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Ensouth

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N South

Advocates

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Managing Partner's message

New Year's Day 2014 brings on a breath of fresh air as a group of rather idealistic young people have decided to take on the political establishment and show that it can be done. So far, they have been spectacularly successful in achieving power. It now remains to be seen how they exercise it. I am excited by the idea that the exercise of this new found power will mainly be in the form of Legislation, Governance and Compliance: subjects that every lawyer breathes, lives and makes a living out of. Equally I am apprehensive that this power will be exercised to recreate a very retrograde 1970s type of *desi* socialism. We will see.

Meanwhile, to provide a context to what needs to be done; all but one of the offerings here is about India's eminently 'fixable' failings as a society.

First, in the Video Section, we offer the full version of **Buffalo Jurisprudence**, a critique of our legal system. Thus far, fixing the legal system has been on nobody's agenda, not least because it is frequently seen as the last bastion against absolute chaos in the nation. Still, there are grave issues urgently in need of addressing and now is a good time to visit this reality.

Next in our Comment Section, we offer three insights. First in **Enter the Sandman**, we delve into the nature of the political compulsions that drive regulatory voids in our society. This raises the unspoken question: how do we achieve fair regulation without first changing the behavior of our polity? Second, in **Casting out Criminal Candidates**, we examine the electoral compulsions that criminalize practically every politician who wishes to win an election in India's rural heartland. This raises another unspoken question: how do we address the deep enthusiasm of our people to exchange votes for cash. Finally, shifting gears, in **Trial by Social Media**, we question the value of free speech when it has the effect of denying other more sacred inalienable fundamental rights, such as personal liberty, a fair trial and the right not to be condemned unheard. In doing so, we question the unstated ideological assumption that freedom of speech comes without a corresponding obligation.

Happy New Year!

Ranjeev C Dubey
Managing Partner

Section I – Videos

Video: Buffalo Jurisprudence: the Essential Principle.

At the Heart of India's legal system lies our unique and endemic school of Jurisprudence: the Buffalo School. This short video sets out the essential principle.

The Video may be viewed at:

<http://www.youtube.com/watch?v=2GIUKUGRFC0>

Section II – Print Media

Fine Print: Enter the Sandman

While zealous officers must apply unfair mining laws, the fact remains that the UP Government's inability to timely award sand mining licenses lies at the heart of the problem being faced by NOIDA's real estate sector today.

Ranjeev C. Dubey

That Ms Durga Shakti Nagpal was suspended and charge-sheeted by the duly constituted Government of India's most populous state for trying to stem the generation of political funding out of the bed of the Yamuna river does not strike me as quite the heart of the wonder that is still India circa 2013. What strikes me as totally weird is that we have not stopped to ask how India can possibly achieve its developmental ambitions when states as humungous and highly populated as Uttar Pradesh give out only 1,900 sand mining licences of less than 5 hectares each across the whole state?

It's considerably worse where this recent drama is playing out. The Hindustan Times reports that nobody mining sand in the Yamuna and Hindon rivers in Greater Noida has a licence to do so. Ever since the Samajwadi party swore in its Government in March 2012, the district mining department has not issued a single mining licence. It seems mining was legal only in three patches on the Yamuna riverbed till May this year, each of which had been auctioned back in 2011. As of now, all the sand that is going into the thousands of high rise apartments under construction and widely advertised in the newspapers in the NCR are being built with - if you believe the Government that is - sand purchased from allegedly auctioned sand seized by illegal miners. Yeah, right!

So long before I begin to talk about zealous officers catching illegal miners, I want to understand why sand is not legally available in Greater Noida. Unless you belong to that perverse group of Green Peace activists who want nothing done at all - the type of guy who don't want thermal power because it pollutes the air, hydro power because it cuts forests and degrades the mountains, nuclear power because it is dangerous or bullock power because methane fluctuating bulls destroy the ozone layer - you have to ask yourself what you expect builders to do. Mouthing colourful allusions like 'sand mafia' leaves us no wiser about the developmental alternatives. And then again, mining in excess of quotas as an accusation I understand. Mining without paying royalty as an accusation I understand. But demanding that buildings be erected without sand mining?

The truth is that there is perfect method to this madness. When any incoming government hands out no mining licences and waits for the supply to grind to a halt, it is looking to create a scarcity which can be converted to political funding. If you will squeeze those with the infrastructure to mine sand and deny them licences - criminalising their business by not making the stroke of a pen -you will create an environment that will allow you a reasonable negotiated settlement: reasonable from the government's standpoint that is. In squeezing them, you will seize their trucks, send a few to jail, make business impossible and then, when you know how deep the bite sinks, you will discover a price. But in the bargain, as with prostitution or gambling, when you outlaw something we cannot do without, chances are pretty good you will have hard core criminals enter the business too. Not that I am particularly impressed with the 'sand mafia' construct. A villager with a dumpster, a motorized back hoe he hawked his land to finance and 20 years' experience in mining sand but no school leaving certificate, doesn't have that many attractive career choices. For him, it's just a matter of allowing the negotiations to play out till a deal gets made between the miners' association and the state government. When he tries to run his tractor over the bureaucrat who is stopping him, he isn't a hardened criminal: he is a desperately frustrated poor man who thinks the dice is loaded against him in a 'no win' game.

Now, in this sordid environment where a high pitched price discovery mechanism is playing out, how do the miners view the department which gives out no licences for a year but carried out 2,727 raids, collected Rs 7.72 crore in fines and lodged 39 FIRs (Hindustan Times, August 5th)? How do they especially view the actions of Ms Nagpal who gets active three months after all licences expire and then in the next 11 months earns the state government 17.85 crore in fines, to say nothing of the business disruption (Hindustan Times August 6th). I mean we are not talking bootleg moonshine brewed in a backwoods shack so noxious it's bound to blind someone here: we are talking sand. Will you forgive these people for thinking she is at best a cat's paw in a come-on scheme being run by the Samajwadi Party government? We need to remember that for the average small-time business guy at the bottom of the food chain, all authority is the same and the power of the state is used as often to fill the coffers of the state treasury as it is to fill the personal coffers of those in power, be they bureaucrats or politicians. Life below the hallowed portals of westernized high education and intellectual sophistication expressed generally in English is mainly several shades of gray. That the same Samajwadi Party is now targeting that same zealous officer is a type of irony gone surreal that you only find in third world reality, never in fiction.

The problem with the foregoing critique is that it somehow diminishes the very brave actions of a very young and possibly idealistic officer. That the "structure" of the sand mining business in Greater Noida reduces much public discourse rendered from a high moral standpoint to a farce is a no brainer. That said, what do we want our young bureaucrats to do? In this environment, do we want bureaucrats to apply these unfair laws or do we not? What can be more admirable than the honest performance of a

public duty? I would argue that this officer's decision to apply the law at risk to herself, regardless of the merits of the law, is the only defensible, sustainable, choice for any zealous bureaucrat to take. If instead, every bureaucrat decides to evaluate the merit of a law before applying it, we would end up with a nation of conscience objectors.

Other societies have been there before. By way of a single illustration, allow me to take you to the fate of the later Ming Dynasty, undoubtedly a high point in Chinese history. Why did the Ming Dynasty fall? When you get past the patchy tax collection and the corrupt bureaucrats, it came down to the neo Confucian philosophy of Wang Yangming who, during the reign of the emperor Wan Li (1572-1620), set forth the proposition that everyone has an "innate knowledge of the good". In demanding that people act on their beliefs, he demanded that every individual including those in government must make a moral judgment on everything they did or didn't. This was not so far from European Individualist Humanism which mercifully never informed European history. This exaggerated moral responsibility really meant that the Ming government became hostage to individual moral choices as officials each decided who would act in what way based on what that individual believed was correct. So simple governance choices were really moral choices and it became impossible to find a middle ground, which lies at the heart of political compromise. Government was undermined, terminally so. Within twenty years of the emperor's death, the dynasty was destroyed by incoming Manchu invaders. By way of an aside, the Americans claimed that every German citizen had the same moral obligation in the conduct of their public duties during the Nazi regime and several German officers were convicted of war crimes for this reason: mercifully, the Americans have never asked the same of its own citizens. Quite the contrary, as Edward Snowden will be happy to advise you!

So while the lady's application of an unfair law is to be admired, especially given the intimidatory lawless environment in the cowbelt, the fact is that as a society, we have to ask who the good guys here are and who the bad? If sand miners were "people like us", they would be a little harder to demonise. The underlying assumption that there is some sort of unholy nexus between politicians and sand miners is to be tested. The construction industry is asking for sand: someone has to supply it. Those capable of supplying it are incapable of getting a licence. In steps those who don't care about licenses and they are trying to buy their way out of the sovereign consent void. Lost in the din are fundamental questions about the structure of our society. If the government will not govern, then what can any businessman do? The businessman can go to court but then, how often do you want the court to intervene and compel the government to do its basic job i.e. govern and regulate.

This is also true of bureaucrats. If bureaucrats must face penal consequences for trying to do their job, where will they find their recourse? It seems that India circa 2013 has decided that the courts of law are a one-stop shop to address all governance ills. There must undoubtedly be desperation in this because it is no state secret that the courts have their own very pressing problems to address before they can wipe the tears of the

rest of India. Court's delays and a certain procedural dysfunction is the least of them. At the very least, a zealous bureaucrat suspended for doing her job could find herself navigating through the labyrinths of first CAT and then the courts for several decades without conclusion. So what do we do to remedy this double whammy? Neither the fate of the Lokpal Bill nor CIC's ruling that political parties are subject to the Right to Information Act lead us to believe that the political classes are straining at the leash to reform themselves. Perhaps we are at that point of inflection where we can all solemnly agree that the only way forward is to reform the judicial system so that we may use it for the purpose for which it was definitely not designed i.e. drag India kicking, protesting and screaming into the real modern world.

Fine Print: Casting Out Criminal Candidates

On denying an individual the right to be an electoral candidate only because he has been accused of a crime, cannot be good law.

Ranjeev C. Dubey

The on-going battle between the Supreme Court of India and our legislative fathers on the question whether criminals should be law makers ignores the superlative irony that winning elections is a tough task without engaging in criminally culpable conduct. Perhaps the ancestors of our legislative fathers who art in heaven understood this considerably better. And perhaps this is why the Representation of People's Act 1951 took a great leap of faith and allowed those accused of crimes to contest elections. Let me dispose of the legal principles first.

In substance, under Section 8(1), a person convicted of a whole bunch of offenses (including those under some truly obscure and exotic laws such as Places of Worship Act 1991 and Prevention of Insults to National Honour Act, 1971) is disqualified from contesting elections for a period of six years from the date of such conviction. Further, under the next sub section, a person convicted of another bunch of offenses (including even more exotic ones such as Commission of Sati Act 1987) is disqualified for six years after release from imprisonment. Finally, the third subsection adds a catch-all generic clause which provides that anyone cast into the slammer for two years or more is also disqualified from contesting elections for a period of six years after he is released from prison. So far so good. The rub comes in Section 8(4) which protects legislators while they appeal their convictions. We can summarize the principle thus: if a legislator is convicted, it doesn't take effect till three months after his conviction. If in that period of three months, he appeals the conviction, he is not disqualified till after the appeal has been disposed of. Since criminal cases take a decade to decide and two decades more

to appeal and second appeal, basically, no conviction has any impact on any candidate's electoral prospects! This is what the recent Supreme Court pronouncement is about.

In fairness, I can see the point of such a law. Aspiring democracies around the world, not including BRMP (i.e The Banana Republics of Mango People), are replete with case histories of candidates who have been slapped with contrived cases and then convicted and jailed in order only to prevent them from winning the next election. In some cases, they were hanged too. For more on this, the Bhutto family resident in the Islamic Republic of Pakistan may be a good starting point. General Musharraf's family may not be such a bad idea either. It won't hurt to remember Malaysia's case where another powerful politician was confined to the dungeons for allegedly having unlawful anal knowledge. That electoral politics is globally a dangerous game is well known. That laws ought to protect candidates from the worst excesses of trumped up charges and pre-ordained convictions from Kangaroo courts is not so well understood in our cynical society where criminality is often suspected to be the chief qualification for electoral success. This is no doubt what convinced India's highest court to rethink this whole matter.

Ensuing events have provided two illuminating highlights. First, in *Lily Thomas vs. Union of India* [2013 (8) SCALE 469], the Supreme Court has held that Section 8(4) is unconstitutional. Going forward, any legislator who is convicted of an offense gets disqualified immediately whether or not he files an appeal. No doubt, Mr. Lalu Yadav is deeply interested in this development. The principle does not apply to a legislator who has been convicted already and has filed an appeal but it does apply to him if he loses again, whether or not he appeal again. It does not end there.

In *Chief Election Commissioner Etc. vs. Jan Chaukidar* [2013 (8) SCALE 487], the Supreme Court went on to rule that if you can't vote in an election, you can't be a candidate either. Section 62(5) of the Representation of People's Act states that a person confined in prison or in the lawful custody of the police can't vote. This doesn't apply to preventive detention of course meaning you can't detain your opponent without charge and then use that to deny him the right to seek election to a legislative post. To me, this is by far a much greater paradigm shift. Think about it: there is no concept of conviction here; you only have to be arrested for good reason or bad to find that your political career has been interrupted for the next five years!

No doubt, herds of educated Indians are delighted at this radical swing of the legal pendulum. Section 8 of the Representation of People's Act has allowed hard core criminals to acquire great legislative power. That is not the same thing as saying that Section 8 is bad law. If the police had great skills in investigating crimes; if the office of the public prosecutor had the best lawyers spearheading the war against ganglord legislators, if the courts were quick to deliver decisions in criminal cases, every hood would get convicted pretty quickly and Section 8 would have done its job of protecting the innocent. If we condemn Section 8, it's because the 'system' does not work and not

because it is bad law. In that perspective, the Jan Chaukidar judgment can't be good. Worse, it is band aid for the mortally wounded.

Why do I say so? I have at least three good reasons. First, it must be the 33 years of legal training but on the principle of it, I don't like anyone being condemned unheard. This principle remains good across the board and for all matters, not just crimes. If you want to strip any man of his rights, you must tell him why and you must give him an opportunity to persuade you that you are wrong. Our system works on the principle that the police accuse and the courts judge. If an arrest alone ejects you from the electoral process, you have been judged only because you were accused and that is not good law.

Second, the Jan Chaukidar decision has abandoned all attempts to distinguish between bad men and the bad application of law against good men. I'm not being glib. A lot of people get arrested in India for a great many bad reasons - for publishing a book about Shivaji suggesting that historical identities are retrospectively "constructed" (See [Quashing Questionable Crimes](#)); for writing a Facebook post supporting Durga Shakti Nagpal's initiatives against illegal sand mining; for forwarding an email about Didi "disappearing" her nominee minister (See [Dour Desis & Diabolical Diatribes](#)) and the idea that such people should also lose their right to fight an election just seems wrong. To hang the civil rights of one man on the professional compulsions of those who arrest him is indefensible.

But none of the foregoing is the principle area of concern. The real concern is the central principle on which our electoral politics runs. Any democratic society that engages overwhelmingly in distributive politics - as opposed to growth politics - must necessarily feature an electoral machine used primarily as a tool for wealth redistribution. India has been this kind of society since independence. Any short term growth oriented lapse of distributive reason in our history has very quickly been redeemed by more redistributions of wealth! Some of these redistributions of wealth have occurred through the creation of unconscionable laws but clearly, not enough has been done because huge numbers of our people remain powerless and poor. In the face of this reality, what do we expect the electorate to do?

In this environment, political constituencies disbelieve promises of future redistributions: they literally sell their votes for cash. Naturally, any candidate's ability to win an election is based mainly on the ability to generate this cash. Most means for generating political funds are illegal. Distribution of political funds to buy votes is illegal too. Electoral candidates always run the risk of getting arrested for succumbing to their political compulsions. This means instant disqualification. When elections can't be won without the illegal use of illegally generated funds, to disqualify those are required to engage in illegality to achieve their ambitions strikes me as farce, even more than irony. This makes the quest for a political career into a kind of steeplechase by a half blind athlete over an unknown course on a dark and stormy night.

Fine Print: Trial by Social Media

While we enjoy the spectacle of a great bag of spiritual gas losing his nuts, Facebook fanaticism and twitterati terrorism can be arch enemies of human rights share.

Ranjeev C. Dubey

When it comes down to the efficient administration of criminal justice in India, we really could use less free speech. The shrieking high pitched excesses of social, AV and print media is making victims of bystanders and collateral damage of family members. The fate of Godman Asaram is a case in point. Already, without so much as a contemplative pause, his entire family stands condemned and everyone agrees they deserve everything they get.

Here are the facts for those off the pace. Born Asumal Thaumal Harpalani (or is it Asumal Sirumalanai?) in Berani Village (in Pakistan) in 1941, he sold tea in front of the Magistrate's office through the 1950s while learning meditation at his mum's feet and transformed into a spiritual bapu to an estimated 2 Crore people. In time, his entire nuclear family - wife, son and daughter - became part of the family business which reportedly grew to Rs 5,000 Crore, helped along by a land grant from the Gujarat Government. His spiritual growth did not dampen his temporal passions. The Gujarat ashram encroached on an additional 6 acres of land and bulldozers had to be used to infuse earthly perspective to his spiritual ambitions. It was déjà vu again with municipal corporation bulldozers razing part of his Bhilwara ashram as well. In 2001, the management of Mangalya temple Ratlam allowed him to run an 11 days satsang within its premises: he still continues to occupy the temple and the adjacent 100 acres of land valued at Rs 700 Crore.

His attitude towards women became quite the rage in Twitterland in 2012 when in the wake of the terrifying Delhi gang rape case, he wished the accused to be leniently treated because it takes two to tango and the victim was equally to blame. He also advised potential victims to avoid rape with a well-aimed bhaiya at their aggressors. Inevitably, in August 2013, he was accused of stripping and fondling a 16-year-old girl and asked for oral sex while exorcising her of a ghost. After the usual protests from followers and pitched battles with the authorities, the Jodhpur police eventually nabbed him from his local ashram on September 1st. The arrest of his aides followed. So far, its par for the course, but it now begins to get confusing.

Five weeks later, two sisters come forward and accused Asaram and his son of raping them respectively in Ahmedabad and Surat between 2002 and 2004. They also accused

Asaram's wife Lakshmi and daughter Bharti of helping the father and son commit rape. If it wasn't Asaram, you would be forgiven for thinking that this is not a particularly credible plot of a Bollywood B movie. Would you agree that there is reason to pause and ponder? If you follow the hysterics on social, AV and print media, not at all. Predictably, the family panicked and fled. Given this conduct, it will be a long time before a court will look at their case with sympathy. How can this be happening so quickly and with so little self-doubt?

Imagine that a young lady accuses your doctor father of inappropriately touching her and asking for oral sex. What do you think the police will do? In the ordinary course, they will verify the allegations from the complainant's description of the circumstances and then get your father's version of events, whatever they are. If, on balance, they have reason to believe that the allegations are true, they will arrest your father and the criminal justice system will crank into life, otherwise not.

It's a whole different story if social-AV-Print media is in on it. India since 2010 has become the land of hyperventilating neurotics with a single dimensional perspective on every issue of public importance. Public passion is the stuff of which lynch mobs are made and the authorities always fear them. Remember that the police followed prescribed protocol in December 2012 (maybe with a few omissions) but they still had to fight a pitched battle with outraged citizens on Rajpath in which Constable Subhash Tomar lost his life because the Police could not anticipate and prevent a brutal gang rape of a young girl in a moving bus. Naturally, when confronted with allegations that are under intense public scrutiny, the Police's basic approach is to arrest everyone named in the FIR. They do this because their priority is not the rights of the accused but the risk of street carnage. For the same reason, a court would be circumspect in granting bail to the accused. The accused then have no chance of a fair investigation till after the fire of public opinion has died down. This threat of pre-emptory arrest and long detention is so real that Asaram's immediate male attendants now claim that he rendered them impotent so that they would not compete with him for sexual favours from devotees (Zee Media October 5th)! You don't need to be Einstein to figure that it's just a bunch of marginal guys trying to avoid getting arrested.

Bear in mind that you cannot and should not assume that the victim of a sex crime will act with perfect rationality. Traumatized, angry, she will lash out at everyone associated with the event, even if it's remote. In your father's case, the victim could think that you, your mother and your brother are responsible for your father's activities because you are all in and out of your father's basement clinic but don't object to him spending long periods alone with young patients without a female attendant at hand. If the secretary was on vacation on the fateful day and you manned the reception and your mother came by for a bit, then your goose is truly cooked. In no time, your whole family will have leading roles in the FIR and like Asaram's family, you too will be on the run.

While on the subject, bear in mind that there are a lot of very strange circumstances in which people crank out FIR's of rape these days. Multitudes of girlfriends who are not able to convert a live-in opportunity into matrimony file FIRs claiming rape on the ground that consent was secured under promise of marriage. Businessmen who can't collect on their debtors file criminal cases to force a settlement. You don't have to be a lawyer to understand that not every allegation is automatically true. People come from all sorts of collateral agendas and there are no holy cows in the world of sexual allegations.

If there were, a case like Uma Khurana, the math teacher in the Sarvodaya Kanya Vidyalaya who was arrested in August 2007 for forcing girls into prostitution and to act in porn movies, would not exist. For her sins, she was molested by a mob on live TV and lost her government job. As it turned out, the sting operation had been contrived by TV journalists trying to get up the viewership ratings. If you believe every allegation you hear, and then start twittering, building a lynch mob in a hostile environment, the police are going to find it very hard to do their job. Inevitably, someone innocent is going to get arrested and spend the next three months in jail, all because you don't have a lid on your emotional excesses.

So where does all this leave Asaram's family? I am not saying that no daughter or wife ever helped her father or husband commit rape. It's too early to say that Asaram's wife and daughter are not guilty but I will say that when sisters show up claiming that they were raped ten years back by respectively father and son in two different towns in two different years, I would be very circumspect in what I think. I would also think very hard about why this is happening to the whole family all at one shot?

And as I ponder, I also think about what would happen if the entire family sitting at the head of a dodgy spiritual empire goes down? If you don't know what is going on, it frequently makes perfect sense to follow the money. If Asaram's whole family ends up in jail, who is going to grab the Rs 5,000-crore empire? Given the cash and jewellery that floats around these godly types, a great many players acting independently could end up with parts of the booty. Not all beneficiaries of this decline and fall are likely to be pseudo spiritual privateers either. The Himachal Pradesh Government Relief and Rehabilitation Department has recently taken back possession of 14 bighas of land in Sirmour district from Asaram's trust because the then Naib Tehsildar of Paonta, who auctioned the land in 1994(!), was apparently not authorised to do so. We will know more as the plot plays out.

Meanwhile, as we enjoy the spectacle of a great bag of spiritual gas losing his nuts, we must pause to ask if the law has been fairly applied in the manner in which we have chosen to bring him down, and those we have made collateral damage of. We must pause to ask if some innocent ladies got hauled across the coals because we were busy collecting Facebook Likes by posturing pretentiously and scoring morally righteous brownie points on Twitter. If a girl must pay the price of her father's sexual escapades,

I would ask if we have heaped one injustice on another. And if our reading and viewing habits have compelled our print and AV media to offer us programs designed to appeal to the basest of human instincts and further whip up public outrage, I am afraid it is us I accuse of a greater crime. Need I say this: unrestrained, excessive morally righteous rhetoric on social, print and AV media is the arch enemy of human rights. In trying to build your online profile, you run the risk of robbing someone of their life, liberty and legal remedy. In trying to sell a newspaper or a TV programme, you could be condemning someone to a terrible fate. At the very least, it is incumbent upon us to act reasonably and fairly.

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