79</sup> is inadequacy of the time frame to trace out structural defects. Accordingly, the PSCUD recommended increasing the time period within which promoters must rectify structural defects which are brought to their notice, from two years to five years. The increased time in tracing out of structural defects will be a key to ensure that the service provided by the RES meets established standards. While some progress has been made in addressing the core issues of the RES, the RERDB has proved its insincerity by maintaining the utmost silence about this precious suggestion on one of the critical issues of the RES of the

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<sup>76</sup> PSCUD, *supra* note 25 at 52.

<sup>77</sup> *Id* at 52.

<sup>78</sup> *Id* at 52-53.

<sup>79</sup> The opinion of the RBI on the issue was that

"While these provisions take care of the situation like delay in completion of the project or any structural defects, there are not specific provisions to compensate the allottees if the construction is of substandard quality. It is desirable to compensate the allottees for substandard quality of work also. As detection of structural defects may not be possible within a short period, we suggest that allottees should have a longer time to claim compensation for structural defects." Similarly, the Department of Legal Affairs of Ministry of Law and Justice opined as under: "The proposal to increase the period from two years to five years is a welcome suggestion." *Id* at 54-55.

country. This would be a daunting challenge for RES and need renewed commitment to reduce possible conflicts and end consumer disputes.

### **Conveyance Deed**

The responsibility of the promoter under the RERDB is to take all necessary steps to execute a registered conveyance of deed in favor of the allottees along with the undivided proportionate title in the common areas. The conveyance including the handing over of the possession of the plot, apartment or building, as the case may be, in a REP. The RERDB, however, is silent about the conveyance of deed in favor of housing societies, even though society owns the land along with the building and flat purchasers have right to use, occupy transfer the said flat. On the suggestion of the issue the RBI strongly supported for the conveyance of deed in favor of the society.

Accordingly, the PSCUD feel that in today's time where cooperative group housing societies have become the need of the hour specially in urban areas the conveyance for the cooperative society or any other corporate constituted by the allottees is indispensable.<sup>80</sup> Thus, the PSCUD strongly recommend that in addition to present provision of conveyance deed in favor of allottees, suitable provisions for providing the conveyance to cooperative society or any other corporate formed by the allottees may also be incorporated under Clause 15 of the RERDB.<sup>81</sup> The PSCUD also desires the MHUPA to define the definite time frame of two months from the date of handing over possession to the allottees, within which conveyance deed needs to be registered by the promoter.<sup>82</sup> There had also been significant defect in the scheme of the RERDB covering this core issue and the RERDB is so pessimistic about the time frame of PSCUD which requires conveyance deed needs to be registered by the promoter.

### **Conclusions**

The past few decades have seen increasing attention given towards constructive urbanization process in the context of rapid transformative process of country. As the nation strives to enhance her capacity to cope up with developmental needs through the urbanization, ensuring adequate roof for people of

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<sup>80</sup> *Id* at 60.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

urban area is viewed as challenging path for the sustainability of the urban India. Housing being a basic determinant of wellbeing of the people of the country is equally prominent to health, family stability and social cohesion. The RES has fundamentally altered the right to housing in urban India and constrained ability of the urban population to have affordable housing. The author is of the firm opinion that the new evolved and experienced system could be able to doing away the drawbacks hanging with RES and invigorate the right to adequate housing as enshrined under the various human rights instruments.

The major stakeholders of the RES such as builders, promoters, agents and allottees are to be complied with specification of the projects, project agreements and regulatory frameworks. The real estate entities must ensure that the properties of allottees are well maintained and that residents are satisfied with the conditions of the properties. The RERDB is significant move in this regard to ensure greater accountability of the real estate builders and agents towards customers as well as government. The RERDB is committed towards the successful and effective implementation of the real estate law of the country and has taken relevant and consistent measures for the progressive development of the sector in the country. To encourage sustainable development of the RES, along with customer friendly environment, various policy measures incorporated under the RERDB would certainly bring remarkable changes in the economic and social transformation.

The mandatory provisions such compulsory registration of REAs, projects and elaborative incidental provisions on this registration processes can serve the best interest of the allottees. The practices such as fraudulent transactions and undue delay of REAs have adequately been addressed under the RERDB through the endowment of the rights on allottees and insertion of appropriate penal provisions. The RERDB, if executed according to its letter and spirit, would bring remarkable efficiency, professionalism and standardization of RES of the country. The government, however, has to shoulder the great responsibility in order to implement the new legal regime as substantial task is to be done in terms of framing rules and constituting Selection Committees. Similarly, the Central government has already been labeled that the government is pro-rich and pro-corporate. The government has to exhibit its prudent steps in implementing the new legal system against the prejudiced mindset of the people by emphasizing the pro-buyers policies.