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Ensouth

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At a Glance

Managing Partner's message

Unwittingly, this edition of Ensouth focuses on the vexed questions confronting our judicial system. There are many such issues but we explore the three that 'burn' the brightest.

First in **Voting for God's Sake,** we ask if the judiciary is competent to deal with issues around spirituality and religion.

Next in **Invisible Elephant in the Court Room**, given laws delays, we ask if the judiciary should have reinvented itself as an all-purpose solution provider and dealt with dubious issues such as Jallikattu, anthem-standing and santa-banta joke telling.

Finally, in **Pul's Perversity Tale**, we confront the reality of a former Chief Minister's 'suicide note' and ask if India has an mechanism to deal with allegations of corruption at the highest levels of India's judiciary.

Happy Reading!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: Voting For God's Sake

Is the Supreme Court capable of defining what is or is not a religion?

Published: Jan 15th, 2017

Ranjeev C. Dubey

Between chacha-bhatija battles within the Samajwadi Party and an election budget allegedly decimated by demonetisation within the BSP, it seems the Gods may well be on the side of Hindutva in the upcoming UP elections. Meanwhile, the Supreme Court ruled on January 5 that candidates can't ask people to vote in God's name. Do we take it that the court is trying to level the playing field between God and man? Let's take a trip down the judicial memory lane to contextualize the new rules of electoral engagement.

When the framers of our Constitution structured us as a secular, socialist republic, did they imagine that the countryside would be one day overrun by katta-wielding *gaurakshaks* and aggressive born-again ultra-right majoritarian Hindu storm troopers. Very likely, they also did not imagine that our apex judicial institution would be compelled to rule on moral questions of good and evil. We are a society where it's okay to go about naked with ash in your hair, smoke dope for Shiva's sake and not do a day's work. It is just as okay to believe in no God and never visit a temple. How is it then that the Supreme Court needed to observe that to seek votes in the name of religion was 'evil'?

Blame it on Teesta Setalvad! She was trying to get the court to review the 1995 Hindutva judgment which defined Hinduism as 'a way of life' and not a religion. This matters because Section 123(3) of the Representation of People's Act 1951 holds that an "appeal by a candidate…to vote or refrain from voting for any person on the ground of his religion….or the use of, or appeal to religious symbols…" is a corrupt practice. Agreeing to hear the issue afresh was no surprise because India has a long history of litigation over such electoral malpractices.

The story begins back in 1960 when a candidate in Jharkhand distributed leaflets using the symbol of a cock commonly used by the tribal Ho people as a sacrifice to their pagan gods. The leaflet threatened people with dire divine consequences if they forgot the cock! Was this a corrupt practice? In *Shubhnath Deogram vs. Ram Narain Prasad* [AIR 1960 SC 148], the court ruled that it is illegal to accuse those who do not vote for the cock of being irreligious.

Clearly, this aggressive pro-secular interpretation of the law pleased no one because a larger five-judge bench was asked to rule again on this issue in *Jagdev Singh Sidhanti vs. Pratap Singh Daulta* [AIR 1965 SC 183]. Was it corrupt for a candidate to use a flag with 'Om' written on it at election meetings? No, said the Supreme Court, while going the other way. It ruled that there is a distinction between a religious symbol and a symbol bearing high religious efficacy! Clearly, a chicken could go where an Om could not, and it set a new trend by which courts declined to get caught up in semantic fine points about what was or was not an appeal to religion. Judicial reluctance to get caught up in religious soapbox oratory then became the order of the day.

Thus, in *Kultar Singh vs. Mukhtiar Singh* [AIR 1965 SC 141], the candidate printed posters extolling voters to keep high the honour of the 'Panth' by defeating those opposing the Akali Dal. The Supreme Court ruled that the use of the word 'panth' did not signify the Sikh religion. In *Ramanbhai Ashabhai Patel vs. Dabhi Ajitkumar Fulsinji* [AIR 1965 SC 669], the candidate distributed leaflets using the 'Dhruv Tara' (pole star) as a symbol. The Supreme Court ruled that the pole star was not a religious symbol. There are any numbers of other cases in this genre.

On the other hand, when it came to direct appeals to religion, the court was equally forthright about the law. In *Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra* [(1976)2 SCC 17], a candidate asked his electorate to vote for him since he alone stood for all that was Muslim, while his opponent was neither a good Hindu nor a true Muslim. The Supreme Court ruled that a direct attack of a personal character upon the competence of rival on the grounds of religion amounts to contravention of Section 123 (3) of R.P. Act. Similarly, in *Harcharan Singh vs. S. Sajjan Singh* [(1985)1SCC370], a candidate appealed for votes on the ground that the Akal Takht had issued a 'hukumnama' in his favour. The Supreme Court ruled this as a corrupt practice. Similarly, when the late great N.T. Rama Rao had himself photographed as an incardination of Lord Vishnu and asked the electorate to vote in his candidates for prosperity, the Supreme Court ruled this a corrupt practice in *M. Venkatha Krishan Rao vs. B. Trinatha Reddy* [1993(2)ALT41].

Then it all changed again when Hindu majoritarian parties pushed to claim space in India's political mainstream about the mid-nineties. The 1996 Hindutva judgements arose because 12 politicians, including Bal Thackeray and Manohar Joshi, made fiery speeches to ask for votes in the name of Hindutva. In *Dr. Ramesh Prabhoo v/s. Prabhakar Kashinath Kunte* [(1996)1SCC130], the Supreme Court took the view that no precise meaning can be ascribed to 'Hindu', 'Hindutva' and 'Hinduism'. Ordinarily, it ruled, Hindutva is understood as a way of life or a state of mind. It cannot be equated with religious Hindu fundamentalism and can well be seen as an appeal to 'Indianisation'. In the result, it came to be that Hindutva wasn't in law about Hinduism at all!

This changed again last week. In *Abhiram Singh v/s C.D. Commachen* (Civil Appeal No. 8339 of 1995 decided on 02.01.2017), the Supreme Court refused to get into the question of whether Hindutva is or is not a religion but ruled that elections are above all a 'secular exercise' while the relationship between man and god is an 'individual exercise'. It held that seeking votes in the name of religion is a corrupt practice, regardless who's religion was being appealed to.

You could of course argue that judgments are nothing but reflections of the zeitgeist, the spirit of the times. You could tell yourself that courts don't shape nations: like politicians, they are mirrors reflecting composite social beliefs. There is merit in this. The real difficulty with laws that invite courts to rule on moral and spiritual matters is the intractable obscurity of the underlying issues. After all, what is religion? Many academics would define religion as a system of belief in one or more supernatural omnipotent deities, who prescribe a moral code by which humans must live, and judge our action at some point after our death. Every element of this definition is contestable of course. Neither Buddhism nor Jainism have presiding supernatural omnipotent deities. Hinduism has no judgment date or damnation to follow; only a balance sheet which simply kicks you back to earth if your karmas suck.

I would argue instead that religion is an attempt to find a design to the universe: to understand the cosmic law which brings order and 'meaning' to our lives. Even though God has died in the scientific age, our need for order and meaning has not. Humanism, the new religion of the modern age, states that we are all free individuals to which inalienable 'rights' are attached. Humanism argues that humans are intrinsically valuable and our experience of life gives meaning to the universe. This is the basis for democracy as a political institution of choice. This is also the basis for 'human rights' (as opposed to cockroach rights). This is also the premise for our new-found obsession with subjective experience as the basis of morality. If it feels good, it is good. Divorce is okay because my experience of marriage is supreme, not the promises I made a very long time ago to some priest mouthing mumbo-jumbo around a fire in an archaic language.

If you follow the argument, you can immediately see that market capitalism and communism are new-age religions. Communism was a religion in which the Party (in China's case, Mao himself) claimed omnipotence, morality was prescribed by workers' unions, and the purpose of life was prescribed in a political doctrine (in China, the Red Book). Contrary to what school textbooks in my time argued, Medieval Christianity, or Islam, did not 'meddle' a great deal in politics: it is that when you establish a supreme source for existence, all human experience and organization - even acceptable political choices - are dictated by that supreme source.

This makes the business of ruling on moral, spiritual and religious issues an incredibly hazardous one. India is a multi-religious, multi-ethnic, multi-lingual, multi-racial society with aboriginal tribes too. One size does not fit all, and many sizes have no supreme

supernatural 'God' in the recipe. If that wasn't enough, Indians are also masters of cognitive dissonance. Thus, up until the 1990s, we were each of Hindu, secular and vaguely left of centre. After Y2K, we have become simultaneously Hindu ultra-right majoritarian and market capitalists, even though the latter is a 'religious' creed based on the supremacy of individual liberty. For the Supreme Court to now tread on this sacred landscape and rule on what is or is not a religious appeal is fraught with risk. How is an appeal to market capitalism and progress less an appeal to religion than an appeal to cosmic order asking voters to protect cows and build temples where once God was born?

That said, how do we then make sense of Sec 123(3) of the Representation of Peoples Act? Each of us has a religion we were born to, but very few of us live by its dictates in any serious sense. Instead, each of us has a personal philosophy of one kind or another, which tells us what the universe really 'means'. We are far more inclined to vote for this personal moral code, this scale of 'meaning', this religion than we are likely to vote for someone who appeals to a religion we were born to.

The problem is that the Representation of People's Act has no problem if a candidate seeks votes offering market capitalism and material progress as an electoral sop. It does have a problem if a candidate seeks votes on the basis of a 5,000-year-old religion which in the main is understood by the overwhelming majority mainly from TV serials. It's hard to see how one is more a 'religion' than the other. It is even harder to see how the Supreme Court is competent to conclusive determine what our collective Indian scale of values are, or should be. This central dilemma does not disappear even though I am at heart terminally agnostic.

Comment-2

Fine Print: Invisible Elephant in the Court Room

Should courts rule on bull-taming, anthem-standing and santa-banta joke telling!

Published: Feb 14th, 2107

Ranjeev C. Dubey

If you live long enough, you come to realize that today's outrageous is next week's new normal. Like 18 hour power outages, people can get used to almost anything. Eleven years ago, Praveen Babi, the iconic Bollywood heroine of my generation died leaving much of what she owned to charity. Her trustees sought to probate her will. Relatives who preferred to keep her money (rather than benefit women and children as she wished) challenged the probate action. Last December, the papers reported that the Bombay High Court had granted probate to Praveen Babi's will after her relatives told the court they did not wish to contest the case any longer. The consumer of justice paid

the vendors' fees for eleven years only to find that the court served the ends of justice by exhausting one consumer leaving the other victor by default.
You can shrug your shoulders and tell yourself this is only a dead women's tale with a sting in the tail. But children don't get treated any better. When a 14 year old Bareilly girl became pregnant after being raped repeatedly, her family petitioned the court to let her terminate the pregnancy even though she was out of time under the Medical Termination of Pregnancy Act. The court responded by footballing the matter off to the Chief Medical Officer, who in turn footballed the matter by ordering a bunch of investigations and neglecting to take a decision within the extended time allowed by the law. In the upshot, institutions manifestly charged with the burden of protecting the young engaged in a series of transaction that ensured that no decision needed taking. It didn't end there. When she went into labour, the health worker at the local facility refused to deal with this medico-legal case, culminating in her delivering her baby in the back of an ambulance in October 2016.

These are no isolated cases. This system failure is occurring in the backdrop of a justice machine that is all but broken. Not even the 2012 National Court Management Report denies it. More than 22 million cases are now pending in the district courts of which 7.5 million are civil cases. Of these, over 6 million have dragged on for more than 5 years. India has 13 judges per million people even as best practice demands that we have 8 times as many. Our judge strength has gone up 6-fold in the last three decades, even though the case filings have multiplied 12-fold. The report estimates that in the next three decades, the number of new cases filed will increase from 15 to 75 per thousand people. We are falling behind, day on day, yet the judiciary is busy assuming powers in areas where even angels fear to tread.

The bigger problem is that even the systemic failure is not consistently applied across all cases. Let me run some illustrations for you. Naina Sahni was sensationally roasted in the Tandoor murder case in 1995, but her lover was not convicted by the trial court, till 2003 or the conviction confirmed by the High Court till February 2007. Criminal lawyers will tell you that 12 years to get conviction is pretty good going for a headline murder case. The People's Union for Civil Liberties case demanding the right to vote "None of the Above" was filed in April 2004 and decided in September 2013. Supreme Court lawyers will tell you that this is reasonable going for a PIL of national importance. They will also tell you that commercial cases do a lot worse, even in the face of the speed at which business dynamics play out in the modern world. The Jindal Stainless Ltd case (which upheld Entry Tax imposed by states) was filed in September 2002 and decided in November 11, 2016. It took the court 14 years to determine the final price of steel in India. Bear in mind that Air BnB, Uber, Fitbit, Instagram, and Facebook were only a few of a dozen $10 billion businesses that didn't exist at all in 2002 when Jindal Steel was filed. Business empires can rise and fall faster than the court can decide whether business should pay a particular tax or not.

Let's look at the other end of the spectrum now. The 2G case was filed in September 2010 and decided in February 2012. The Shreya Singhal case which abolished Section 66A of the IT Act was filed in November 2012 and decided in March 2015. The case determining the legal status of transgenders was filed in October 2012 and decided in 2014. The coal scam case was filed in September 2012 and decided in August 2014. The Subramanian Swami case upholding the validity of criminal defamation was filed in October 2014 and decided in May 2016. Now here comes the best part: The Supreme Court (AOR) Association case holding the National Judicial Commission unconstitutional was filed in March 2015 and decided in October the same year.

So how come it takes seven months to decide who appoints Indian's top judges while it takes 14 years to decide the price at which steel should be delivered to a consumer? If we want to make in India, do we really want to prioritize the procedure by which a judge will be appointed knowing that no matter who is appointed, he will not decide our case?

I could give you competing narratives in answer to this question. I could say judges prioritize matters that are of grave public importance. That may be, but then, the price of steel is pretty important because unqualifiable potential liability kills business. I could say that judges only decide issues that get boosted up by the frothing heads on prime time news TV, because justice has to be seen to be done for the welfare of the republic. That may well be, but how much do judges really care about 'public pressure'? I could also say that judges prefer to decide stuff that gets their names into newspapers, after all, they are human. In my heart of hearts, I believe it's none of the above.

The truth is that law's delays of all types have a lot to do with the top judiciary's self-definition of their job description. Consider the core facts. Day on day, the judiciary concerns itself with vexed questions it is not equipped to handle. It can't stop farmers from burning crops around the National Capital Region, but it is willing to risk bringing economic life to its knees by subtly promoting bans on odd and even number plates. It cannot prevent smoke spewing Jugads (constructed out of trolley mounted diesel engines attached to rudimentary steering axles) from running all over the countryside in rural Haryana, but feels justified in banning cars sporting engines over 2 litres capacity. To add to the Kafkaesque nature of these decisions, it now feels it entirely appropriate to allow the same engines on payment of a completely arbitrary environmental cess that has no bearing on either the vexatious problem or its complex possible solution. Am I entirely unfair in thinking that our judiciary is simply contriving logic as it goes along without a very good sense of where the limits of its jurisdiction are to be found?

So we have the spectacle of animal rights activists demanding that bulls not be subject to the cruelty inherent in Jallikattu. No one noted that jallikattu annually kills several people but no bulls. You could argue that saving people's lives is just as sacred but then, where would that leave Harley Davidson? It is laudable that the Supreme Court

doesn't want India to become the accident capital of the world, but is it equipped to understand the implications of a summary ban on "sale of liquor within 500 meters along national and state highways"? Did the court consider where that would leave the Westin or the Trident in Gurgaon, or even the 34 pubs and bars in Cyber Hub? The courts regularly rule against governments for destabilizing business, through arbitrary ill-thought-out actions, but who will issue the remedial writ when the arbitrary boot is on the judicial foot?

This is the heart of the problem. Somewhere in the last 20 years, as India's institution structure has come under ever greater attack from the deteriorating political environment, we have developed a blind faith in the judiciary's ability to deliver us from every conceivable evil, whether or not it has the skill to do so. In the upshot, the judiciary has stopped acting pragmatically - i.e. matching ambitions to resources - but has instead proceeded to redefine itself as an all-purpose solution provider. Thus, an institution designed to pragmatically enforce the rule of law, and keep the wheels of social and commercial life turning with minimal conflict and friction, has lost focus on its core job. It has instead reinvented itself as a philosophical force of moral authority engaged in social engineering determined to propel India into a brave new post-modern world of its own conception. This is akin to working on the basis that to win a 100 meters sprint it is not necessary to be able to walk first. If religion can be properly defined as a system of faith and worship of the superhuman, Indian courts of law have now rapidly transformed themselves into a church worshipping an egotistical God called justice. That is the real invisible elephant in the court room.

Comment-3

Fine Print: Pul's perversity tale

Do we have an institution mechanism to deal with accusations of corruption at the highest level of the judiciary?

Published March 10th, 2017

Ranjeev C. Dubey

In history, no one has the last word, but the former Arunachal Chief Minister Kalikho Pul's suicide note must at least be a kind of judicial full stop. The note is as you would expect a credible suicide note to be: a potent 60 page tale of misappropriation of public funds, political and judicial corruption at the highest level garnished with a heady dose of moral righteousness. It condemns the entire political process, admits to the author's wrongdoings, claims justification for them, and then blaming those who beat him at his own game of even greater moral depravity. It's an imaginative crafty piece of fiction, unless it's not.

To be fair, the tales of political corruption are neither new nor novel. Generally speaking, tales of judicial corruption in India are also not particular novel or new. The difference is that Pul accuses the judiciary of exchanging cash for judgments at its very

apex. When three Chief Justices of the Supreme Court of India are accused of corruption, no matter how fanciful and unbelievable the claims, a nation has to be particularly perverse to be disinterested in what is said. Let us look at some of Pul's 'judicial' material:

First, Pul claims that when the Guwahati High Court ordered a CBI probe against a former Arunachal Chief Minister, he paid the then Chief Justice of India Rs. 28 Crores to stay the operation of the order.

Second, Pul claims that this same former Chief Minister invented the PDS scam in the state. He starting a 'head load system' for delivery of PDS goods applicable even to areas accessible by vehicular traffic and thereby ballooned the budget from 16 lakhs to 168 crores overtime. This forced the Central Government to sit up and stop payments under the scheme. Pul claims that this Chief Minister then conspired with local contractors and financed their litigation in the Supreme Court against his own government (paying their lawyers 90 Crores in professional fees) and paid the Chief Justice of India Rs. 36 Crores through his son to hand down a decision in favour of the contractors, it being pre agreed that 50 per cent of the sum received under the judgment would go to him personally. Once handed down, this judgment allowed the former Chief Minister to distribute Rs. 600 Crores to the contractors.

This brings us to the third and final major allegation. This Nabam Tuki government lost a vote of confidence in the Assembly on December 16th, 2015. After a short spell of President's Rule, Pul formed a government on February 19, 2016, but the matter was bitterly contested before the Supreme Court. Pul claims that the son of a Chief Justice of India priced a favourable decision at Rs. 49 Crores. In turn, the brother of a companion judge concurrently priced a favourable decision at Rs. 37 crores.

It is not for me to canvass the possible authenticity of such information, nor do I presume to do so. People stick numbers to allegations all the time even if it's not Saturday evening in a smoky bar. Nevertheless, the real question is this: If the former Chief Minister of a state pens such allegations and then kills himself, are you going to pass it off as mere gossip? Furthermore, what do you make of subsequent events?

On February 17, 2017, the Chief Justice receives a letter from Pul's widow requesting permission to file an FIR based on the suicide note. The permission was neither given nor denied. Instead, the letter was treated as a PIL and listed before a relative 'junior' judge who had previously served with the Chief in a High Court. Soon thereafter, the widow's lawyer withdrew the case. This respected member of the bar is now vocally on record with his belief that an attempt was made to bury the case, forcing him to withdraw it. He says he is not done yet.

This drama has occurred in the backdrop of another happening story that has been all the rage for several months now. The esteemed Justice C.S. Karnan has provided

endless entertainment to Madras High Court lawyers through exhibitions of erratic behaviour over the years. His outrageous antics culminated in a judgment in June 2016 ruling that "couples who had premarital sex are in law to be treated as married", making him the toast of social media. When the Madras High Court Chief Justice tried to restrain his worst excesses, he clothed himself in Dalit righteousness and claimed victimization, lobbing thunderbolts all around about corruption in the judiciary. The Supreme Court reacted by transferring him to Calcutta. He retaliated by suo motu assuming jurisdiction and passed orders restraining his own transfer! He later withdrew his order, proceeded to Calcutta, but then resumed his campaign of mass accusations against his brother judges. On January 23 this year, he wrote to the Prime Minister disclosing an "initial list of corrupt judges" against whom he demanded a CBI inquiry.

Beside themselves with exasperation, a seven member bench of the Supreme Court issued a contempt notice inviting him to present himself and explain his conduct. Karnan first announced that he will defend himself in court, then ducked two successive hearings. On March 10, the court issued warrants and directed West Bengal's Director General of Police to personally escort this worthy judge to the Supreme Court at the next March 31 hearing. We wait with baited breath. Blowing in the wind is the 'crorepati' question: when removal of a judge is parliament's prerogative under its power of impeachment, where does the Supreme Court find room to import this concept of Contempt of Court by a sitting High Court Judge? This is going to take some figuring out.

No matter what you make of the specifics in either case, it is clear that nothing in India's constitution, or practice in our judicial system, arms us with a mechanism to deal with errant members of the higher judiciary. If we then throw in allegations of high corruption by three Chief Justices of India, we have a vexed problem to which much Talking-Head time can be devoted on prime time News TV without resolution. Whatever be the quiet burial status of Pul's suicide note, the fact is that we cannot now deny that the Indian judiciary is facing a deep crises and a deeper legislative void.

In this, India is not alone any more than corrupt judges are kryptonite. The world grapples with judicial corruption. In the main, it comes down to who judges the judges. Overwhelmingly, the "developed" world believes that it should be judges. Thus, UK has the Judicial Conduct Investigations Office (JCIO) constituted under the Constitutional Reform Act 2005. Similarly, the US has its own disciplinary bodies in its various constituent states. But these examples do not take us far because I am not aware of a case where a Lord Chief Justice of England and Wales, or the Chief Justice of the United States is accused of corruption. In the result, there are no definitive rules anywhere in the first world that have been put to good use. In the third world on the other hand, this occurred as recently as October 2016 when in pre-dawn raids, the Department of State Security (DSS) arrested members of the Supreme Court and High Court of Nigeria. The DSS is the Executive arm of government and President Muhammadu Buhari has been slated for reproducing acts reminiscent of his days as a military

dictator. If we look for inspiration to handle the crises facing us, Africa may not be the best place to start.

The implications of these developments are all too clear. The judiciary has successfully battled the executive's vigorous attempts to wrest back control over the appointment of judges for years now, but not without great cost to itself. The stress and the ensuing logistic nightmare of delivering judgments in the absence of enough judges has reduced at least one Chief Justice to tears in the past. In the unlikely event that we really do have a compromised judiciary, deals will have to be made. The executive will wrest the initiative, including the right to appoint judges, and in the long run, our judiciary would lose something of both its strength and its moral authority. The judicial cheese has moved, and Pul may have been the man to achieve that, even if it was only posthumously.

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