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Ensouth

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Advocates

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At a Glance

1.	Managing Partner's Message	3
	Section I - Videos	
2.	Video: Why is India so corrupt?	4
	Section II - Print Media	
3.	Comment: Healthcare Hope We should re-examine our values. We care for our country but not for our countrymen. We care for progress, but not for what it means to the majority of our countrymen.	5
4.	Comment: The Moving Sexual Harassment Cheese In the new emerging India, a women's body also belongs to the three most powerful "P"s of modern life: Politicians, Police and Press.	8
5.	Comment: Socializing Shareholders Interests For a more service oriented government, corporates have to take government's roles. That requires us to trust corporations in a way we hoped we could have trusted the government.	11

Managing Partner's message

Now that the highly entertaining if lowbrow electoral discourse has passed and we are glued to our televisions no more, perhaps it is time to pause and reflect whether we Urban Westernized Educated English Speaking Elites are fair in the moralistic hyperbole we inflict on our country. As a society, are we really in trouble?

Corruption and its role in our society is always a good place to start any such reflection. So in our video section, we ask ourselves: **why is India so corrupt?**

That takes us to the next question: whose India is it anyway? We are all obsessed with progress but who is impacted in what way by this progress, and who is asking this question? Fortunately, the Supreme Court is asking this question, and is taking steps to help those who need it. In **Healthcare Hope**, we contextualize this issue in the area of medical support for our citizens.

This same question has many dimensions to it of course: half of Indians are women, but they fear to tread the streets. Fortunately, no society is working harder to address this question than us. Right or wrong, Delhi has fought pitched street battles with the police in defense of its women. Has this brought the right results? In **The Moving Sexual Harassment Cheese**, we review the state of the law and its practical impact on women in the workplace.

Finally, we move on to the most difficult question of all: who is running India and what does it mean for the rest of us? All around the world, corporate power is displacing sovereign power. This can be alarming because companies consider themselves answerable only to their shareholders. In **Socializing Shareholders Interest**, we examine the implications of a world where a government is a corporate *dukaan* and evaluate the legal issues that arise from such a world.

We always appreciate your feedback.

Yours truly

(Ranjeev C Dubey)
Managing Partner

Section I - Videos

Video: Why is India so corrupt?

The current state of India's democracy makes corruption inevitable. This video sets forth the point that we cannot evolve away from our scams without dealing with certain development imperatives first.

The Video may be viewed at:

<http://www.youtube.com/watch?v=llQyhWqh5m8>

Section II – Print Media

Fine Print: Healthcare Hope

We should re-examine our values. We care for our country but not for our countrymen. We care for progress, not care for what it means to the majority of our countrymen

Ranjeev C. Dubey

While everybody and their Nilgiri langurs are worried to death about the decline and fall of India's institutional structure, little is ever said in print, video or social media about what is happening to our Urban Westernized Educated English Speaking Classes (Should we be calling them UWESE?). Indeed, this last year demonstrates that while the UWESE are floundering in a rising tide of cynicism, the institutional structure that we so despise is still doing its job.

Going back to the beginning of the year, it was apparent that a great many of us had deeply distorted perspectives on the burning issues of the time: the horrific Delhi Gang Rape, the Right to Education law and the Right to Food law. UWESE were deeply upset about the rape and the police's inability to 'prevent' it but no one cared that a policeman had died while trying to contain rampaging mobs. Not many wanted to see poor kids in rich kid schools because in truth, no one cared about educating poor children. Worst of all, no one cared at all that poor people in India didn't have enough to eat. All attempts by the ruling coalition to alleviate this suffering were trashed as unaffordable political populism. Fortunately, our judicial system too has neither succumbed to this cynicism nor lost its moral moorings. Within this year, it has passed two significant judgments relevant to the Healthcare industry, addressing both product and service providers. This alone is reason to be grateful for this year's mercy.

On April 1st, the Supreme Court pronounced judgment in the long awaited Novartis AG v Union of India [Air 2013 SC 1311]. Recall that in 1997, Novartis filed a patent application for the cancer prescription drug Glivec claiming that it had invented the beta crystalline salt form of the freebase salt Imatinib. Based on this filing, on March 27th, 2002, it asked for and received Exclusive Marketing Rights under Section 24A the Patent Act (as it then stood) and then went about preventing generic manufacturers from selling unbranded versions of the same medicine.

To get things in perspective, generic medicines offered this product at \$ 177-266 per patient per month while Novartis offered the same product at \$2666 per patient per month. Those who objected to the grant of patent basically argued that the Mesylate salt form of Imatinib was already in the public domain in 1997 and Novartis could not now ask to patent it. Novartis argued that the beta crystalline salt form it was seeking to patent was a huge improvement over the earlier known form: it showed a 30%

increase in availability (based ironically on a study of rats!). Curiously, this 30% increased availability wasn't in reference to the previously marketed Mesylate form of the salt: it was with reference to the "free base" form which was never marketed because it was not soluble. At any rate, since "bio-availability" is not the same thing as enhanced therapeutic value, the whole argument was somewhat misleading.

The Supreme Court was not impressed. It held that Imatinib Mesylate was known in 1977 (and published in the Cancer Research journal), so this "beta crystalline salt form" did not qualify as an "invention" which could be protected under the Patents Act. It strikes me as self-evident that the Supreme Court had dealt a body blow to the never ending attempts by patent holders to ever-green their inventions beyond what the law allows. If there wasn't so much technical gobbledegook around this patent, you could argue that this ever-greening attempt was fraudulent! Curiously, most conversations I have had in Delhi's elevated drawing rooms focused intensely on protecting corporate profits so that pharmaceutical innovation can help drive India's progress. Lost in the din of corporate double speak is concern on what this judgment means to the life expectancy of people who didn't have US\$ 2666 a month to blow on cancer treatment. Perhaps it is indeed true that a pharmaceutical company has more money grubbing dividend hungry public shareholders than it has cancer ridden customers.

Six months later, on October 24th, 2013, the Supreme Court acted against negligent healthcare service providers in *Dr Balram Prashad v Dr Kunal Saha* [MANU/SC/1098/2013]. Back in May 1998, an NRI had contacted epidermal necrolysis, a rare skin disorder, was admitted to the AMRI Hospital in Kolkata and was overdosed on steroids which led to her death. Based on her potential earning capability, her husband then claimed an obviously exaggerated compensation of Rs 77,07,45,000 (which I can add is quite the norm) before the National Consumer Disputes Redressal Commission. He also claimed additional compensation of about Rs.20,00,00,000 because of cascading consequential events in America when he lost his job, lenders foreclosed his residential mortgage and he went bankrupt. As is common in such cases, the defense raised a range of technical issues.

I did not read the case to have been particularly well presented in the trial court. The quality of the evidence was sub optimal and expert witnesses testifying on compensation to be awarded did not particularly inspire confidence. Nevertheless, the Supreme Court established several principles that are of long term interest. First, they held that compensation awarded should take into consideration the impact of long term inflation. They also decided that where the claimant resided overseas, the impact of a declining rupee (against the US Dollar) should be compensated. Third they rejected the technical challenge that events subsequent to the filing of the case could not expand the amount of compensation granted. Fourth, they ruled that a young victim would have a higher income than she did at the time of her death and revised her potential income upwards. They also assumed that she would work for 30 years. Finally, the Supreme Court rejected the idea that "interference" by members of the victim's family

in the treatment given to the victim would absolve the hospital and its doctors from their "primary responsibility and default in duty on their part". In conclusion, the court awarded Rs 6 crore in compensation to the husband of the deceased. Two of the doctors were asked to pay a compensation of Rs 10 lakh each while a third doctor was ordered to pay half as much.

As I read this judgment, several trains of thought are worth a whistle stop. First, the law it seems is catching up with the cost of living. Compensation awards are increasingly beginning to reflect the real financial impact of accidents and negligent actions. This means compensations now actually compensate. Second, doctors are being required to assume more or less absolute responsibility for the things they do: contributory negligence as a defense is beginning to get de-rated and in my view, rightly so. Third, the court has refused to succumb to the false attraction of hyper technical defenses. Since all potential damages cannot be known at the time when a case is filed, the impact of subsequent events have been incorporated into the compensation awarded without excessive hyperventilation. In the upshot, I would say that given the rising stakes, the practice of medicine will be taken far more seriously. If the courts keep up this momentum, the days of patient's attendants frantically ringing bells for urgent help while the duty nurses continue to tattle down their mobile phones will become a memory. Doctors too won't prescribe treatment because they have prescription quotas to meet or junket-offering medical salesmen to satisfy so that they can get their next gang bang in Bangkok.

What I have heard from many UWEES though is apprehension. Some have expressed the fear that doctors insurance costs would rise and they would in turn charge higher consultation fees thus impacting health costs. This view is premised on the assumption that cases of medical negligence are few but professional liability insurance will become universal. I guess most of us don't expect to become victims of medical negligence. This view is also premised on the assumption that medical negligence cases are easy to fight. I have argued seven years back in the Fine print [Criminalizing the Healer](#) that it is very difficult to hold a doctor responsible for negligence. Nothing has changed since. To me, the main benefit of this judgment is that with the risk of a large award looming in the distant future, an insurance company may be encouraged to quickly settle such claims. It doesn't hurt to bear in mind that statistically speaking, not every victim of medical negligence is a rich man capable of fighting a 15 year case all the way up to the Supreme Court.

As I look back to 2013, I guess, that was a good year that was. But having said that, I come back to the moral moorings of our UWEES and wonder if we should re-examine our values so that we may know ourselves for the first time. We purport to care for our country but we do not care of its countrymen. We purport to care for progress, but we do not care for what this progress means to the majority of our countrymen. And we care for a more ethical, a more moral India, but not if we are required to then live out that standard.

Fine Print: The Moving Sexual Harassment Cheese

In the new emerging India, a women's body also belongs to the three most powerful "P"s of modern life: Politicians, Police and Press.

Ranjeev C. Dubey

Conspiracy theorists in lawyer circles had it that the government avenged the 2G judgment by taking his lordship down in a sexual harassment scandal! Tehelka's Tejpal was of course taken down by a vengeful BJP for what he had done to Bangaru Laxman! As for the learned senior advocate who failed to pressure Ms. Mihira Sood into succumbing to his magnificent obsession, well, what's wrong with wooing a pretty girl? It seems that privately, the *desi* male is more entertained than upset to hear of sex on the bench, sex at the bar and sex amongst the righteously rhetorical media activists. Given that following the terrifying Delhi Gang Rape last December, we have radically changed both Rape and Sexual Harassment laws (since April 3, 2013), what explains this state of denial?

At a pinch I would say four reasons. First, we live in a society that has become remarkably amoral. The UWEES (Urban Westernised Educated English Speaking Classes) believe that everyone stinks, and moral righteousness is now the exclusive preserve of those who haven't yet been caught. While we rant and rave about scams, corruption, tax evasion, injustice, adultery, bride burning, and what else besides, few of us act on these beliefs in our personal lives. Criminals in India get glamorous glitterati for groupies, not social sanction. Second, cultural scripting tells us that men woo aggressively and women succumb reluctantly. A million women around the country still seek out movies featuring the single biggest personification of this cultural construct - Shammi Kapoor, who else - and thoroughly enjoy what appears to be a very abrasive, and physical, form of conquest. Anybody who came of age in the 1960s and still has a libido knocking on his door would think this is the way to be.

Third, there is the problem of entitlement: what is success if it's not access to Fame, Fortune and F**ks? Every macho male at the top of the food chain in every area of life is getting his due and you don't need a meter above any bed to disclose what everybody knows. He who expects that we can easily legislate an alpha male out of his sexual appetite by retrofitting a law must be smoking something psychotropic. Fourth and finally, we are as yet to reconfigure the risk-reward matrix. Too many people succeed too often in the proposition game not to risk the consequences of failure. For every outraged woman, there is another who is glad to get on. Within my profession, a highly respected law firm owner has married his junior, another is carrying on with a member of his admin staff, and one of the country's all-time top counsels travels with his charming young junior who shares his suite. I assume that other professions are not peopled exclusively by madonnas on the threshold of immaculate conceptions.

The real issue though is this: modern life is increasingly about work, even when we socialize. Inevitable, this is where most of us find both solace and opportunity. The river doesn't just run one way. This 'New Normal' of even more stringent laws disrupts this naturally flow of the river. The world is now getting restructured into one where any proposal you make to a lady results in either a great and memorable relationship or a great tryst with criminal law. I suppose for some, this heightens the excitement. It certainly does not kill the brinkmanship, any more than AIDS killed promiscuity. I will admit that this binary nature of the new normal is entirely consistent with modern India, exactly as it is projected on social media. If you are not with us, you are against us: worse, you are a demon. I will let you love me, or I will send you to the dungeons.

Perhaps ignorance of these new laws is a very large part of why men remain unmoved even though the cheese has moved radically. Under the new Section 354A, displaying porn, making physical contact and advances involving unwelcome and explicit sexual overtures, or making demands or requests for sexual favours can hurl a man into the pits for three years. Even making sexually coloured remarks can send a man to jail for a year. As for rape, Section 375 has now been substantially expanded. Invading someone's genitals (whether or not you then text 'Fingertips' to her) in a lift or otherwise is rape and that can consume at a very minimum, the next seven years of a man's life. Just for the record, sticking an ear-bud into a girl's ear without her consent is rape.

As a lawyer, I am of course alarmed at the excesses of these new laws. But even more, I am alarmed at what these new laws really mean for the victims as well. Let's use a hypothetical example. A young lady in my office emails me saying your colleague made sexual advances at me and touched me inappropriately. Let's say that she would be satisfied if I sacked him. As it turns out, her email to me reaches another colleague who gossips about it to his brother who in a tragic twist is a cop. On November 12th, 2013, the Supreme Court ruled in Lalita Kumari v State of UP [Manu SC 1166 2013] that "registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation." Basically, the cop has no choice but to file an FIR.

What happens next? The cop pays me a visit. Since I don't want to be accused of helping the perpetrator (ask Shoma Chaudhury), I will readily make a statement confirming what the poor girl told me and I will definitely not try and resolve anything. Heck, I might even go to the cops myself, even before they show up, just to be sure. The cop now goes to the victim but she says "look I am really outraged but I don't want to put this man behind bars". You would think that a woman has no obligation to complain of every wrong, big or small, done to her, right? I mean she does own her own body, right? Wrong! The Leader of the Opposition and Senior Advocate Arun Jaitley does not agree (see TOI Nov 22nd, 2013).

To recall, Jaitley argued the other day that every crime is a crime against the state and not the individual (which is correct on the principle of it). He added that to offer the victim "the choice of refraining from pursuing a criminal investigation... (is) akin to offering the offender an escape route". So, if you are raped and do not complain, you are an accomplice who abetted your own rape. If this is true, you can go to jail for failing to cooperate with the police. In short, you may be the victim, but now that you have disclosed the crime to me, somebody with an agenda, political or otherwise, is going to parade you up and down the court and make you a cat's paw to be used to hang someone against whom he may have an agenda. That doesn't seem like the protection of women's rights to me.

What it comes down to is a series of recommendations I will make to all my readers. If it is your misfortune to be a victim of sexual harassment, be aware that the law will not protect your dignity though it will try and enforce the law about your body. The press and the police will make a public spectacle of you. Although the Sexual Harassment of Women at Workplace Act 2013 entitles you to pursue the matter with your employer, anything you say in writing will be used to file an FIR and then victimize you for non-cooperation. So you can complain, but you can't give any details whatsoever. I recommend this because if you should change your mind for any reason (like the guy fell at your feet and said he was really sorry and then publicly apologized), complaining without facts allows you to end it there and then. On the other hand, if you put down any detail, a policeman can deduce that a crime has been committed, and then it's out of your hands. In short, I am saying that you should forget about these new-fangled women friendly laws: go find a lawyer to explain to you what you can and cannot say in a complaint to your employer. You need to learn the fine art of credible deniability. Also be prepared for more than you could chew. If the experience of the Supreme Court intern and the Tehelka's Shoma Choudhury is anything to go by, your disclosure may be far more traumatic than anything that was done to you by the original perpetrator of the crime.

Now, if on the other hand, you are a perpetrator, understand that these new laws have no room for repentance or forgiveness. Understand that if the lady did not succumb immediately to your irresistible charm, there is no question of reassessing your action, coming to terms with the wrong you have done, accepting your fault, going up to the lady and make amends, or - and this is especially important - apologizing to her or explaining anything to any of your colleagues in writing. Remember, anything that is not an absolutely and total denial of everything (with a bunch of counter allegations thrown in for good measure) is an admission of guilt and that will be used by the justice machine to nail you even if your victim bears you no great ill-will. Once the crime is committed, the victim is irrelevant to what happens next. It is now between you, the police, politicians, the press and whoever has it in for you. At this point, your only aim should be to get out of here alive.

As for the women, their bodies have always been controlled by others in all cultures - father, mother, husband and - if you take the *Khap* Panchayat worldview - the whole damn *biraadari*. As it now turns out, in the new emerging India, a women's body also belongs to the three most powerful "P"s of modern life: Politicians, Police and Press.

Fine Print: Socialising Shareholders Interests

For a more service oriented government, corporates have to take government's roles. That requires us to trust corps in a way we hoped we could have trusted the government.

Ranjeev C. Dubey

It's not just the Aam Aadmi Party that makes the New Year radically new. All around us, ideological assumptions on the foundation of which we have built our nation are being put to the test. On January 6th, 2014, the Delhi High Court has ruled in the Association of Unified Telecom Service Providers Case that if you provide a revenue stream to the government, the Controller General of Accounts can come snooping into your finance department. We know that even that rag picker under the half built flyover buys a tax-paid soap sometimes: should CAG be auditing his spend in defense of the Government's top-line?

As we get into this issue, let's also understand the underlying ideological question. For a start, let us accept that political theory, like the length of skirts, is driven by fashions. The Great War 1914-18 heralded the end of the Colonial era and brought on the modern - partially Socialist - one. Predictably, it was to a Fabien (read vaguely leftist) vision of modern India that our Constitution turned. After independence, we increasingly succumbed as we went along, drifting further left of centre till in 1976, we expanded the Preamble of our Constitution to redefine ourselves as a 'Sovereign Socialist Secular Democratic Republic'. Any which way you look at it, our legal system is nothing but a manifestation of a political ideology. Inevitably, this meant a great judicial romance with a grossly underfunded welfare state that distributed free lunches and crippled business.

Unfortunately, the global love affair with socialist idealism ended in 1991. Maggie Thatcher fought a pitched battle with the unions between 1980 and 1990 to convince her people that Governments do most things badly. Mikhail Gorbachev fought another battle to dismantle the Soviet Union's version of a welfare state till his actions dissolved the USSR itself in 1991. This had its impact on Indian politics. Narasimha Rao changed course in 1991, liberalizing the domestic economy and reaching out to global business by deregulating inbound investment. Our judiciary was quick to react to this turnabout. It reduced its intervention in corporate affairs, stopped protecting jobs at all costs, stopped supporting labour right to be paid not to work, stopped protecting tenants from their landlords, and so forth. Lawyers who have lived through the 1980s have

experienced a huge shift in the attitude of the courts towards private capital in the last twenty years. In the judiciary's mind today, no matter what anyone may posture, shareholder sovereignty has primacy, shopkeepers are not scum, Governments should keep out of corporate hair and Governments of the day are not the best judge of public policy.

Unfortunately, global events have proved that too few laws may be no better than too many laws. The Wall Street Subprime Crises of September 2008 has reminded us that you have to be crazy to believe that businessmen will police themselves: the law has to do its job. At the same time, we know that corporates of the future will rule the world. Already, Yahoo is bigger than Mongolia, Visa is bigger than Zimbabwe, EBay is bigger than Madagascar and Nike is bigger than Paraguay. At the top end of the spectrum, Chevron is bigger than the Czech Republic, Exxon Mobil is bigger than Thailand and Walmart is bigger than Norway (a top 25 income country).

Naturally, the decline of government and the corresponding rise of corporations raise grave legal issues. Inevitably, courts suspect there is something terribly wrong in a regulatory regime founded on the idea that a company belongs to only its shareholders and the devil can have the rest. This is why Indian courts have in recent years looked closely at the wholesale usurpation of peasant lands, about company funded private vigilante armies, about profiteering schools, about the environmental costs of economic development, and so on and so forth. The biggest issue facing the law today is this: if countries will now be run on corporate interests, how do we balance the interests of corporate shareholders with the interests of a nation's citizens generally? This is the real question that the Delhi High Court was called upon to decide in Association of Unified Telecom Service Providers versus Union of India.

The genesis of the dispute lay in Trai's request to telecom companies in May 2010 to have their accounts verified by CAG. Considering that CAG had accused the Government of a Rs 1,766-crore scam two months previously, telecom companies were naturally skittish. In fairness, since telecom companies paid a revenue share to the Government, their licenses provided for several kinds of verification of their accounts. All else apart, the Government drew the court's attention to its contractual right to appoint "Special Auditors" at the cost of these Licensees with the same power as the Statutory Auditor of a company.

The court agreed. It also saw the issue in its larger ideological perspective. It acknowledged that we cannot leave companies to be regulated by company law alone because companies treat themselves as being answerable only to shareholders. Curiously, although these "property rights" in shareholding are created by law, the same law does not require these property owning shareholders to perform certain reciprocal obligations in the bargain. The court also took the point that the government acts as a custodian of a public asset when it allows telecom companies to use this national resource in exchange for a revenue share. It follows that "licensees are the

accountant of the Central Government with respect to the complete, accurate and honest maintenance of the books as to any transaction(s) involving revenue". Good faith must inform this contractual relationship, the court observed.

Now, under Article 149 of the Constitution of India, it is the constitutional duty of CAG to "exercise such powers in relation to the accounts of the Union and the States and of any other authority or body as may be prescribed by or under any law made by Parliament". Parliament has of course made such a law: The Controller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971. Since a share of telecom revenue is part of the Government's income, CAG is duty bound to perform all of its duties by auditing this income at its source.

The implications of this judgment are far reaching. If CAG has to protect every revenue stream the Government has, where does it leave a tax paying citizen like me? Twenty two years of 'liberalisation' has not changed the basic fact that our socialist sovereign Government has a finger in every revenue stream it possibly can and so, by the logic of this judgment, only a subsistence islander living on barter and fishing in the far south of the Andaman sits outside CAG's jurisdiction. In a predatory state like India where a lot of lofty reasons have been used to inflict grave injustice on its citizens, this is truly an alarming risk to run.

In fairness, the court has seen this risk. It has specifically observed that CAG can only audit receipts and "not confuse himself with his wide all-embracing power under Section 14(2) of the Controller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 which includes inquiries into aspects like faithfulness, wisdom and economy in expenditures". Hopefully, the same principle applies to CAG's ambition to audit someone like me, even though this is no great solace. In the days to come, CAG's new found power could prove very opportune should the Aam Aadmi Party's zealous desire to audit the accounts of Delhi's power utilities move forward.

What we are left with at the end of the day is a fundamental ideological issue. We know that we all want a more service oriented, less intrusive government. This is impossible without letting corporate entities perform roles that Government hitherto have. That requires us to trust corporations in the same way that we hoped we could have trusted the Government. If corporations do not believe that they owe the people of India anything - that they will act in the best interest of only their shareholders - how can the rest of us, including the courts, trust them? So how do we find that golden mean that both protects private profits and protects public money? As a tax payer, I want to know where my money is spent. As a law firm, I also want Government out of my hair. What regulation will best achieve both ends? The answer my friend is blowing in the wind.

