

July 2012

Ensouth

The E-magazine brought to you by

N South

Advocates

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1. Managing Partner's Message

In recognition perhaps of the significance of the times in which we live, Ensouth this month is biased towards unfolding current events. Thus, we evaluate the impact of three events that have occurred within the last few months.

First, in **The Law that Saw the Light**, we subject the political peccadillos around the Lokpal Bill to a critique in the context of the of Jammu

and Kashmir's Roshni Act, perhaps the most outstanding example of self-serving political perfidy.

Next, we travel back down to the 2012 Jaipur Literary Festival in **Joust in Jaipur** and seek out the limits of free speech. We can disclose that this same topic will come up again in the next Ensouth when we go back to examine whether a harmless Bengali academic ought to be arrested for cracking a joke.

Finally, in **Telecom Torment**, we review the consequences of the Supreme Court's decision in the 2G case and draw some conclusions about the existential angst inherent in public administration in India.

We welcome your feedback!

Ranjeev C Dubey
Managing Partner

Comment-1

(This column appeared in the January 7th, 2012 issue of Business World)

The Law That Saw The Light

(After ten failed attempts to enact a Lokpal law in 44 years, should we conclude that we cannot expect politicians to worry about the people or shoot themselves in the foot?)

Ranjeev C Dubey

The explanations to why the Lokpal bill didn't get legislated come thick and fast. Perhaps Didi down in Calcutta was only in extraction mode as usual and has no real objection to the bill. Perhaps the BSP genuinely believes that politicians do not need supervision. Perhaps the BJP was filibustering only because it wants to stonewall everything the UPA wants to do. It is true that genuine differences of opinion can arise on matters as complex as the appointment of a constitution level super regulator. It is equally true that politicians don't want their thunder stolen. We understand that politicians are human. Nevertheless, it was the argument underlying **Melas With Missions**¹ that we should give our political classes the benefit of doubt and let the parliament do its job. Behind that belief was the tacit understanding that all political processes entailed both cooperation and compromise between divergent shades of opinion. It was understood that if something is good for the entire electorate, notwithstanding the devil in the detail, politicians would find a middle passage. Unfortunately, our political classes have failed us again. Obviously, what is good for all the people of India is not good enough for our politicians.

Contrast this situation with one where a proposal is made which benefits all politicians (as opposed to their constituencies). When this happens, political

¹ Please see this link: <http://www.iallm.net/90.html>

parties from a diverse range of opinion have no difficulty in coming together and voting in what works for them. When is it last that a proposal to increase MP salaries and perks was defeated on the floor of any legislative body? Frankly, in the larger scheme of things, just in terms of self-serving legislation, salary increases is really small stuff. I can think of far more outrageous laws that have been passed even though political parties were particularly hostile to each other at the time. Here is just one example from Jammu and Kashmir.

In 2000, then Chief Minister Gulam Nabi Azad announced that he had seen the light and proposed vesting ownership rights to unauthorized occupiers of public land through a new Roshni Act in order to generate funds and finance power projects in the state. He announced that through this innovative legislation, the state will gather Rs 25,000 Crores of revenue. The Jammu and Kashmir State Lands (vesting of Ownership to the Occupants) Act, 2001 became a law in November 2011. If you leave out the embellishments and the hoopla, the substance of the law is found in its Section 5 which states that anyone who has encroached on government land can apply to the Tehsildar to have the title to this land transferred to him. To get this done, he has to supply proof of possession which could comprise of an electricity or water bill, an extract of a *Girdhawari* (mutation record), a certificate from a Naib Tehsildar or an affidavit to that effect. In effect, the Government decided that for a sum of money, they will reward encroachers of public land with ownership.

On receipt, the application is reviewed by the Tehsildar and the District Collector and finds its way to a special purpose Committee which determines the price at which the land is to be vested. It is up to the Government to decide how it wants to constitute the Committee so you can take it that the Committee is the least of anyone's problem. Section 12(2) prescribes a criterion for the valuation of this land, a valuation that depends on four factors: (1) its potential value, (2) its proximity to urban infrastructure, (3) irrigation and transport facilities available, and (4) "the market value of land determined for purpose of stamp duty under the Stamps Act, Samvat 1977." The sting as usual is in the tail. No attempt is made to charge for this land at market rates. Instead, land grabbers will pay for land at the notified 'minimum circle rates' which are used by sub registrars as floor guidelines during the registration process. Allow me to confirm to you that these circle rates are already absurdly low everywhere in J & K.

That said it's not as if land grabbers pay even the circle rate. Because he has grabbed the land, this law gives the land grabber a further discount. So, those who grab residential land pay 40 per cent and those who grab commercial land pay a rather less generous 60 per cent of the already absurdly low value determined by the Committee. If you can show the land you grab as agricultural, you pay Rs 100 for up to 100 kanal of land. Net, net, unless you grab land right in the middle of the city, it's basically free to take.

The law provides a fascinating mechanism for those who are dissatisfied with the Committee's decision. An appeal from the Committee's decision lies directly under the Government who's decision by the way is final. The courts are excluded from review under Section 14. Thus, the politicians make the law, control its implementation through the revenue department, appeal to themselves when they are dissatisfied and exclude the courts from reviewing what they do.

The fascinating part doesn't end there. Under Section 6, "the Government may grant such rewards and incentives, and in such manner, as may be prescribed to the officers/officials showing excellent performance in administering the scheme under this Act." For those who didn't catch it, this means that if a revenue official zealously helps a politician grab public land, he will be rewarded for his effort with tax payer's money!

On the basis of this law, tens of thousands of kanals of prime public land, much not yet encroached upon, was suddenly shown as privately occupied and transferred to those with the ability to make it happen. For instance, all along the Dal Lake in Srinagar, a great deal of land formerly belonging to the Maharaja was taken over by the Government after the land ceiling law come into effect. Today, this land is overrun with private bungalows. Guess how these people become owners of this public land.

So did Rs 25,000 Crore end up in the Government kitty as a result of this Roshni Act? A decade into the scheme, by 29 July last year, the Government had laid its hands on a mere Rs 73 Crores! Naturally, J&K is not overrun with newly build power projects. Not that you expect the Government to see the light in its correct perspective. It is now accusing revenue officials in "having too many misgivings". It proposes to amend the law again to eliminate the need to prove possession through a mutation record extract.

I don't have any particular agenda on Jammu and Kashmir or its Government. Self-serving laws are legislated by legislators all the time. Conversion of public assets to private use through dodgy legislation dates back to at least as far back as the Forest Act of 1878. Independence has not stemmed the tide either of which the Roshni Act is only one small example. But when it comes to a law that has so much popular support, is it unreasonable to accept that our legislators will find it possible to meet our request? After ten failed attempts to enact a Lokpal law in 44 years, should we conclude that we cannot expect politicians to worry about the people or shoot themselves in the foot!

There is no great moral to this story. A great many Indians believe that the purpose of our political processes is primarily to allow the winner to usurp public wealth for private purposes. This is one of the reasons why Indians have come to accept that governments will not govern and don't like to pay taxes. A great many Indians also believe that a second purpose of our political process is to allow the winner to extract protection money from

citizens. This is why despite all the rhetoric you hear from political parties on their ideological disagreements with the Lokpal bill, it's really down to the fact that they don't want any impediment to the protection rackets they run. This is not a matter of this politician or that, or this party or that. As a class, the politicians have failed the people again. They will have a shot at making amends in the budget session. Hopefully, while there is still time, they will see the real light and do what needs to be done.

Comment-2

(This column appeared in the February 4th, 2012 issue of Business World)

The Joust In Jaipur

(Do we need a more nuanced, more mature perspective on free speech?)

Ranjeev C Dubey

Even though the putative purpose of literature is to show us the true nature of reality, the *tamasha* at the Jaipur Literature Festival compels us to ask if litterateurs, or their fans, live in a world substantially removed from reality. In the beginning, the joust seemed to be about facilitating the author of a banned book in Jaipur. It then became about video chatting with the man across 4477 miles of shark infested waters. Finally, it became about persecuting some other authors for reading from a banned book. Running as a subtext through all this, as Salman Rushdie reminded us with his impeccable intellectual clarity, was the threat to humanity's fundamental right to freedom of speech. It does seem like a heavy load for a bunch of book lovers to carry on a pleasant January weekend in a pretty city like Jaipur. What on earth was going on out there?

Let's try to break down the issues. Should Jaipur have facilitated the author of a banned book? Rushdie's work *The Satanic Verses* was never published in India. Nearly as I recall, Khushwant Singh advised Penguin against doing so because it could and eventually did upset the Muslim community. Nine days after it was published in UK, it was barred from being imported to India under Section 11 the Customs Act which allows the government to prohibit imports to protect the "maintenance of public order". We can of course debate the relative merits of maintaining public order by banning books as opposed to containing the emotional outbursts of people upset with insults to their prophet. Be that as it may, the ban was on the book, not Rushdie. As a PIO, he has a right to come here and this was indeed what the Government said.

Should he have been discouraged from coming here by holding out — as he claims and the police deny — references to the security threat? Let us not deny that Rushdie's very presence offends those he has insulted, and they swore to kick up a right crazy shindig if he showed up. Whatever our views on free speech, I trust we are not suggesting that we have a right to insult someone under the shelter of free speech but that person does not have a right to be offended. Are we then suggesting that the offended person does not have the right to protest the offense caused to him? I believe most of us will defend the right to protest but add that the protest has to be peaceful

and so forth. Since we are neither policemen nor politicians, this sophistry allows us to disclaim the ensuing consequences when the peaceful protesters spontaneously combust and start burning buses and shops at which point there is a *lathi* charge and someone gets his skull split open. Perhaps we need to pause and ponder the argument that the principle is more important than the lives lost, that the blood on the street is fighting the good fight.

Either ways, we know what happens next. The imams make speeches from the *minars* and the country goes up in flames. All this because somebody wants the right to say nasty things about the Prophet of 1.5 billion people, i.e. 21 per cent of the world's population! I say no more because I know the argument that to avoid the slaughter is appeasement of minorities while the protection of those saying crass insensitive things about others is an admirable promotion of liberalism and freedom of speech.

Which bring us to point number two: should the government have leaned on the festival organizers to prevent them from having a video conference? The neo conservative traditionalists are no doubt on thin ice here, not least because Rushdie was on national television the same evening, carrying on the same chat with page 3 newscasters, saying presumably the same things! Having said that, if you accept that lives may be more important than free speech, you would have to reluctantly admit that the diktat to the festival's organizers was consistent in philosophy, even if it wasn't to your taste.

That takes us to point number three: should we be threatening prosecution of authors who read from banned books? As I have said, the book is not banned. If you flew back from London with a copy in the nine days before the ban was imposed, you could continue to have it sit pretty on your library shelf. If you like, you can get up on Amazon, download the Kindle version right now and you would not be accused of anything. Reciting passages from *The Satanic Verses* is not in principle a crime either. On the other hand, what you read may be a crime. For instance, under Section 153A of the Indian Penal Code, if you read something that promotes enmity between different groups on grounds of religion, race, place of birth, residence, language, and so forth, or disrupts the harmony between these groups, you have committed a crime. Similarly, under Section 153B, if you promote hatred between people, you can be put away for three years. Finally, under Section 295A, if you deliberately and maliciously outrage religious feelings, you are a criminal. Naturally, to be guilty, it is not just *The Satanic Verses* you could read from!

The upshot of this is that as a society, we have accepted the idea that it's not okay to hurt the religious sentiments of others. That I won't insult your prophet and you will not show the naked bodies of my goddesses is a long accepted deal. This is a choice we have made as a society — not as individuals — and it reflects in our laws. The essence of Rushdie's view, and of those who support him, is the proposition that it is okay to abuse someone's religious beliefs. Without suggesting that Hussain did any such thing, the logic of the proposition is equally that it is okay to make a

pornographic movie about somebody else's god or goddess. How about full frontal triple X rated nudity with Lord Krishna as a horny stud in a garden by the river full of naked Bombay B movie extras begging him for a piece of it? Is that okay?

If you asked me where I stood on the issue, I would admit that as a member of India's very westernized English speaking urban elite, I would come down on the side of liberalism and all this means by way of free thought, action and speech. But we need to ask ourselves if we need a more nuanced, more mature perspective on it. We also need to exorcise some false Gods in the bargain.

For instance, let us be aware that free speech goes only so far in practically every society no matter how liberal it claims to be. I have heard no end of good humored jokes about killing off mother in laws in America but I have never heard a good humored one about ravishing mothers. Why raping one is worse than killing the other is not clear to me. As Bhajee found out, you can question the morals of anyone's mother in Australia, but you can't berate them from being simians. Why a bastard is better than a monkey is no clearer to me than it would be to an animal rights activist. In Europe, it is quite alright to rubbish the religion of another but it is not alright to condemn them for the color of their skins. Why it is more important to be skin sensitive as opposed to spiritually sensitive is not at all clear to me. Political correctness is completely arbitrary at the best of times. At any rate, no society believes in completely free speech and every society promotes public order. There would be no defamation law or riot busting policemen if it wasn't.

As I think about the joust in Jaipur, it strikes me that we have an honest to goodness cultural conflict here. We have a traditional culture in India which does not approve of religious insensitivity even as it is completely insensitive about a great many other defining parameters of individual identity. We also have an emerging India that has taken a great deal of liberal influence from the west and is pushing for a quite different vision of India. In the mix is a bunch of PIOs and non-residents who make money out of India and patronizes it at the same time. There are dynamics at play here and I see it as a negotiation process between groups carrying radically different opinions. In the circumstances, while I have my individual preferences, I don't see the benefit of the us-and-them blood-on-stone inflexibility on the issue. At any rate, I do not buy into the absurdity of Salman Rushdie damning us all for failing to protect free speech even as he declined to come to India in defense of his own freedom of speech, preferring instead to save his life and limb on the off chance that an outraged zealot blows both of them up to smithereens. I especially don't see why India should be compelled to protect his freedom of speech at the risk of jeopardizing the lives of citizens who, misguided as they may be, work and live here, and probably contribute something to our society too!

Comment-3

(This column appeared in the March 2nd, 2012 issue of Business World)

Telecom Torment

(When we speak of policy paralysis, bureaucratic vacillation or judicial reluctance, it mostly comes down to who gets the free lunch and who gets to wear the dunce cap)

Ranjeev C Dubey

The decision of the Supreme Court of India in the 2G scam case is perfect illustration that it is a whole lot easier to rant and rave about corruption than to actually do anything about it. Recall that when fixation with revenue losses was at its peak, the Controller and Auditor General of India estimated that telecom minister, A. Raja, had lost the government Rs 1, 76,645 Crore. The Central Bureau of Investigation paired this down to Rs 30,984.55 Crore. So while everyone cheered when the Supreme Court intervened, we now stare at the specter of a government with accumulated potential liabilities it may not be able to sustain.

As the situation stands today, the government is liable to return all the license fees it has collected from these companies. We have Russian telecom company Sistema, which risks losing Rs 12,500 Crore spent so far in acquiring the licenses and rolling out the service, seeking to protect its investment under the Indo Russian Bilateral Investment Treaty. C. Sivasankaran, who bought out his foreign partner, wants to be paid the Rs 1,700 Crore that was put in by S Tel. Loop Telecom wants to be paid Rs 1,454 Crore to surrender its licenses. Telenor is issuing masterly understatements about its investments of Rs 6,100 Crore in equity and Rs 8,000 Crore in corporate guarantees. Another dozen companies have spent varying hundreds or thousands of Crore each in acquiring licenses and rolling out networks. Which loss is greater now: Raja's choices or the 2G judgment?

The legal heart of the issue is simple. If your counterparty commits a crime and your contract with this party is terminated by a court, are you entitled to compensation? Forget about losses to the exchequer, the Government of India is down in a hole for more money than anyone has cared to count just yet.

You could well ask the question: did the Supreme Court see what was coming? In truth, the Supreme Court was not terribly concerned with the fate of the companies who stood to lose their licenses. It set out to answer this question: could the government transfer natural resources without following a fair and transparent policy? In answering this question, it reasoned that spectrum is a national asset entrusted with the government for use in the public interest alone. In its allocation, all applicants must be treated equally. It observed that this has two aspects. First, equality demands that the people must be fairly compensated if a natural resource is converted to private use. Second, the government cannot adopt a procedure that is unjust, arbitrary, opaque or discriminatory between similarly placed private parties.

That finding took the court into an examination of the government's policy on the point. It noted that TRAI itself believed that the current criterion for allocation of spectrum and its pricing was deficient. It determined that to allocate spectrum at 2001 prices in these circumstances was illegal. The court noted that while spectrum was "gifted" to certain companies, these same companies then off loaded stakes to third party foreign companies at fantastic mark-ups thus reaping super profits.

Whether spectrum can be allocated on a first-come-first-served basis was the third question considered by the court. The court held that the element of chance inherent in such policy catapulted anyone with special access to government to the head of the queue. The court also suggested that the government has engaged in some suspect internal maneuvers in order to achieve a pre-mediated result. On the face of these facts, the court was then left with no choice but to quash the award of spectrum. Bear in mind that the court did not decide that spectrum allottees had purchased their licenses by a back door. It did not determine anyone's culpability. How then could companies be penalized for crimes they did not commit?

In point of fact, these companies did raise these issues. They argued that the policy was public knowledge for months and there was no question of anyone jumping the queue. They argued that many of them had applied in 2004 and 2006, and had nothing to do with Raja's shenanigans. They argued that if the 2001 first-come-first-served policy was unconstitutional, then every license granted since 2001 should be cancelled. They argued that licensees had managed to get in vast sums of money by way of foreign investment to build networks in remote areas which would benefit vast numbers of deprived people. They argued that they had invested thousands of Crore in infrastructures and cancelling the licenses was not in the public interest. The court either completely ignored these arguments or perfunctorily dismissed them out of hand. The issue was decided on the basis of policy and the question whether these companies should take a bullet in the gut was not addressed. Unfortunately, this is indeed how the law works. We have been there before.

Recall that in May 2011 (see **Pandora's Real Estate Box²**), the Supreme Court cancelled the acquisition of vast swathes of land in Greater Noida on which residential and commercial developments were already well underway. The government had colourably invoked its power to pre-emptorily acquire land that was not required for the purpose for which it was acquired. Allegations of vast payoff by builders to the government of the day were in common circulation. Even so, the fact of the matter was that these property developments had been presold to end customers. If the land acquisitions were cancelled, the property buyers would get it in the neck.

² Please see <http://www.iallm.net/89.html>.

Given how the law is structured, the Supreme Court cancelled the allotments without factoring in the property buyers. Did this mean that property buyers got their money back with interest? Did this mean that the original owners reclaimed the land, tore down the partially built structures, re-established their farms and went back to their utopian rural paradise? Of course not! The farmers took more money and settled the matter, the builders passed on the added cost to the end purchaser and all the players in the game save the buyers lived happily ever after. Something similar is inevitable in the 2G case. The mechanism by which this will happen will become clear in the days to come.

What is clear already can be shared. As matters stand, the government faces huge potential liabilities for the sins of its minister. Suing the government is not what many foreign investors come to India to do but their difficulties have to be addressed. In the long run, with some policy tweaks, the government may be none the worse for its predicament. If you go by the loss-to-exchequer numbers, the government is in for a bonanza. Circumspect experts argue that with banks now unwilling to take further exposure, spectrum bids are likely to be modest. Other experts suggest that the government could pick up Rs 65,000 to 75,000 Crore in a fresh auction. It seems to me that the government's first task is to make sure that Raja's licensees get spectrum as soon as possible because the government must avoid potential liabilities flowing from the 2G judgment. It has already made this move by telling the Supreme Court that it is simply unable to auction the spectrum any time soon. In effect, it is now trying to claw back the termination of the licenses. If and when it does auction the spectrum afresh, at whatever cost, you can be sure that the additional cost will be passed through to the customer.

Given these realities, you could ask yourself what the Supreme Court was doing getting Shahid Balwa's Rs 200 Crore back from Raja and hitting the people of India with a bill of Rs 75,000 Crore. Thus, the difficulty with questions of the type raised by the 2G case, become easier to see. Every policy, administrative or judicial option imposes a cost: somebody or the other pays the bill. If you give away spectrum cheap, companies tend to benefit but if competition drives down prices, the consumer is always the gainer, stimulating the economy as I have observed (see **Scam Mela**³). On the other hand, if you sell spectrum expensive, you pass this bill back to the mobile phone owner. In this day and age, that could be the Lamborghini driving real estate super brat as easily as it could be your *dhobi*. The government no doubt would be a whole lot richer but that still leaves open the question where it would spend the money. Will it spend it on building highways and hydro projects? Will it instead give the money to legislators to spend on "development schemes" in their constituencies at their sole discretion? Or would it spend the money on some rural upliftment scheme the benefit of

³ Please see <http://www.iallm.net/83.html>.

which we know will never reach the intended recipient? This is existential angst of a common Indian variety.

To add to the misery, this existential angst applies across the board to all 'public' decisions. Seen thus from inside and above, most options confront the decision maker in shades of gray. So when next we speak of policy paralysis, political impotence, bureaucratic vacillation or judicial reluctance, we must remember that most of the time, it comes down to who gets the free lunch and who gets to wear the dunce cap. This is quite apart from the fact that by the time the Law of Unintended Consequences works itself out, no one will remember what it was that we had set out to do.

-X-