

Ensouth

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Advocates

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1. Managing Partner's Message

Although the 2G and Vodafone judgments have created enough excitement to keep Ensouth buzzing at least till after the rains, enough learning survives from 2011 for us to pause and ponder on the year gone by. This issue is all about corporate compliance, political perfidy and a bit of historicism!

First, in **Maul The Messenger** we examine the complexity of the compliance challenge in India in the context of both bribery and extortion and

focus on the legislative void which makes commercially acceptable solutions impossible.

Next, in **Plundering Political Event Managers** we continue our pondering on the problem of public perfidy by examining the real reasons why an international sports event was mismanaged by the government.

Finally, **Inflexion Point 2011** rounds off the year and focuses on the big picture movements that occurred in this period.

We welcome your feedback!

Ranjeev C Dubey
Managing Partner

Comment-1

(This column appeared in the October 15, 2011 issue of Business World)

Maul The Messenger

(Perpetrators of corruption have gone blameless while victims and whistle blowers got it in the neck)

Ranjeev C Dubey

September has been a cruel month for victims and whistle blowers. On 28 September 2011, J.S. Verma, General Manager of Essar Steel, found himself in the slammer accused of funding Naxal groups in Dandewada area of Chhattisgarh. The same day, Sudheendra Kulkarni, former aide of BJP stalwart L.K. Advani, was also taken into custody, accused of bribing his own party's MP's to help the Congress Led UPA government survive a vote of confidence in July 2008. Neither the extortionist, nor the primary beneficiary of the intended bribe, suffered any consequence. Does this make any kind of sense at all?

Let's deal with the facts. The Chattisgarh police have been very active in arresting people who hand money over to the Maoists. As part of this tit-for-tat campaign, they caught up with a contractor called B.K.Lala who they accused of paying off the Maoists to protect Essar's 267 km pipeline from Bailadila to Vizag. Lala reportedly told the police that the money came from the General Manager's office so Verma was booked under Section 121 of the CPC for waging war on the State and other sections of the Unlawful Activities (Prevention) Act. Essar of course denies that they ever pay anyone off.

How does one read this situation? The Essar pipeline has been damaged 15 times since Oct 2005 and the police can't do very much about it. We can safely assume that leading industrial houses do not willingly give money to terrorists. If we assume that everything the police say is true, what is the storyline? The police could not protect the people from the terrorist's demands so the people met the terrorist's demands and now the police accuse the people of supporting the terrorists. That sounds a lot like my

security guard arresting me for not using his services while admitting that he cannot provide me security. It seems the main choice is to get the pipe blown up or get arrested. Would it help to report the upcoming extortion to the police and help them nab the criminal? Is whistle blowing a solution? We come to that in a moment but hear another story first.

On 24 August, the police filed a charge sheet in court accusing famed deal maker and former Samajwadi Party leader Amar Singh and L.K. Advani's aide Kulkarni of conspiring to bribe three BJP Members of Parliament to help the Congress led UPA survive a vote of confidence in the Lok Sabha in 2008. Amar Singh allegedly used Kulkarni to deliver the money to the MPs. We know that these three MPs accepted the money, took the money to parliament and chucked it about to show how the UPA was engaging in skullduggery. The charge sheet does not name anyone in the UPA government, so the beneficiaries of this scheme remain blameless. Kulkarni doesn't understand how he is in jail because as far as he is concerned, he is a whistle blower. No doubt he will agree that he did not blow the whistle - the three MPs did -but he worked for a BJP leader and other BJP MPs were being bribed, so you can see the argument that he was one of the good guys. In any case, these three MPs are also in jail too. I would say that these three MPs are whistle blowers because if they were in it for the money, the MPs would have kept the money rather than display it in Parliament. The moral of story then is clear. If you are a victim or a whistle blower, you are going to get it in the neck. If you are the beneficiary of the scheme, all you need is credible deniability.

I hasten to add that I am not blaming the police for anything. I am also not blaming the magistrate for anything. Since the two cases address the same issue but span two different laws, we need to look at them separately. Consider first the Essar case. If someone squeezes you, or threatens to explode a bomb under your butt, what are your choices? You have four. First, you can go to the cops and hope someone takes you seriously. This country is full of people who scream death threat in order only to get a free gun toting body guard they can then flaunt as a status symbol. You would have to work hard before the cops would take you seriously. Even if they do take you seriously, do they have the capacity to protect 267 km of pipeline? Your second choice is to buy protection from the hoods. This is not outrageous: protection is a significant part of urban life in a significant portion of the urban world around the globe. However, if you get caught, Verma will tell you what happens to you.

You do have a third choice: you could go to the police and say, I have to pay the extortionist and so help me nab him while I pay him. Considering how the local police has been infiltrated around the world, leave alone India, what are the chances the extortionist won't know in advance that they have been set up? Do you expect to nab the culprits or stop a bullet? Finally, you could pay the extortionist off and then go to the police and say, "this is the guy I paid. Now go catch him." This option would be viable if the cops were

capable of catching him. Considering the numbers of Maoists on the loose in Chhattisgarh, what would you rate the chances? The way I see it, your only realistic option is to pay him off in any case: then you can pour yourself a stiff one and ask yourself if you should turn whistleblower. In truth, this question is only worth asking if we have effective whistle blower legislation in place. As things now stand, you are going to get arrested for paying a terrorist because you are too afraid to die for a nation that will not protect you. You need effective whistle blower legislation.

This same argument can be made in the Cash for Votes case. Someone offered BJP MPs some serious money to abstain from voting in Parliament. This would have helped the Government of the day survive. The MPs could have refused, the Government may have fallen but the legislators would have suppressed information relating to a potential crime. Alternatively, the MPs could have gone to the local police, complained that they were being corrupted, set up a sting operation and nabbed the bribe givers. When a policeman hears that he is expected to nab the emissary of a major political party, someone who just may be in power next week, what do you think he is likely to do? Your third option is to turn whistle blower, take the money, take it to parliament and then tell the country what the ruling party is trying to do. As the law now stand, it seems if you do this, you can expect to enjoy some R&R in Tihar jail for your social service. Isn't there something wrong with a law like this?

It obvious solution to this problem is to grant immunity to whistle blowers. At the height of the Anna hunger strike and its attending *tamasha*, I was as strident as anyone in drawing attention to the Governments effort to legislate an appropriate whistle blower law (see [Melas with Missions](#)). These two cases now reveal that my optimism was misplaced because the *Public Interest Disclosure and Protection of Persons Making Disclosure Bill, 2010* would not help the whistle blower in either case. First, it applies only to central government employees, not to public servants generally and most certainly not to terrorists. This may not make much sense. Not everyone who puts the squeeze on you is a civil servant because he may well be the power of attorney holder of a civil servant. The agent who shows up to make a 'settlement' after the finalization of your income tax return has been indefinitely delayed isn't a civil servant either.

Second, this bill does not decriminalize bribe giving whistle blower. As often as not, to bribe and then squeal is your only option. If you do it and squeal, you're screwed. This seems to be a popular view. The Chief Economic Advisor to the Finance Ministry Kaushik Basu has recommended immunity for bribe givers. Infosys founder Narayana Murthy has endorsed this view. It seems to me that while this is a good idea, it is not enough because in the Cash for Votes case, the bribe takers were the whistle blowers! This takes us to the inescapable conclusion that it does not matter who is the taker and who is the giver: all we want is that in all cases, the whistle blower must receive immunity. You may wonder if this is going to lead to competitive

squealing! Frankly, if we end up in a world where everyone is dying to squeal and no one wants to give or take a bribe, would you be complaining?

This takes us to the third critical leg of the whistle blower stool: a witness protection program. Section 10 of the bill states that if a man fears victimization, he can file an application before the Competent Authority! That is outrageously laughable but it is not funny at all. If you do not have an effective obligatory right-off-the-bat witness protection program, the only whistle blowers would be dead ones. How many Satyender Dubey's need to die before we figure this out?

At the end of the day, it comes down to this: If you do not give complete immunity to the whistle blower, regardless of whether he is a giver, taker or just the facilitator, you are not going to get too many whistle blowers. If you do not give complete protection to the whistle blower, you are not going to get very many whistle blowers who will live long enough to finish the whistle blowing.

Comment-2

(This column appeared in the November 12, 2011 issue of Business World)

Plundering Political Event Managers

(Let's stop diverting attention about F1 and event management. Let's get to the point and address the issue of election funding)

Ranjeev C Dubey

Contrary to popular perception, the recently held, much acclaimed and highly successful 2011 Formula 1 Airtel Grand Prix is not a testament to India's organizational capability at all. As far as I am concerned, the seamless conclusion of the event damns us as ascorbic short sighted child-adults, incapable of understanding our true potential. It also reveals our inability to see what is wrong with us or take steps to right the wrong. Consider the facts.

At the end of the Commonwealth games in October 2010, we decided that we were incapable of organizing an international sports event. Since this project had only two aspects to it—a real estate project and the management of an event—I assume this meant that we were neither capable of undertaking a complex construction project to an agreed schedule nor were we capable of orchestrating a complicated event. To my mind, both conclusions were ridiculous on the face of it.

India has organized large construction projects for as long as we have been an independent nation. Chandigarh was no colonial gift. The foundation stone was laid in 1952 and by 1965, when I lived there while a war raged at the edge of my home town on the Pakistan border, it was already substantially complete. I could add any number of large hydro projects to the list. Indeed, even a purportedly dysfunctional and much reviled government

entity like Delhi Development Authority managed to build Janakpuri - that humungous city sized colony - within a decade. If India could not build venues for the Commonwealth games in the scheduled time, it wasn't for lack of skill or ability.

You could say the same for event management. In 2001, the Maha Kumbh at Allahabad was attended by 60 million people. In Jan 2007, the Ardh Kumbh at Allahabad had 70 million visitors. These weren't all ticket purchasing, beer swilling fancy car owning snooty types either: they were pilgrims and pundits, sadhus and soothsayers, shopkeepers and scallywags, crooks and creeps. India is globally recognized for its crowd management skills. So when we manage to smoothly host a motor race in India, the last thing I want to hear some party wag tell me is that global confidence in India's ability to host international events is restored. The idea is not just patronizing and ludicrous, it is based on delusion. The problem lies elsewhere.

You don't need to be a contemporary political philosopher to figure out what the problem is. Check out Gurgaon. Here is a small stretch of city generating 50 per cent of the total revenue of Haryana, 71 per cent of its exports, 60 per cent of the entertainment tax and 80 per cent of the FDI in the state. It is home to 300 of the Fortune 500 companies, some 50 of them with an office within a distance of one square kilometer. Yet, its infrastructure is laughable. You find state-of-the-art buildings sticking out of roads that look like motocross race tracks, potholes that could hone your golfing skills to a fine art, sewerage main lines that discharge into open fields and electricity wires that hang like spaghetti off the ceiling fan after a minor kitchen explosion. It dawns on you: whatever is privately build is slick to the bone, whatever is built by government is dust and bones.

This is the story of much of India and it gets worse with each passing year. If you leave it to the government to build anything these days, you are going to get screwed. This is not because the government doesn't know how to build anything. It's because when the government builds something, its primary purpose is not to get something built. The basic purpose is to divert funds and that necessarily means screwing the schedule. Government rules say you must have open tenders, fair bidding, objective evaluation of bids and award to the lowest bidder by whatever established criterion. You can't divert funds this way. You have to find reasons not to follow the rules. One persuasive way to do it is to plead that you haven't the time to follow rules. So don't establish the deliverables, don't take out the notice inviting tenders and don't evaluate the tender. Then say "damn, there is no time; we need to dispense with the rules". Now you can do whatever you want: procure the goods at whatever price you like, award contracts to whomever you like and rent equipment at prices higher than you would pay to buy them. The last is the best way to generate cash. Take a decision to rent, not buy, then avoid renting till the last minute and then claim to pay a fortune because you can't find it at short notice. No one is going to ever find out that you had the arrangement in place all along: you just unveiled the arrangement when time

was really short. Let me put it to you plainly. It is in the interests of those who run fund generating projects to find ways to delay projects so that they can then achieve the real purpose of the project.

All this is completely obvious. It is also completely rational. There is no reason whatsoever to be outraged about this because, in the main, all this is driven by a perfectly legitimate compulsion. Let me wind back a little. In India you have two basic problems: no actually, its three basic problems.

First you have no legitimate way to fund India's democracy. I have discussed this at length in previous *Fineprints* (see [Systemic Scamming](#)). If we want to run a democracy, we have to find a way to fund elections. We simply can't seem to accept the idea that perhaps we should have benefit dinners for politicians where we can sell table space at a couple of lakhs a plate. Given our love for probity in form, though not in substance I hasten to add, this one is a hard sell. We have not been able to put any other acceptable system in its place. Politicians need money to persuade us to put them in power and we won't give it to them. They have no choice but to milk projects.

Second, a very great many government servants have purchased their jobs. If you find this surprising, we do not live on the same planet, leave alone country. People who have purchased their jobs are entitled to get back a little return on equity and the salary is certainly not enough. Bureaucrats will dip into project cash and they feel entitled to do so.

Third, when any lucrative cash generating job vacancy comes along, like the station house officer of a police station along the border of a drug distribution corridor, the posting is purchased. So it is with toll tax collecting posts, or large construction projects. I hear you need contacts to get these jobs but shorn of the sugar coating, it's pretty much an open auction: the highest bidder gets the job for a while. In this time, having purchased the posting, the winning bidder has to turn a profit too. I don't find anything extraordinary about this. It's a BOT contract like any other and the successful bidder needs to make his money. The difference between the management of a government construction project and a private BOT contract is in two pieces of fine print. First you can't legitimately turn over a profit to yourself so you need to slick cash off the till and second, you have to find a way to circumvent millions of rules which prevent you from turning a profit in the first place.

Obviously, unless we are going to look yourself squarely in the face and say "this country needs to find a way to legitimately fund the huge cost of an election", we will continue to lie to ourselves and mouth meaningless platitudes about rectitude and honor. I suggest we stop this pussy footing hypocrisy immediately.

Before I move on, I have two riders to make. First, not everyone executing a government contract is a crook, not by a long shot, and heaven's forbid if that be the insinuation. Every group of people is a mixed bag, a bit of each of acquisitive and self-abnegation type, some good, some not. That said, I would be delighted but not a little surprised if Kalmadi turned out to be show white. Second, not everyone who is a crook has purchased his job. The world is full of honest bureaucrats doing their honest jobs to the best of their ability. Third, not everyone on the take has been told by his political superiors to find ways to fund the democracy machine. The world is also full of people who have a piece of the action through dumb lucky. That is the kind of guy who is on everyone's potential son-in-law list. I'm not kidding. Back home, I attended a village wedding where the bride's family was jubilant because the guy worked in a state toll plaza collecting taxes from passing truckers. The loot it seems ran thick.

So what is the moral of this story? Governments ought not to build anything, run anything, manage anything, buy anything or sell anything? No buildings, no dams, no canals, no tourism departments, no factories, no airlines and by heavens, no events, be they industrial fairs or athletic meets? There is logic to this extreme view. In this day and age, everything, even village *dangals* and *kabaddi* contests can find corporate sponsors. You can legitimately argue that a government's job is to govern and if it does that effectively, we should all heave a sigh of relief and say 108 gayatri mantras in the morning. But this kind of extreme position is always disconcerting.

There are jobs you can't or shouldn't be outsourcing. I'd rather the government ran the defence services, the nuclear power plants, the fire brigade, the police... Besides, Government servants can extract money from award of contracts to private parties just as well as they can extract money from executing those contracts. This is just not an allopathic type of situation where you cut off this limb, create that antibiotic law to counter that crime virus and ban that element of the life style to eliminate vulnerability. You need holistic medicine: attacking the problem at the root. And the root is legitimizing election funding. So now ladies and gentlemen, can we please stop diverting attention about F1 and event management. Let's get to the point and address the issue of election funding, and then, either put up or shut up. Your call.

Comment-3

(This column appeared in the December 10, 2011 issue of Business World)

Inflection Point 2011

(Despite black marks in the report card, in the long run, everyone will agree that 2011 was the year in which India reached an inflection point)

Ranjeev C Dubey

Notwithstanding that the Parliament has remained paralyzed throughout 2011, many reform laws are not being passed, inflation is on the

edge of control, the rupee continues to sink and the civil war in Maoist India rages unabated, I believe strongly in the India story. Indeed, I am inclined to the view that in the long run, everyone will agree that this was the year in which India reached something of an inflection point on its climb to the global summit of economic and political leadership. There are at least four reasons that help us identify this inflection point.

First, in a manner unprecedented in India, we decided to apply the same law to both the powerful and the powerless. For India, this is deeply shocking and I am not being rhetorical. Our society is structured around the fundamental principle that if you are powerful, you are above the law. If you flag down a VIP car flying down the wrong side of the road, you would expect the irritated politician to thunder "don't you know who I am?" VIP's expect not to be frisked at airports. Movie stars expect not to be caught at customs carrying jewelry. Bureaucrats don't stand in railway reservation lines. To now say that if you take or pay a bribe, you will go to jail is a disturbing, indeed alarming, movement of the goal posts. The greatest impact on this paradigm shift is seen in the 2G case in which MP of ruling party allies, heads of India's largest corporations and political organizers of international sports events were sent to jail. Naturally, all major paradigm shifts bring new issues and I've written about some of these too ([Judicial Collateral Damage](#)). That said, no one will deny that if the same laws apply to everyone, a lot of very powerful people will have to clean out their act. The long result will be a fairer, more egalitarian society. It won't happen first thing in the morning, but the shift has begun.

Second, 2011 saw Indians become orders of magnitude more serious about doing something about corruption in high places. Corruption management in India has long been best described in that delightful Indian word 'tokenism'. Since we did not want to fix the problem, we would earn brownie points by catching a DTC bus conductor here and a well-past-the-best-before-date politician like Sukh Ram there. If a smoking gun led to someone genuinely powerful, it was understood that the effort would degenerate into a theatre of the absurd such as Bofors. Since I've also written about this recently ([Scam Mela](#) and [Systemic Scamming](#)), I will pass on with the observation that since corruption is ultimately about funding elections, the long term impact of these events may well be a fundamental change in the manner in which we finance our democracy. I wait for a pragmatic debate on this subject to begin.

2011's third major change is our changed attitude to the manner in which we rob rural and tribal Peter to pay urban Paul: I speak of course of land acquisition. This has always been a brutally unfair law on which I have had a lot to say over the years (especially [Land Acquisition Angst](#) and [Pandora's Real Estate Box](#)). At the time of writing, the new land acquisition dispensation is still a work in progress and as a nation, we are addressing three issues: (a) the price at which we compulsorily acquire agricultural land, (b) the mechanism by which we acquire this land, and (c) the purposes for

which we may with justification acquire this land. Early symptoms suggest that we are now overreacting in the other direction — a sure fire recipe to kill industrial development — but be that as it may, in changing this law, we would have substantially changed the basic structure of our society.

The final big picture shift is in the nation's handling of its "law and order" situation. If I didn't love this very charming Indianism quite so much, I would have called it the state's abdication of its sovereign function. The Government of India delights to engage in self-indulgent excesses far removed from its job — hotels, airlines, booze shops and handcraft stores - sometimes at great cost to the exchequer. Yet, when it comes to essential sovereign functions — and what can be more sovereign than maintaining infrastructure or policing the people — the government is completely dysfunctional. In recent years, human rights activists have had much to say about the havoc that government sponsored private armies have wrecked in Chhattisgarh. The result has been a rising cycle of violence and counter violence. We got away with this privatization of sovereign duty in the past — and "terrorist infested" Punjab is a case in point — but in truth, can a modern civil society fund one side of a raging undeclared civil war? On 5th July, 2011, the Supreme Court of India ruled on this question in *Nandini Sunder versus State of Chhattisgarh*.

In this case, the court was invited to determine if the state should be allowed to recruit 'Special Police Officers' in "Maoist infested" areas, to arm and fund them and to then prevent their activities from being registered as crimes. No, said the court, and for a variety of reasons. First, to do so was to violate the constitutional rights of the people the state was recruiting. Poor uneducated and negligibly trained tribal youth could not be exposed to the inherent dangers in counter insurgency operations, nor could they be exposed to the risk of retributive killings after their appointment ceased. Second, these tribal youths were themselves responsible for human rights violations — looting, arson, violence — because arms in the hands of the illiterate and the untrained endangered society generally. Third, the court observed that it is the duty of the State to protect the fundamental rights of its citizen. To pay an "honorarium" of Rs 3000 per month, and outsource this responsibility to those manifestly incapable of discharging this burden, is illegal.

The long term consequences of this judgment are debatable. On a practical level, to declare a reactionary counter insurgency group illegal is not to repress the insurgency, leave alone address the conditions that led to the insurgency in the first place. Astute political thinkers have criticized the judgment for its ideological leanings. Doubtless, the judgment is not at a loss for rhetorical expansiveness with catchy quotations such as Cicero's "Laws cannot remain silent when the canon's roar". It delves deep into Joseph Conrad's *Heart Of Darkness*. It tries to explain the violence in Chhattisgarh. It even condemns the "amoral political economy that the State endorses, and the resultant revolutionary politics that it necessarily spawns". It castigates the "culture of unrestrained selfishness and greed spawned by modern neo-

liberal economic ideology, and the false promises of ever increasing spirals of consumption leading to economic growth that will lift everyone, under-gird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general, and Chhattisgarh in particular". It condemns the State's "subsidies to the private sector, giving it tax break after tax break, while simultaneously citing lack of revenues as the primary reason for not fulfilling its obligations to provide adequate cover to the poor through social welfare measures. On the other hand, the State seeks to arm the youngsters amongst the poor with guns to combat the anger, and unrest, amongst the poor. Tax breaks for the rich, and guns for the youngsters amongst poor, so that they keep fighting amongst themselves, seems to be the new mantra from the mandarins of security and high economic policy of the State".

If it wasn't for the paper on which it was printed, I would have put the lot down to the work of Arundhati Roy! But be that as it may, the fact of the matter is that the court has held — and I just have to quote the judgment here — that "the constitution does not support the institutionalization, of a policing paradigm, the end point of which can only mean that the entire nation, in short order, might have to gasp: The horror! The horror!" A legal principle has been decided and as its consequences percolate down into national consciousness, we would have changed another fundamental basis on which our democracy deals with underprivileged communities.

Ultimately, all these four changes are about equality before the law, indeed equal protection of the law. If we can actually get to that point of political, administrative and judicial equality, we would have ushered in a real democracy in India.

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