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Managing Partner's message

Another year dawns, bringing new hopes, just as the last one did!

2016 will go down as the year that cash was crunched! Demonetization has touched every Indian's life as few events ever do. In **What gives Narendra Modi the legal right to scrap Rs 500, Rs 1,000 notes**, we examine the laws by which Governments can take away our hard earned cash and confront the problem of saving our wealth from Big Brother.

In the corporate world, 2016 is also the year that witnessed the owners of India's most respected company make a spectacle of themselves over who should run it. In **Tatas Vs Mistry**, we note how this latest corporate battle has eroded the very foundation on which our Corporate Governance vision has been built.

Moving away from current affairs to topical issues, we grapple with two key sociological issues that dominated the discourse in 2016. In **Sanctimonious Surrogacy**, we ask why should the law decide how a woman may use her womb. Finally, in **Screen Sex and Censorship**, we trace the direction the law is taking and ask if the new guidelines will have the effect of degrading entertainment into perversion.

Happy reading!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: Tatas Vs Mistry: Here's why independent directors are in the dock Ranjeev C. Dubey

In Indian corporate history, boardroom battles are truly old hat. What makes the Mistry-Tata spat so singular is that finally, for the first time since we legislated the new Company law in 2013, India will get to find out if the role of independent directors in corporate governance is quite what the pre-legislation rhetoric projected it would be. Judgement day is here.

To set the context, let us understand where the law stood before 2013. Since 1956, we applied a company law designed to help our political-industrial complex run on a uniquely Indian model of crony capitalism. Boards of Indian companies revelled in credible deniability. No individual director had either power or responsibility. Executive power was exercised in the collective wisdom of the Board. An individual director could claim that the company, not he, was the owner of any scam and proof of conspiracy being as hard as it was, prosecutions were unknown.

In 2001, SEBI made a weak attempt to introduce a stricter norm of fiduciary responsibility by introducing Clause 49 of the Listing Agreement. This defined independent directors as people who had no "other material pecuniary relationship" with the company which "in the judgment of the Board may affect independence of judgment of the directors".

This could not work, and it didn't. When conflict of interest becomes a matter of opinion, you can be sure the law isn't worth much, and it wasn't. As if that wasn't enough, Clause 49 also let directors off the hook except in circumstances where an "offence has been committed by the connivance or is attributable to any gross negligence of the officer" (Sec 21 SCR Act).

Other than the Audit Committee, independent directors really had no role at all. Like I said in my book Bullshit Quotient, independent directors remained nothing but celebrity endorsements on company boards, like Shah Rukh Khan sitting in a tub full of role petals enticing you to buy shares of the company, rather than Lux soap!

The new company law of 2013 finally changed all that. Section 149 now sets out a comprehensive definition of who is qualified to be an independent director, and it's a hard hill to climb. It steers independent directors into a seriously heavyweight Schedule IV, which creates a whole new role for them.

Speaking compositely, the new law does four things. First, it identifies independent directors as GRC drivers. The upshot of this is that the man who sits on the outside with no money in the company carries the moral burden of the company. Second, it enjoins independent directors to become protectors of minority shareholders, a sort of stakeless David taking on the might of the successful entrepreneur.

Third, it asks independent directors to have an independent voice expected to "scrutinise the performance of management in meeting agreed goals and...monitor the reporting of performance". Finally, it expects independent directors to hold separate meetings in the absence of both management and promoter nominee directors, and review the performance of the rest of the Board. By definition, you could say that the law demands that every independent director be hostile to the promoter!

This enlarged role also comes with grave risk. Sec 149 provides that "Independent Director shall be...liable only in respect of acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes, and with his consent or connivance or where he had not acted diligently." (Emphasis Supplied). So what does "acted diligently" mean for an independent directors? That is explained in Schedule IV.

Schedule IV, Part 1, Guidelines of Professional Conduct Clause 1 requires Independent Directors to "uphold ethical standards of integrity and probity".

Clause 9 of the same part expects them to "assist the company in implementing the best corporate governance practices". Schedule IV, Part II, Role and Functions, Clause 4 expects them to "satisfy themselves on the integrity of financial information".

This responsibility comes riding on the back of Sec 23M of the Securities Contracts Regulation Act, which sends an independent director to 10 years in jail with Rs 25 crore in penalties for failing in his duties. I think we can fairly agree that independent directors carry a heavy burden in this new dispensation, and it would behove them to discharge this responsibility with great seriousness.

Clearly, independent directors of Tata Group companies are aware that the cheese has moved. We must not forget that Indian Hotels, Tata Motors, Tata Chemicals, Tata Consultancy Services and Tata Steel are all listed companies.

As the ripples created by Cyrus Mistry's removal from Tata Sons spread downstream, it forced independent directors of these companies to reconcile possible conflicts of interest between their fiduciary responsibilities and their personal relationships with the Tatas. This has played out in full glare of the media. Let's take some examples.

As far back as November 4, independent directors came out in support of Mistry. The Tatas reacted by claiming that Mistry was trying to deviously take over Indian Hotels amongst others with the support of independent directors. On November 10, the

independent directors of Tata Chemicals came out in full support of Mistry because they believed he had done a good job. The company reacted by calling an EGM for December 23rd to remove Mistry and independent director Nusli Wadia from the Board.

Wadia has reacted by issuing notice claiming defamation. On November 12, three of six independent directors of Tata Steel came out in support of Mistry. The Tatas reacted by claiming Wadia was galvanising other independent directors to act against the Tatas. The company has called an EGM on December 21st to remove Mistry and Wadia from this Board as well.

As you can expect, Wadia has issued another defamation notice. Similarly, Tata Motors has called an EGM on December 22 to remove Mistry and Wadia as directors. Wadia has issued yet another defamation notice here as well.

This is where we encounter a great irony playing out in the corridors of India's most respected companies. The law wants all independent directors to act in accordance with their fiduciary duties and protect the best interest of the company as they see fit in their individual judgement. Yet, when they do so, the majority shareholder makes all manner of alarming claims including but not being limited to an attempt to influence other independent directors, an attempt to take over the company in a hostile manner and so forth.

I am not saying that these independent directors do not actually harbour such motives. I am not here issuing character certificates, nor is it appropriate for me to do so. Be that as it may, it does strike me as rather obvious that all things considered, some independent directors are taking heat here for doing a job the law wants them to do.

Worse, now that some independent directors have exercised their independence and taken an independent line of action, one of India's most respected business houses has decided that such independence of judgement is simply unacceptable and has moved to have them ejected from the boards. Where does that leave our new corporate governance norms?

Comment-2

Fine Print: What gives Narendra Modi the legal right to scrap Rs 500, Rs 1,000 notes

How to protect your Tax Free income!

Ranjeev C. Dubey

While uncertainty is central to the human condition, it takes on a whole different meaning when you find your hard earned wealth go up in a puff of demonetised smoke! Life is doubtless an illusion, but does that really include cash in hand? I am afraid it does.

Article 246, Union List, Entry 36 to 38 of our Constitution vests power on the Union of India to regulate currency and prescribe what is 'legal tender'. Legal tender is a holy cow. If I owe you money and I offer you legal tender, you can't say I won't take the currency notes, but would rather be paid in, say, cartons of cigarettes! The legislature has in turn given to RBI the sole right to issue paper currency in India. Section 26(2) of RBI Act also empowers the Central government to notify that from any particular date, any series of bank notes of any denomination will cease to be legal tender. Legally speaking, what the RBI prints, the government can take away, no questions asked.

This action does raise two interesting questions, though. First, the old notes are demonetised; they are not counterfeit. You are not obliged to accept old notes any longer, but if you decide to do so, what grievance can the government have? We are a country starved of liquidity. So long as banks accept and exchange old notes, it makes sense to keep passing them around in payment. This is why many small businesses are still accepting them, including especially the succession of upwardly mobile dhabas-turned-hep in the market below my office. For them, it's a choice between accepting old notes and shutting down. Will the tax boys have a problem with these restaurants? I would expect not. So long as they bank the money and pass it through their account, where is the tax evasion?

Which takes us to the second question: Where is the law that prevents you from handling, doling out, wearing, rolling joints in or making toilet paper of old demonetised notes? Maybe you are an old currency note collector! If the police catch you on the Haryana border with a stash of old cash, what law have you broken? Yes they can ask you where you got these pretty pieces of paper from but surely, that is only an invitation to you to come up with an inventive story about going around your colony collecting one Rs 500 note from everyone till it added up to... well, 20 crores! Perhaps it's worthwhile to suffer the short-term police harassment so that you may enjoy the long-term celebrity you will doubtless eventually come to have. By the same logic, what prevents you from making a wallpaper of your old financial vanities and papering over a whole room in your penthouse with old Rs 1,000 notes?

There is, too, a larger question to deal with. If you can't store your wealth in cash, how should you store it? Does gold do it? The good news is that our Constitution does not have anything to say about Parliament's power to mess around with your cache of gold under your bed. The bad news is that this Constitutional void did not stop Morarji Desai from bringing the Gold Control Act in 1968. How did he do it? Believe it or not, Parliament exercised powers granted by the Constitution under entry 52 of the Union list (Industries), entry 27 of the state list (trade and commerce) and entry 33 of the concurrent list (products of any industries)! It was a law ripe for constitution challenge and goldsmiths rose to the occasion. In *Harakchand Ratanchand Banthia v. Union of India* [(1970) 1 SCR 479], a five judge bench of the Supreme Court ruled that ornament making was a "process of systematic production" and so, was properly an "industry"! The court did strike down some of the more draconian 'inspector raj' powers assumed by the government, but this only encouraged Parliament to amend the Gold Control Act, which in turn was challenged with less success. Eventually, the law was withdrawn, but this does not mean the government will not carry out the Prime Minister's veiled threats and bring it back next year. Gold may be a great hedge against financial collapse, but it exists only because, and for so long as, the government lets it exist.

How then are we to store our wealth? Real estate is usually touted as the metaphorical third leg of the black money grease ball stool, but is it everything it is cranked up to be? Regrettably, no. To begin with, we need to accept that Indians do not have a fundamental right to property anymore. As enacted, the Constitution did have it but this led to acrimonious exchanges between Parliament and the Judiciary. Most of these controversies centred on the government's power to acquire private land and be compelled to pay for it. Parliament amended the Constitution at least six times to nullify the effect of Supreme Court judgements, and eventually repealed the fundamental right in 1978. As the position now stands, such rights as a citizen possesses to his property are contained in Article 300A, which merely provides that no man can be deprived of his property except by authority of law.

The state of the art in 'authority of law' is the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. This limits the government's ability to acquire private land, and forces it to pay for what it acquires almost immediately. You can argue that a growing economy can never build infrastructure when hobbled with laws such as this. The scale will doubtless tip the other way sooner rather than later, but at least you will receive some money for the land that is snatched from you.

The bottom line is that any government determined to beggar you will always have the authority of law to do so. Still, wealth is better stored one way than another. Any value embedded in currency notes can disappear in a flash. Gold will not disappear so to speak, but government can force you to cough it up and flush it down the tubes into the bottomless pits of government coffers, leaving you with worthless receipts too tasteless to eat. Besides, they will still ask you to explain where you got your gold from.

This puts real estate in the best possible place of all three. Government can take it away, but it has to pay something for it even if it's not everything you paid for it. Real estate may be maya like everything else, but even in the face of the most determined government, it is unique in its ability of being fungible into other kinds of maya!

Comment-3

Fine Print: Sanctimonious Surrogacy

Why should the law decide how a woman may use her womb?

Ranjeev C. Dubey

It's not just death and taxes that are certain: it's also the law's voyeuristic interest in the bedrooms of citizens! We have long struggled with the manner in which the law minds our private business.

2015 saw a bitter battle to determine if the law should decide which human orifices are most appropriately employed consistent with "the order of nature" to achieve sexual fulfillment. It seems the later part of 2016 will be dictated to determining the manner and circumstances in which women may legally employ their wombs.

I kid you not! Look at the conditions being proposed in the Surrogacy (Regulation) Bill 2016. A couple can't have a surrogate baby till they are heterosexual, have been married for five years, one is infertile and they have no children. They can only employ a close "altruistic relative" who is "sympathetic to the situation" as surrogate, pay no money to the surrogate mother, have only one surrogate child, blah, blah, blah. If your essential DNA is liberal, you will doubtless find this very distasteful. Whose womb is it to use anyway? Indeed, you could argue that this is a typical illustration of our odious patriarchy dictating to women what they might do with their bodies. Should Eve Ensler now be inspired to write a Womb Monologue?

Regrettably, the entire matter is not quite that uncomplicated. Supporters of this new piece of legislation turn the critique grounded in patriarchy on its head by drawing our attention to the reality on the ground. In rural India, where the other half dies, Indian family life remains for the most part deeply patriarchal. Women don't own their bodies anyway. Commercial surrogacy has created a situation where men are now able to compel their wives to rent their wombs so that men may continue to play cards for the rest of their lives under the *peepul* tree before retiring in the evening for a quarter at the local *theka*. Feminists would like to argue that in truth, the law is structured to protect unwilling women from exploitation.

I am afraid the structure of this new law does not support the ostensible social objectives. If the law allows a village woman to have a dozen children with her husband should she wish to, there is no logical reason to prevent her from becoming surrogate

mother to a dozen children should she wish to. If the law allows a couple to have more than one child, there is no logical reason why they should not be allowed to commission a second surrogate child. About the only truly legitimate concerns I can find in all the high pitched feminist rhetoric around the surrogacy debate are issues around free consent. Do women truly want to have someone else's baby? The question is as legitimate as the answer is indeterminable. How will the law truly determine whether a girl really wants to marry a particular man, leave alone have his baby? And if it can make that determination, what will the law do about it? If you can't find a way to regulate that, are you going to ban all marriages except under tightly specified conditions? That is so very grotesquely Kafkaesque.

I suspect that this new surrogacy law is grounded not so much in the sociological issues around it as it is in the disturbing moral landscape in which technological transformations are occurring. We are now at a point where we can transplant human body parts from one person to another. Already, we can use the body of one person to grow an entire baby body for another. Who is to say what comes next? We are confronted with a deeply disquieting question: what scale of values will determine how legislative choices will be made when regulating these revolutionary technological advances? Lurking in the background is the fear that already, markets are pre-empting too many choices that religion used to previously make. The real issue, then, is this: should the wave of market triumphalism we see sweeping across our land become the default legislative norm?

Take an example: following the passage of the Commercial Courts Act, the ability of wealthy businessmen to buy faster "business class" justice for a premium price has already become the new normal. If the rich can get faster justice, should they also not be allowed to enjoy better facilities while they are pursuing their legal remedies? Illustratively, shouldn't wealthy murderers confined to Tihar Jail (such as politicians) be entitled as of right to rent a luxury suite complete with climate control and top quality catering if they can afford it? There are justifications aplenty for allowing business class confinement in jail. At the very least, this revenue stream will compensate for the upkeep of some of the poorer inmates. On the other hand, there are arguments against it, too. If you stand accused of moral turpitude, is it appropriate for you to take a pleasant vacation while you avoid being condemned for your sins? If you allow this, you may as well allow the convict to buy his way out of jail. Shall we say Rs 1 crore for each year of sentence purchased? By that scale, the murderer who is convicted to a term of life in jail should be able to buy a Get Out of Jail card for the price of a reasonable-sized bungalow in Defence Colony New Delhi.

Clearly, a lot of people would agree with the idea that there are some things money should not be able to buy. Located within this issue is the larger ideological question: should market forces be forced to submit to moral limits? Our legislative history would lead us to believe that Indians do not as a general proposition take the view that markets make morally acceptable choices. This is the main reason we have created a

plethora of laws in protection of the ostensibly defenceless. Take our industrial laws as an illustration: Workman's Act, Factories Act, Payment of Wages Act, Payment of Bonus Act, et al. What are these but attempts by our polity to surmount the amorality of the labour marketplace?

It's not just on the labour marketplace that we have tried to impose a public standard of morality. Private and family law is no different. Thus, the legitimacy of a child, the birth of a child, the ability to buy and sell a child, the right to education of a child, the power to marry a child, the right to public support of health, the right to extend life by medical intervention, trafficking of women and children, sex slavery, are all closely supervised by the law. Seen from this perspective, it is not the bedrooms of the citizens in which the law is grotesquely obsessed. It's in preventing the occurrence of social ills that represent a clear and present danger to the well-being of our citizens. Its real focus is the very real risk of our freedoms coming back to become our nightmares. Seen thus, the grotesque part of the new womb law is that inevitably, our social ills seem to lead us back to the darkness that seems to lie embedded deeply in our private space and souls.

Comment-4

Fine Print: Screen Sex and Censorship: What the law says

If you can show on TV anything people are 'habituated to', entertainment will degenerate into perversion.

Ranjeev C. Dubey

Now that we are nearly empty nesters, the maids at home get their fill of TV time. A lot of it is pretty racy stuff, putting me in the impossible position of diving for the Remote every time one of them walks in with the dinner tray. Section 354A of our Penal Code defines sexual harassment to include "showing pornography against the will of a woman". The maids watch Paoli Dam doing her thing on the kitchen table downstairs in the same movie I do to the full approval of the Censor Board, but if I watch it while they are in the room, I face three years in the slammer! Don't you just love the law?

Who decides what should or should not be beamed into Indian living rooms, and when it becomes sexual harassment? When I first started to see movies in the 1970s, a lot of the explicit content you see these days wasn't ok by far. What has changed? Section 5B(1) of the Cinematograph Act 1952 remains unchanged on the statute books for a long time:

"a film shall not be certified if any part of it is against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or involves defamation or contempt of court or is likely to incite commission of any offence".

This sets up the power of the Central Board of Film Certification to snip bits of film in the interest of 'public decency' before sanctioning them for public viewing. But how is 'decency' to be defined? The Central Government has tried to help CBFC by providing Guidelines as late as Dec 6th, 1991. Vulgarity, obscenity or depravity which 'offends human sensibilities', scenes degrading women, scenes of sexual violence against women including rape, sexual perversion, and so forth were all prohibited.

But how are we to tell what offends human sensibility? My mother is offended by a great many explicit scenes I am not. Who best represents the average in average human sensibility? Inevitably, the courts have been approached from time to time to unravel this cultural mystery. The Supreme Court made an admirable attempt to establish some criterion 45 years back in the case of K.A. Abbas v Union of India [(1970) 2 SCC 780] when it examined the contents of a documentary called 'A Tale of Four Cities'. This lefty work attempted to contrast the lives of the rich and the poor in four Indian metros, and included footage from Bombay's red light district. Was this footage indecent? The Supreme Court didn't think so, setting up the criterion thus:

"Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. ... Therefore it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer. We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the Kamasutra, but a documentary from them as a practical sexual guide would be abhorrent."

It was 16 years before this principle experienced its first evolution when the Supreme Court extended this principle to mean not merely the on-screen 'handling' of explicit content but also its relevance to the overall story. In the case of Bobby Art International vs Om Pal Singh Hoon [(1996) 4 SCC 1], Shekhar Kapur's graphic depiction of Phoolan Devi's (1) rape by the dacoit Babu Gujjar and (2) subsequent gang rape and naked parade in Behmai village come up for adjudication before the court. Was frontal nudity always indecent? Once again, the Supreme Court took the liberal view.

"Nakedness does not always arouse the baser incident. ... Bandit Queen tells a powerful human story and to that story, the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: ...We find that the judgment under appeal does not take due note of the theme of the film and the fact that it condemns rape and the degradation of and violence upon women."

The Bandit Queen judgment represents a great departure from previous norms. In one giant brushstroke, the goalpost had been moved from tasteful depiction to contextual relevance. This meant that if you decided to make a movie about any brutalised person, graphic depictions of brutality would be entirely appropriate. This is the main reason why movies of the 1990s have depicted progressively more on-screen brutality than

their predecessors, a process so relentless and unidirectional that its only logical endpoint is a situation where all limits are removed.

This brings us to the political scandal that is 'Udta Punjab', of which CBFC ordered 13 different deletions including verbal profanity, public pissing, scenes of intravenous drug use, the inclusion of a common Punjabi homily in the dialogue, indeed the reference to Punjab itself. In Phantom Films Pvt. Ltd. v. CBFC [Bombay High Court order of June 13th, 2016], the court overruled these cuts, observing:

"The human sensibilities are not offended by vulgarity, obscenity or depravity. Such scenes and dialogues have to be viewed in totality. The story must be read and considered in its entirety. It is not safe to select a few words, sentences, dialogues and scenes and then to arrive at the conclusion reached by the board. If a strata of society habituated to indulge freely in vulgar abuses are shown as indulging in the same without in the slightest manner glorifying them or their language, then, we do not see anything objectionable in the words." (Author's Emphasis)

I gravely suspect Udta Punjab represents a greater watershed in the evolution of Indian thinking about decency in films than most people give it credit for. From a point in time in 1970 when the Censor Board was most concerned about tasteful thematic handling of disquieting subjects, we are now at a point where filmmakers are free to show any subject so long as the protagonists are 'habituated' to them. For instance, we know that there are pedophiles aplenty 'habituated' to getting oral sex from minors. I fear that the Bombay High Court has set up a criterion so broad that in the very near future, our films will literally leave nothing to the imagination. As a card carrying liberal, this should please me no end, but as is often the case, I now fear my own freedom. We can only take solace in the fact that we do not really have to see anything that offends us.

External events, too, seem to be moving in the same direction. Indeed, Arun Jaitley anticipated the 'Udta Punjab' case by appointing the Benegal Committee on the first day of January 2016. He wanted it to examine the feasibility of replacing our censorship norms with some sort of certification regime. It submitted its first report on April 26th this year. It is early days yet but already, it is clear that the era of deleting scenes from films has passed. Films in future will have one of a variety of possible certificates representing their suitability of viewing. More significantly, the committee has taken the view that

"It is not for the CBFC to act as a moral compass by deciding what constitutes glorification or promotion of an issue or otherwise. The scope of the CBFC should largely only be to decide who and what category of audiences can watch the depiction of a particular theme, story, scene etc,..."

This brings me back to my problem with the maids at home. Indian cinematographic norms are moving to an extremely liberal position, but our laws in general continue to

be entirely conservative. Taking only our criminal code, sexual harassment aside, Sec 293 sentences an offender to three years in jail for exhibiting any obscene object to any person under 21 years of age. Who is to say what object gets exhibited in an explicit movie scene! Section 294 similarly convicts anyone who 'sings, recites or utters any obscene song, balled or words, in or near any public place'. What about that old Mehmood double entendre' movie about "Sticking it in your hand on a dark night"? Section 509 condemns a person to three years in jail for anyone who 'intending to insult the modesty of a women....exhibits any object intending.....such objects shall be seen by such women'.

Explicit movies run at home raise the specter of multiple potential crimes in an environment where the underprivileged are increasingly becoming aware of their rights, to say nothing of the opportunity inherent in entrapping the *babu* in a crime. I fear that unless we take a holistic view of many of these crimes that are really opportunities, our courts are going to be clogged with a lot of cross class cases created by a censorship regime that was too liberal for the society in which it operates.

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