

**Issue 39**

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# *Ensouth*

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

***N South***

**Advocates**

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## **Managing Partner's message**

It's been an interesting year but the impact of the changes we have experienced is still far into the future. The July 2014 issue of Ensouth did not begin by heralding the dawn of a new era with a new government and a new vision led heroically by a new leader? It didn't because the structural, cultural and developmental issues that face our society transcend short term governance by a wide margin. If we truly want change – and many of us don't honestly want change - we as a people need to change. Ensouth's endeavor is to be this change agent by drawing attention to what needs doing.

In **Black Money Ballyhoo**, we critique the new Government's determination to "bring black money back to India", a point out the basic fallacy on which it is grounded.

In **Commercial Common Sense Justice** we examine the manner in which the judiciary's propensity to interfere with commercial contracts and established law in order to dispense what the judge thinks is just inflicts gross injustice on those who approach the courts.

Finally, since we have just criticized the judiciary, in **Judging Judges**, we ask how far we as a people are within our legal right to criticize judges and their judgments.

We do wish you a very happy new year!

Ranjeev Dubey

## **Print Media**

### **Comment-1**

#### **Fine Print: Black Money Balahoo**

#### **The truth about bringing Indian black money back to India**

**Ranjeev C. Dubey**

Of all the doublespeak Indians have been sold at election time since we declared ourselves a sovereign socialist secular democratic republic, the elimination of corruption and black money has remained the all-time bestseller regardless of market sentiment. So why has this eternally winning formula never translated into any effective action on the ground? There are of course three sides to every story and the story you buy depends mainly on who you hate the most.

First up is the Robber Baron narrative, much favoured by those who truly resent the wealthy. It proceeds on the basis that we are a deeply fractured society and our elites have no sense of equal opportunity or equal protection of the laws. These elites offer kickbacks, rake offs, bribery and quid pro quos just so they can stay ahead of the queue. India then is a country of crony capitalists who promote whichever politicians best dish up rules that serve their purpose. Thus, a group of businessmen got together and hired Niira Radia to secure Spectrum Raja's appointment as Telecom Minister so that they could corner telecom licenses to the exclusion of those in the breadline out the door. There is great truth in this narrative because a great deal of corruption is about getting ahead of the pack in the allocation of scarce resources.

Next, there is the Power Usurpation narrative, best loved by those who truly resent political power or who are most vulnerable to it on the ground, as for instance cycle rickshaw pullers. This proceeds on the basis that politics remains the leading way to very quickly accumulate a very large amount of tax free wealth. Our democracy then is the procedure by which gang lords, hoods, crooks, racketeers and thieves propel themselves from the margins of society right into the legislature, thus acquiring the power to make and implement laws. They bully the bureaucracy on pain of victimization and transfer and use their extensive powers to extort money from their own people. In this narrative, the queue jumping businessman reincarnates as the eternal victim, his business paralyzed till he disgorges political payments. There is great truth in this narrative too, especially when you think of the extortionist activities of revenue collecting departments.

That brings up the final narrative: corruption and black money as a Democracy Tax, which appeals most to those who have a keen sense of pragmatic cynicism. In this narrative, corruption and black money are the means we employ to fund our much admired democracy. If you want to win an election - even if it's only to the local gymkhana - you have to stitch together a coalition of politically significant groups and persuade them to vote for you. It doesn't matter why you want power. You can want it

for the good it will do the poor, the nation, your extended family or just because your daddy and his daddy before him had power. If you want to get what you want, you have to give those who put you there what they want. That is where corruption and black money enter the picture.

There is great truth in this narrative too. Every successful politician has basically been great at putting together such coalitions. Indira Gandhi successfully sold it to Brahmins and Scheduled Castes as a voting block; Chaudhary Charan Singh successfully sold it to Aheers, Gujjar, Jats and Rajputs; Arvind Kejriwal now sells it to slum and resettlement colony dwellers, scooter rickshaw drivers and kaabadiwallahs. Running like a leitmotif through all narratives is your real problem. In general, righteous rhetoric notwithstanding, self-interest trumps morality every time. As our politics has now developed, the electorate expects payment for its votes in two instalments. First, there is the upfront pre-election earnest money paid in the political equivalent of *shagan* in an engagement ceremony. That includes cash, liquor, saris, laptops, et al. That's just the beginning. If you win, you then have to deliver the big ticket payment: vast numbers of jobs in some yet to be built railway factory or PSU, lucrative contracts from the development funds allocated to parliamentarians to build imaginary roads to fictitious villages, contracts to build large local infrastructure with great scope for misappropriation of funds, stuff like that. Welcome to corruption.

So how are you going to win an election? Who will pay for the booze and the saris? You could hold out your hat to an industry lobby but unless you are offering a tax sop or an industrial license, why would they bother? Basically, unless your daddy left you rolling in it, you are compromised before you start your political career. Succeeding elections only compound your compromises because next time around, you are going to need even more money. A ministerial berth is the best chance you have of funding your next election and you'd be a fool not to cash it in. That explains why we allocate a significant sum of money as a constituency development fund to every parliamentarian, especially those who don't become ministers. It's not that the Government can't more efficiently manage development budgets: it's all a parliamentarian has to reward his constituency with!

Now, if you do become a minister, you have countless ways to make this money:

1. Sell windfall profits disguised as economic policy. Increase customs duty here, allow imports of some items at concessional rates for a while there, change a tax rate here, allow a banned activity to select industrialists there, etc.
2. Sell licenses, spectrum, mines, real estate development approvals, forest clearing permissions, and whatever else is controlled by Government in the guise of protecting the public interest, or the environment or whatever.
3. Sell jobs and postings. Have you ever wondered why the petty bureaucrats hate

working? They have purchased their jobs from politicians and the salary is just an interest payment on the cash deposits they made decades ago. If citizens want them to work, they expect citizens to pay cash for them instead of calling them bribes. As for posting, sovereign processes - like collecting taxes and managing long haul cross state border trucker traffic - generate large pay-off opportunities and it makes sense to auction the collection process to a pliable bureaucrat for an upfront payment. If you can get over your moral outrage, it's no different from auctioning a parking lot to a local contractor.

So if someone with a crusading zeal comes along and wants to chance the whole shooting racket, chasing Swiss bank accounts seems like symptomatic treatment. Clearly, the key to changing the national paradigm comes down to two bullets. The public funding of electoral processes is the first bullet. If you can win without commercial sponsorship premised on post-election benefits, you've gone a long way in getting rid of the compulsion that makes politicians corrupt. It then frees development funds for developmental activities. State funded elections are not rocket science. It's been done before by many societies using many models. Whether you have the public money to fund this is another question. Law enforcement is your second bullet. You have to catch the corrupt and you have to then send them to jail. In fairness, we've been doing a bit of that lately to the unpleasant surprise of Amma, Chautala and Lalu amongst others. We need to do a lot more, and that means much better policing and a way more effective judicial system.

In that view of the matter, what should we make of the oft repeated threats of incoming governments bringing black money back to India? First things first: if it is your fate to have the skill to generate a lot of black money abroad, what would you do with it? Would you fly down to Geneva, have some poor porter haul bags of crisp notes up the stairs and into the nearest bank? Would you then whip out your Indian passport, prove your identity to the bank and ask them to hold this money for you in a safe deposit box like you were Jason Bourne? Anybody smart enough to have money abroad is smart enough to know how to get it there anonymously and then put it to work multiplying itself without compromising the owner. That won't happen if the money sits in a Swiss safe deposit box.

Clearly, the idea that vast Indian wealth continues to sit in Swiss bank account is incredible on the face of it. How do you get 'black money' to work? You have to set up a trust fund run by chartered accountants in a tax haven and then funnel money into 'white money' investments. You have to send it to a market you understand offering returns you can live with. If you are an Indian industrialist or politician, where do you think that is going to be? That really is the heart of the matter. If you check out FDI figures in the last decade or so, you will find that a lot of it is coming through tax havens, trust funds, Private Equity and Hedge funds. Have you the slightest reason to believe that these funds and trusts are owned by foreigners?

To put it bluntly, if you are a politician determined to bring black money back to India, you are twenty years too late. In announcing his globalization policy and allowing FDI, late great Mr Narasimha Rao already did that in 1992!

### Comment-2

### Commercial Common Sense Justice

**The judiciary ambivalence on the sanctity of commercial contracts and its propensity to interfere with established laws derails the delivery of justice.**

### Ranjeev C. Dubey

To make India a wealthy country, we don't need to read Arnold Toynbee's twelve volume "A Study of History". We do, however, need to get together and agree that we really do want to be rich! As far as I am concerned, for most of my life, and for a hundred years before that, this has definitely not been the case. Back during the British colonial period, businessmen - '*box wallahs*'- were treated with a kind of tolerant contempt, not quite good enough for gymkhana membership. Small town Jammu of the late 1960s, where I grew up, put businessmen far below bureaucrats and soldiers in the pecking order of respectability. The generalized attitudinal shift by which greed has become good and wealth is for flashing is less than two decades old.

This paradigm shift is yet to be universally embraced. As late as UPA2, we have witnessed pitched battles between those who want development at almost any sufferable cost and those who want development only if it has very little cost. I have commented on some of these battles over the years: environmental protection versus industry (see [Enter The Sandman](#)), agrarian rights versus land for industry (see [Land Vs Industry](#)), and Transparent Regulation versus Crony Capitalism for quick growth (see [The Pontyfication Of Politics Processes](#)). While flaunting my share of ambivalence on many of these issues, I can add that I am not alone in this failing!

Indeed, as India transforms, this ambivalence rages unabated. Everyone wants to earn an arm and a leg but everyone is definitely not prepared to work 80 hour a week with no vacation for five years. What is more important to you: attending the closing of the next small share acquisition your company is making under your guidance in Jhumri Tallaiya or going to Haridwar to morally support your cousin who just lost his father? When I was a little boy, this truly was a no-brainer. Family then was sacred. Fifty years later, the reverse is doubtless true for urban go-getters. By the same token, if you should get hit by a truck today, how many of your cousins will offer to pick up the hospital night duty?

It should not surprise us then that the judiciary is equally ambivalent on the sanctity of commercial contracts. Far too often, its conscience is pricked enough for it to play God between businessmen who consented not so long ago to enter into one or another type of business arrangement. All too often, the judge prioritizes a quest for what he thinks is

justice over the integrity of contracts in the market place. The problem though is that when the judiciary succumbs to your everyday human failing, the cost can run into billions and billions. This came home to me last week when a client walked in the door asking me to help him get possession of a 360 sq yard plot he had booked with DLF in Gurgaon in 1991, and which DLF cancelled in 1994 after receiving 80 per cent of the money.

In the twenty years since this cancellation, this gentleman had been religiously fighting his court case without result. In this time, he had progressed the case by no more than 10 per cent of its normal total life cycle (assuming two regular appeals and no more) which meant that other things being equal, he could expect a decision in 200 years. How had this happened? The responsibility, if that is the word for it, rested squarely with the judiciary. Let me explain.

Section 20 of the Code of Civil Procedure permits parties to sue the defendant where the defendant resides or where the cause of action arose. DLF's head office is located in Delhi and the buyer purchased the property and paid for it in Delhi. DLF's plot buyer's agreement specified that disputes were subject to Delhi Jurisdiction. Naturally, the buyer sued DLF in Delhi in 1995.

Ten years later, in *Harshid Chiman Lal Modi vs DLF* (AIR 2006 SC 646), the Supreme Court decided that such cases can only be filed where the property is situated. That took the case back to square one and a new beginning in a new court. Why a citizen should suffer ten wasted years of litigation because the judiciary changed its mind on this or that point of procedure is a question that the judiciary really should address.

Gross miscarriage of justice of this type is far more common than our rose tinted attitude to courts would lead us to believe. On August 1st, 2014, the Supreme Court in *Dasrath Rupsing Rathor v State of Maharashtra* (Cr App 2287 of 2009) in effect decided that a 'cheque bouncing' case under Section 138 of the Negotiation Instruments Act can only be filed in a court convenient to the defaulter. Let's understand this.

If your debtor makes over a cheque to you and it bounces, you can send him a notice under Section 138. If he does not pay within two weeks, you can drag him to a criminal court. When parliament created this law in 1988, it presumably intended to restore some credibility in commercial life, premised on the assumption that anyone who issues a cheque ought, barring truly exceptional circumstances, to be bound to honour the payment that it represented. This makes perfect commercial sense because all business runs on trust. A society where no one trusts anyone naturally adopts complicated measures to secure payment and it becomes that much more difficult to seamlessly conduct business at speed. It follows that if you encourage a system for the administration of justice where cheques bounce with wild abandon and recourse is long and hard, you will naturally help create a dishonest commercial environment. At the best of times, legal recourse in India is prolix, complex and expensive. This is why parliament



did not limit the victim's ability to sue on a bounced cheque anywhere it chose.

As a general proposition, in Indian law, a case can be filed in a court where an offense occurs. Five candidates fit the Section 138 bill: the place where the cheque is issued, the bank where the cheque is deposited for collection, the place where the cheque is presented for payment, the place where notice under Section 138 is issued and the place where the maker of the cheque failed to pay the holder of the cheque. For my money, the wider the choice available to the victim of a bounced cheque, the easier it is for him to get help from a court. Perhaps this is why traditionally, you could sue the maker of the cheque anywhere and the courts would happily take up your case. Not anymore. The court has now decided that the offense is committed when the cheque is returned by the bank for insufficiency of funds.

In the upshot, the victim of a 'cheque bouncing' can only sue where the cheque is dishonoured. A cheque is always dishonoured by the bank on which the cheque is drawn. People only open accounts with banks located conveniently close to them. Ergo, the victim is now compelled to sue in a court close to the home of the perpetrator of the crime. The court was quite aware of the implication. It explicitly stated that allowing any of five courts to try such a case would "lead to harassment of the drawer of the cheque". Clearly, the convenience of the defaulter took priority over the convenience of the victim of this crime.

What is consequence of this new decision? In time, people will no doubt refuse to accept payment by anything but a local cheque, doing nothing for the promotion of commerce across India generally. More alarmingly, this judgment applies with retrospective effect. In the months to come, lakhs of 138 cases are going to get transferred to courts convenient to the defaulter. Since many of these have been languishing in courts for years already, this body blow will no doubt encourage some creditors to give up and go away. As far as I am concerned, in passing this judgment, the Supreme Court has implement a kind of debt write off, just as Governments do before elections. Only this time, it's not the tax payer who gets it in the neck; it's the credulous creditor who accepted a cheque rather than receiving cash. Guess what he is going to do next time?

### **Comment-3** **Judging Judges**

**Does freedom of speech extend to a right to criticize judges.**

**Ranjeev C. Dubey**

When it comes to a conflict between constituted judicial power and conflicting political ideology, the most poignant image yet is Arundhati Roy being convicted for contempt of court in 2002 because she did not agree with the Supreme Court on India's developmental priorities. In speaking out for displaced persons during the construction

of the Sardar Sarovar Dam, her language was barbed and scathing, exactly as we would expect from a writer as gifted as her writing on a subject as emotional as the rights of the dispossessed in any democratic society. Whatever side of that political divide you stood, you could be forgiven for thinking at that point that in post Y2K India, you can ridicule anyone's views you please, but that privilege does not extend to ridiculing the judiciary's views. You may ask, why?

The legal principle does not explicitly come from the idea that our judicial system stands on a pedestal equal in stature to our holy cow: it comes from our law on contempt of court, and that is about the objective administration of justice. Very briefly, there are two kind of contempt, civil and criminal. If you disobey a court order, or fail to honor an undertaking you have given to a court, you are guilty of civil contempt. On the other hand, if you publish something that does one of three things - scandalizes or lowers the authority of any court, or prejudices the course of any judicial proceedings, or interferes or obstructs the administration of justice - you are guilty of criminal contempt. It is as serious as it sounds!

This does not mean that you can't report on court proceedings: it does mean that you can't candidly pass adverse judgments on judges or their judgments. For the sophisticated English language press run out of India's biggest metros, this means you report facts but not your views. If you do need to run opinions, you find a lawyer to hold forth on his expert exposition of the issues. Now, if you have been reading this monthly column for the twelve years or so that I have been writing it, clearly, I am marching to the tune of quite another drummer. It's not just me though. Check out Facebook, or Twitter, or a hundred other websites that take in comments. Going by the shrill standard you find on the websites of newspapers and TV channels, I am unworthy of notice!

Just so there is no misunderstanding, be perfectly aware that everything you post on Facebook, or Twitter or punch in as a comment on any website including mine, is 'publication'. We are all authors and publishers now! Anything you say can and will be used against you. You have the right to an attorney, etc etc. Jail and your motor mouth are now closer than they have ever been at any time in human history.

But if that is so, you may wonder, then how come you and your Saturday night demagogues so exuberantly wrote whatever served your fancy in the anger-management-challenge-turned-anarchy upshot of the Nirbhaya Rape case? What about the rights of those bus borne desperadoes to a fair trial? Given the pressure 'the public' had generated on the police and the courts, did those guys ever have a ghost of a chance? Why didn't the courts gag the public? What about the objective administration of justice then? It's possible for you to take a cynical view. You could argue that the courts will detain a pamphleteer to protect the interests of big business but it will not detail the screaming public to protect the interest of an illiterate desperate halfwit from a slum with a severely inhibited moral yardstick.

Personally, I don't think this is true. Early in September this year, CBI Director Ranjit Singh petitioned the Supreme Court to restrain the media from reporting on the contents of the visitors log book at his residence which purportedly showed that some 2G and Coalgate accused tramped up to his home rather too often. He said this was "a matter of his privacy" and publication would cause "irreparable damage to his reputation". The current Chief Justice of India refused, observing that "We have no control over the press. We only have control over proceedings in the court. Everybody is expected to know what they should do and what they should not".

What are we to make of this? Is the court slowly abdicating the judicial power it has always possessed to keep the public trap firmly shut? I don't think so. The court has traditionally been very reluctant to exercise this power at all. The issue is both ideological and cultural. Freedom of speech is a right that is gaining in value in India even though this ideological conflict is far from over (as attested by Salman Rushdie's tribulations). At the same time, India is experiencing a cultural dialectic, where a neo-classical restraint in public discourse is confronting a high strung emotionally overblown hysterical form of self-expression. Amidst this social evolution sits the judiciary observing the antics not only of hemorrhaging TV celebrities but also retired members of its own community including but not being limited to our inimitable Chairman, Press Council of India. The result is an ever greater judicial self-restraint.

A long history bears the judiciary out. In 2009, NDTV broadcast a celebrity sting program recording the attempt by a senior advocate to bribe a witness. Did this broadcast prejudice the accused during the upcoming judicial proceedings? In *R.K. Anand v. Registrar High Court [(2009) 8 SCC 106]*, the Supreme Court held that the sting program served an important public cause. Were we to understand that you are free to obstruct justice if it serves a public purpose? Was the court evolving a judicial principle? Generic judicial reluctance is probably a more accurate answer.

Speaking of celebrity cases, when actor Salman Khan sought to extract publicity mileage even from the tragic death of a pavement dweller in a hit and run case by creating a website which reported daily developments in the case, the court issued notice to determine if he was in contempt of court. In *Salman Khan v. Hemant Patil*, the court held that so long as he is not misleading the general public, there can be no contempt. That left open the question where the leading ended and the misleading began!

Then there was the case of *Leo Roy Fray vs. R. Prasad [AIR 1958 P&H 377]* where a newspaper sensationalized a customs case by using provocative expressions such as 'smuggler' and publishing photos of the car in which contraband was carried. Again, the court said that publishing extracts from a collector's order while filling in background facts was not contemptuous.

Now, as opposed to these decisions, we have the case of *M.P. Lohia v. State of West Bengal [2005(2) SCC 686]* where an article titled "Doomed by Dowry" was published

carrying the version of events narrated by the family of the deceased bride, especially the distraught father. Here, the Supreme Court took the view that "the facts narrated therein were all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice". The court pointedly condemned the publisher, editor and the journalist "who were responsible for this trial by media when the issue (was) sub-judice". Clearly, disclosure of facts to be used in a trial do prejudice a trial.

The Punjab and Haryana High Court followed the same logic in *Court on its own Motion vs. Times of India [CWP 7160 of 2013, decided 4 April, 2013]* in relation to a report regarding the auctioning of mines in the Aravallis by the Haryana Government one day before the case was listed for hearing in the court. The court asked for restraint in the manner of reporting but then chose not to proceed with contempt in order that "right to freedom of speech and expression (may) prevail without any hindrance". Clearly the court does not always speak in one voice, or with one mind, but this we already know.

Which brings up the opportunity presented by the leak of certain confidential information between Sahara and Sebi's lawyers in the case of *Sahara India Real Estate Corp. v. Securities Exchange Board of India [(2012) 10 SCC 603]* to definitively decide this issue once and for all. Following this security breach, parties asked the Supreme Court to frame guidelines for the reporting of sub-judice cases. The Court declined to oblige, observing only that an aggrieved person could approach the High Court or the Supreme Court with a writ seeking postponement of a publication which could impact a trial.

What does this mean? Has the onus to "control" publishing content shifted from the publisher to the victim of a prejudiced trial? Is it for the accused to try and bolt the barn door after the horse has bolted? If I take this view at face value, I would consider myself completely free to express any opinion on any judicial decision this side of slander. Naturally, when a very respected journalist expressed reservation over my high pitched criticism of Mr Subramaniam Swami's attack on National Herald not least because it impacted my firm's M&A business, I could do no better than draw attention to the violently hurtling comments on social media, to say nothing of the sarcasm, repartee and derisive laughter in *Aap Ki Adalat*. That said, given the complexity of the issue, I ask myself if the Supreme Court's pronouncement in Sahara India is quite the last word on the subject. After all, given human nature, when any of us confronts a truly difficult issue to which we have no ready response, we trust in God and pray it will go away. It usually doesn't and so, like an itch we can't shake, this issue too will be back!

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