

**Issue 44**

**April 2016**

# *Ensouth*

**The E-magazine brought to you by**

***N South***

**Advocates**

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## **Managing Partner's message**

Welcome back to another issue of Ensouth! So far this year, April has been the cruelest month yet, breeding 42 degrees in the shade in some places. Naturally, our thoughts turn to philosophical issues around humanity and its environment, especially the legal environment. This time, all three topics we pick on are both philosophical and ideological.

First, in **My Human and Other Animal Rights**, given how dogs are ripping apart infants who live on the streets, we ask if dogs should have more dog rights than poor humans have human rights?

Next in **Decriminalizing Defamation**, we ask if India can allow a law to exist which sends a man to jail for telling the truth only because he knew that in revealing this truth, he would harm the reputation of the person he named, shamed and defamed.

This brings us to the most basic issue of all: our very judicial system. In **Justice for All**, written for the 21<sup>st</sup> Anniversary Issue of Business Today, we ask how the courts can become an instrument of social justice. The answer lies in the transformation of our judicial system, an examination of which reveals that this task is not as hard as appears to be the case.

Happy Reading

Ranjeev C Dubey  
(Managing Partner)

## Print Media

### Comment-1

#### **Fine Print: My Human and other Animal Rights**

#### **Should Dog Rights take precedence over Street Infant Human Rights?**

**Ranjeev C. Dubey**

Is this just the dawn of *acche din* or are Indians beginning to have too much of a sense of entitlement? Why do we think we deserve highways like America, public behaviour like Japan or politicians like Scandinavia? Indeed, why is it our birth right to have a house, a car, an annual foreign vacation and a wardrobe full of designer dude rags? Indeed, on a more serious level, why on earth do we think we have individual fundamental rights, indeed any human rights at all?

If we think about it, what we call human rights is just an ideological construct. Many species inhabit our planet: do they have equivalent rights? Do small fish have Fish Rights including the right not to be confined to a tiny aquarium without a fair trial? Do spiders and cockroaches have Spider and Cockroach Rights not to be sprayed with lethal poisons from a can sporting the picture of a very delighted young lady? Don't be silly, I hear you say? But then, what about dogs? You wouldn't expect it, would you? Doctors working in outpatient clinics in towns across the country will tell you horrific stories of human flesh mangled by street dogs. That does not include the small street children who are ripped apart by hungry pie dogs. Thirty five thousand Indians die of rabies every year. Still, when citizens poison stray dogs, the police register criminal cases against the crusaders. Clearly, dog lovers love dogs a whole lot more than they love people. In India, Dog Rights take precedence over Street Infant Human Rights, if there is such a thing as Human Rights for street dwelling infants. Dog Rights are never championed by those who actually live on the street.

The bigger irony here is that a rational law has led to absurd results. As usual, the devil has been in the detail. The whole basis for these criminal prosecutions is premised on the Prevention of Cruelty to Animals Act 1960, which is most concerned with preventing the infliction of cruelty on the dogs, rather than conferring a fantastic quality of life on them. So too the provisions of the Animal Birth Control (Dogs) Rules 2001. It divides dogs into pet dogs and street dogs and pins the welfare of the latter onto animal welfare organisations, private individuals and local authorities. When you read the Animal Birth Control Rules, you get this sinking feeling that its vision is exactly the stuff Indian tax payers would not break down the door to be first in line to pay for. The rules specify procedures for registration of dog bite complaints, constitution of dog squads, the manner and implements using which dogs should be caught, the sick ones treated, the healthy ones sterilised, culled or housed in animal shelters. It's all delightfully humane stuff, but probably not implementable in a country where we can't treat people humanely. What we get then is administrative paralysis. If you can't do it by the book, why not run away from

the scene of the potential crime instead?

That's exactly how it has turned out. More's the pity because not only do the authorities scamper out of the scene of all potential crime; they also accuse you of a crime if you try to fix the problem yourself. I trust you will not think me facetious if I remind you that this attitude is colloquially called 'Dog-in-the-manger'! I can see the method in the madness though. Cops are just robust semi-rural boys who landed a tough job. Before they got the job, they probably lazed away the day back home in the village following a dog with tin cans tied to its tail. They are not trained to handle screaming dog loving activist frothing at the mouth. They react by filing FIRs against dog killers.

In the result, the practical reality is that anyone trying to kill dogs in India runs the real risk of having his life ruined. Given the speed at which our criminal law system works, if one such cop is intimidated into filing an FIR, it is decades before the case is decided. This has Kafkaesque consequences. I understand the very tony Delhi Golf Club has a peculiar problem: its pariah dogs are killing off its peacocks. Should we love our national bird less than we love our mongrels? The management didn't think so and obtained permission to terminally rid itself of its killer dogs. The permission was granted. The Minister of Women and Child Development, we are told, was not amused. Someone called up the Secretary of the club and said the Minister will be delighted to file an FIR against him if he touched a single dog. No Peacock activist appeared on the scene. In the result, nature - like justice - is taking its own course: the peacocks are dying and the dogs are partying.

Finally, the Kerala High Court had had enough. On Nov 2nd, 2015, it ordered local bodies to take effective steps to control stray dogs while killing rabid and diseased ones. For good measure, it asked the authorities to comply with the law while doing so. Dog lovers were incensed. A local businessman staged a fast in protest. A lawyer took the matter to the Supreme Court. He wasn't the only one. Both the Delhi and the Mumbai municipal corporations have asked the Supreme Court to allow them to kill stray dogs because they are killing women and children in increasing numbers. This has put the Supreme Court in the tricky position of prioritising human rights and dog rights. Not exactly its solemnly constituted function, is it then?

Fortunately, the Supreme Court has never been one to shrink from performing a prickly task. On November 19th, 2015, the court revealed its thought process in observing that:

*"(The) life of a dog is not more important than the life of a human being. Life is the glorious gift of nature and the compassion for animals and human lives should harmoniously co-exist. A balance should be struck between compassion for dogs and human lives".*

The Supreme Court has put a finger on the key issue perfectly. Life must be held in balance, but even more importantly, in context. The right to shelter cannot include the

right to build your jhuggi in my home, or better still, the Rashtrapati Bhawan because there is more land to spare there. A dog's right to live a dog's life does not include the right to bite people (on the ground that it's in its nature) any more than a criminal has the right to rape infants and carve holes into people's bellies because it is in the criminal's nature. Come to think of it, I've never heard that argument made about tigers, or even cockroaches.

While the Dog Rights case will be listed in March next year, and no doubt the Supreme Court will do the right thing, we need to confront the reality that we run the real risk of becoming a society with severe bi-polar disorder. We have dog lovers and dog haters but the space in between for those who think Dog Rights need to be seen in context has shrunk considerably. This is by no means limited to the Fundamental Rights of Dogs. As a society, the middle passage is disappearing fast.

Those who protest seeking to reclaim this space are demonised and condemned. We need to examine this. We need once again to begin cultivating cultural traits that were always ours, but have gotten away from us completely in recent decades: balance, tolerance, empathy and understanding. Complex multi-cultural, multi-lingual, multi-religious, multi-ethnic and multitudinous societies can be run as liberal democracies or not at all. What we are witnessing instead is the complete polarisation of all paradigms. I have little interest in promoting one brand of animal rights over another or one brand of politics over another. I am vitally interested in preaching peace and harmony, and the creation of an atmosphere conducive to propelling my country to its trust with its destiny. Hate, anger, hostility, resentment and reaction is not going to get us there.

## Comment-2

### **Fine Print: Decriminalising Defamation**

**Should the police be deciding how much civil liberty we deserve?**

**Ranjeev C. Dubey**

When the inimitable Subramanian Swamy added his name to a gallery of eminent Indian politicians who have been sued for criminal defamation, he could at least demand that he be taken seriously because he had suffered the mandatory rite of passage! I am not being facetious. An allegation you make only matters if you matter. Who sues someone who no one believes? So when Rahul Gandhi says the RSS murdered Mahatma Gandhi, or Arvind Kejriwal says Nitin Gadkari is corrupt, enough people believe them to make suing them worthwhile.

But what if you speak the truth? Section 499 of IPC defines defamation as "*any imputation either spoken or written concerning any person with an intention or having a reason to believe that such imputation will harm the reputation of the other person*". This admits to ten exceptions. Your statements are not a crime if what you say is 'for public good', in good faith against a public servant or on a public question, while reporting court

proceedings or rendering opinion on a court case, etc. Truth is not one of them. If you say something that is true, but you intend to, or know this will hurt the reputation of your target, basically, you are going to jail for two years.

On the face of it, this is a very strange law. You can't call a crook a crook even if it's true because you have an agenda. Kejriwal can never call anyone corrupt because it is not merely his intention: it's his whole political platform! Bluntly put, he is guilty for what he said about Gadkari the moment he said it, whether or not it is true, because he believes saying it will get him votes.

The same holds true for Rahul Gandhi and for the same reason. I must confess I don't quite know what to make of Subramanian Swamy who tweeted that asking Ms. Jayalalitha "to govern is like giving a garland of flowers to a monkey or asking a donkey to appreciate Kalpura incense aroma". Does Swamy have reason to believe that a donkey doesn't appreciate good aroma? Does anyone believe this highly successful much admired politician may be a simian? And does it matter? I mean, didn't you respect Sugriva and Vali's wives in Ramanand Sagar's Ramayana?

The same is especially true of Arun Jaitley who can command millions in hourly fees for legal advice. With the money he is capable of legitimately making if he has a mind to, Kejriwal calling his leadership of the Delhi Cricket Board corrupt may be of little consequence, yet he has filed criminal proceedings against Kejriwal. Curiously, Kejriwal, who has the most to gain from an unqualified legal licence to shoot off his mouth from time to time, actually issued a circular in May 2015 directing all departments of the Delhi Government to criminally prosecute all 'who damage the reputation of the Chief Minister'. For a guy who has been sued by Sheila Dikshit's ex-political secretary Pawan Khera, Kapil Sibal's son lawyer Amit Sibal, and lawyer Surender Kumar Sharma too, that is irony wrapped in absurdity. So what should we do with such a law?

It really is a bit of a no-brainer because of the peculiar way in which India manages its criminal administration of justice. We commonly add six names to a rape case and convert it into gang rape, sometimes because we want the rapist's family to suffer torment as the girl did, and sometimes because the extortion opportunity is too good to miss. Likewise, if someone defames someone, we add more names and make others we hate suffer criminal trials even though they didn't say a word merely by accusing them of criminally conspiring with the guy who did all the defaming. Indeed, this law makes it entirely possible to send those who speak ill of the dead to jail! Why that you may ask, considering that the dead truly have nothing to lose? As it turns out, politically speaking, a lot of the living live off the deeds of the dead. If the dead are defamed, the living lose political credibility too. Thus circa 2016, we are jumping hoops about whether Nehru was responsible for the mess in Kashmir, whether Shastri's concessions in Tashkent were justified or not, and so forth.

The litany of woes does not end with the foregoing. We can conceive of situations where

criminal prosecutions are entertained by criminal courts based on statements that are on their face intended to be ironic: as for instance when ribbing a couple living together that they are "living in sin". We can conceive of statements that are mere expressions of political ideology - like "the present government is funded by and therefore pursue the agendas of private enterprise alone" - which can lay the foundation for a criminal prosecution. We can conceive of situations where imaginary legal entities created by fictions of law that have no physical existence except in a register in some government office somewhere - and I mean departments, undertakings and companies - launch prosecutions because 'they', whatever that means, feel defamed. Bear in that mind that beyond a point, it does not matter if the accused comes out unscathed. Many of these prosecutions run for decades, compelling the accused to be present in court on every date, binding him hand and foot to this excruciating procedure, the sword of coercive process dangling over his head. If you have not had this experience, you do not truly understand its corrosive debilitation. All this is possible, even though what was said was true and did the target of the statement no harm at all. It's ridiculous.

It is especially ridiculous because the Article 19(1)(a) of the Constitution guarantees us free speech subject of course to reasonable restricts. How free is our free speech? I have written extensively on this subject in the context of Section 66 of the IT Act (Please google "**Freedom to Offend**" and "**India's Silenced Daughters**"). To cut to the chase, I would say India's free speech liberal credentials always find their nemesis when confronting an opportunistic - or worse, mercenary - howling mob screaming for blood. At that point, free speech transforms into incitement and the country prioritises public order at the cost of all else, leaving Charlie Hebdo with not a leg to stand on.

Does that mean I am advocating that everyone should be free to smear everyone's good name? Of course not! I am asking you how inviting the police to administer the limits to our constitutionally guaranteed right is an appropriate solution to the problem. Defamation is a well-established tort, i.e. a civil offence between people not bound by contract who are still legally obliged to act responsibly to one another. You file a case in a civil court, you pay your court fees, you prove damage was caused to you and you collect. If you were not defamed, or if you were and it was true, or if you were but you can't prove it did you harm, you do not collect. This seems to me to be the eminently sensible way to handle it.

Of course there are several problems with this solution. You pay your court fees upfront and then you wait for a very long time for the court to decide your case. Let me not underplay the difficulty, but I can't stretch it to defend the argument that where civil cases take a long time to conclude, we ought to convert our grievances to crimes and drag the defendant through a more onerous process. The failings of the law cannot become the privileges of the outraged.

The Supreme Court can certainly see the point. Since last year, it has accepted multiple pleas from multiple appellants, notably Kejriwal and Swamy, to examine the issue of

decriminalisation of defamation. Much of the attack is grounded in our right to free speech, which is subject of course to reasonable and not excessive restriction, which of course is very quick to transform into incitement, which of course is inches away from a howling mob, which is where the cops are very interested in the subject.

As for me, on balance, I am on the side of the free speech liberals. My reason is very simple. Cops are great with crowd control but they are not trained to make keen judgements on ideological issues like how liberal India should be. Their default response is aggressive, pre-emptory and - how should I put it - not intellectually nuanced. That frequently makes it unjust. I have spent too much time battling the professional compulsions of overworked policemen and the enormous pressure they face to trust civil liberty to their discretion. For that reason alone, I'd rather scrap criminal defamation as an offence.

### Comment-3

#### **Fine Print: Justice for All Judgment on our Judiciary**

**Ranjeev C. Dubey**

*[Some of India's landmark legislations such as MGNREGA, insurance for all, direct benefit transfer, education for all and health for all, have been instruments of bringing social equilibrium. But with crores of cases pending in Courts across the country, delayed justice continues to deny justice to the common man. How could law become an instrument of social justice? Ranjeev C. Dubey, Managing Partner, N South, Advocates, outlines what must be done to bridge the gap between the rich and the poor over the next 25 years.]*

Here is a core eternal truth: removing the symptoms of an ailment is not the same as curing the ailment. India's main problem is that in the last two decades, we have acquired a peculiar fascination for symptomatic treatment. When women are raped in cars, we ban solar film on car windows. When air quality declines, we ban half the cars from plying the streets on particular days. When corruption spins out of control, politicians fight pitched battles with the police on the streets. Lost in the symbolism and emotional catharsis from such actions is the fundamental fact that everyone rises to the incentives of his/her environment.

At the root of the vast majority of our ills lies our wanton neglect of a key instrument of social equity, equilibrium and justice: the judicial system. This is actually quite obvious. If rapists, polluters and scamsters were convicted faster than they could profit from their felonies, there would be little incentive to engage in criminality. You can't build a great country by hysterically protesting on the streets, stripping crooks naked and parading them on donkeys, or spewing venom on TV. You do it by building great institutions that efficiently pursue the objectives for which they are designed. Almost

every society that has identified social equilibrium and justice as objectives, has hastened to establish, and carefully preserve, an efficient judicial system.

In India's case, this becomes all the more necessary because we now expect our judicial system to not only deliver justice but also define policy (distribution of 2G licences, mining licences), investigate crimes (the Hassan Ali Khan case, the Jayalalithaa case), regulate markets (SEBI and the fascinating case of Sahara India), define political deology (rule on the legitimacy of Salwa Judum) and even resolve metaphysical conflicts (suicide versus Santhara)! Many would agree that this side of Bollywood and cricket, only the judiciary holds this country together. We need an efficient judiciary, especially since, in recent years, the legislature has gone the way of all flesh.

Yet the fact remains that the judiciary as an institution is deeply troubled. At its worst, it is an extortion racket equal to anything the provincial police station can conceive of. For the most part, it is overburdened, unable to function, gridlocked and log jammed. As former Chief Justice H.L. Dattu so candidly acknowledged, India has more than three crore pending cases. One estimate claims that at current disposal rates, we will need 466 years to clear the backlog. However, the situation is not hopeless. This seemingly intractable problem comes down to only a few things we need to fix. At the heart of the problem is the fact that we haven't enough judges. Countries with efficient legal systems uniformly have a ballpark ratio of 50-60 judges per million people. In India, the corresponding figure is closer to 10. We need to fix this, and fast.

But there is more to increasing judges' strength than appointing more judges. It is also about providing them the real estate, infrastructure and support staff they need to function. I understand there has been a policy decision to increase judges' strength by 25 per cent. But this will barely keep up with the ambitions of an expanding economy: it will not make up for the neglect of the past. Can judges' strength be increased to five times its current level? No doubt, it's a great challenge. Where do we get so many skilled judges? After all, its productive assets we need, not well meaning, decent folk who hope to learn on the job. I get plenty of CVs from aspiring lawyers emerging from the hallowed portals of India's leading law schools: most don't have employable skills, although they do have great financial expectations.

Skill deficit is a complex countrywide phenomenon. All I can say is this: if you want great skill, you better have a great budget. The world is what it is. And money is never enough. You have to catch talent young. A lawyer with 10-15 years experience can switch jobs and become a judge because he has a career expectation of another 20-25 years. Once he has been 20 years a lawyer, he is too successful, too set in his ways and doesn't have a career progression deep enough to justify the switch. Bear also in mind that you will have to train him for this specific role. You will need to build great training institutions, much more intensive than the short workshop routines you have now. What will you train these judges to do? The era of the generalist judge has passed. I have 35 years of legal experience, but I don't even pretend to understand tax laws or

intellectual property rights (IPR). At the rate we are changing our regulations, in a few years, I fear I won't understand capital markets either. We need intense HR planning for judges. How many do we need for which jobs? Getting this product mix right isn't rocket science, but it isn't our usual perfunctory gloss-over-details claptrap either.

One more problem is the inability of judges to exercise complete control over their own courts. Technology now provides a solution. Enterprise resource planning has penetrated the very heart of Indian business; there is no reason similar systems can't be implemented across all courts. We need to move to a completely electronic ecosystem, transparent to all stakeholders. We need to standardise all our practices, from the way we number our cases to the way we organise our data systems. We need cooperation from our lawyers, too. A vociferous minority of lawyers can be particularly perverse. I'm too poor to buy a computer, you might hear one say. My fundamental right to practise this noble profession stands impaired if everything goes online. It is imperative that I be present at my uncle's cousin's brother-in-law's funeral, another may insist as he seeks postponement of a hearing. Conflict aversion then becomes the road to institutional self-destruction.

This brings me to discipline and intellectual clarity. I have lived through the deterioration of the legal system in the late 1980s and 1990s, when time after time courts took to unsettling long-settled law in some elusive quest for targeted justice for individuals, subjectively defined through the prism of the judge's ideological bias. What we have now is a legal system in which I as a lawyer cannot definitively tell potential client what the court will decide in the face of any given set of facts, or how long it will take, or what it will cost to get that decision. The situation is truly ludicrous. We need certainty of law a good deal more than we need justice for each individual based on some misguided notion of compassion. Fixing this has two elements. First, we need our judges to think only of the big picture. Judges are here to apply the law to the facts, not deliver individual justice to the downtrodden. It's a cultural shift, easily implemented if it is clearly understood. Second, we need to arm judges with a definitive understanding of the law. All this takes is IT and competent law clerks. If a judge can punch a couple of buttons and get abstracts of all cases decided on a particular point of law in the last 60 years before him, he will know what law to apply. The rest is common sense, and that has never been lacking.

I am overwhelmed by the irony presented by the judicial system in India. Here is a hallowed institution that has all but disintegrated in substantial measure. We observe this downfall as mute spectators even as we continue to look to the judiciary to rescue us from a predatory state. The fixes are easily understood and easy to apply, but there is no administrative will to make the changes. Even where administrative will exists, political support is absent. The people want justice, but there is no popular movement on behalf of civil society agitating to enforce the fixes. Topping all this is the greatest irony of all: we want the best judiciary possible, but we haven't the slightest interest in

addressing any of its existing problems. In this, we only prove the greatest eternal truth about Indians: we are superb at strategy, we just hate to implement our rhetoric.

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