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Managing Partner's message

While Urban Westernized Educated English Speaking Elites may be delighted that growth as a political priority may be back on the agenda – for a while anyway - fundamental questions remain about the rules we are prepared to ignore in this quest for growth? I fear these questions will haunt us in the years to come.

We bring focus on this question within the context of the heat the Aam Aadmi party was able to generate a mere three months back in the destructive way it went about reforming India. In **Means, Ends and Jurisdiction**, we ask ourselves if we can ever do the right thing without adhering to both the form and spirit of the rules we have created for ourselves.

That said, the quest to create a rational society does not end with following existing rules: it continues with the attempt to create the right new rules. In **Blowing Away Whistle Blowers**, we pick up this long burning issue and examine what a quality whistle blower protection law should look like.

Finally, the quest for a rational society also requires us to sagaciously reform institutions that have diluted their sacred mandate, lost their way or are under relentless pressure because of dysfunction elsewhere. In **My Wages For Your Sins**, we examine the manner in which the judiciary is absorbing the pressure of a society under ethical seige and the price it is paying for doing so.

We do love feedback!

Ranjeev C Dubey
(Managing Partner)

Print Media

Fine Print: Means, Ends & Jurisdiction

When we seek to do the right thing without adhering to both the form and spirit of the rules we have created for ourselves, all of us undermine the very ideas we believe we are upholding

Ranjeev C. Dubey

Even economically savvy voters who never bought into the Aam Aadmi Party's 1960s style teeny-bopper socialist manifesto - but prayed for transformation through its disruptive politics - must lament the spontaneous self-combustion of the Delhi Government in a haze of pepper spray last week. As for me, after 33 years of law practice, I can confirm that the path to ethical hell is always paved with the best intentions wrapped in crusading rhetoric. When you've kept the appointments I have, it's hard to be a believer.

The angst is all too plain though. When corruption combating crusaders sleep on pavements protesting the actions of cops who do not arrest African women without warrants in the middle of the night, do we question their bona fides? When the Apoplectic Aam Aadmi announces that he is going to deliberately bypass due process of law so that he can have his Lokpal Bill the way he likes it, should we be alarmed? When the Government of Delhi files an FIR against the Union Law Minister, the Union ex-Director General Hydrocarbons and one of India's foremost businessmen for hatching a conspiracy to double gas prices in India, ought we to stand stunned in horror? As far as I am concerned, its three strikes and I am out.

As a lawyer, I am always preoccupied with questions of ethical choices. To say 'never mind the rule about not arresting women at night so long as we end up with a sinless city' is indefensible. To say 'never mind the obligation of every legislator to follow the law in creating the law he hopes will catch those who break the law' is self-defeating. We have all heard that ghastly story about 'the Congress being a Reliance dukaan' but to say that 'state governments have jurisdiction to file FIRs against Union functionaries because they don't like Central Government policy decisions' is truly surreal. Means and ends are convertible, Gandhiji warned us: "Our progress towards the goal will be in exact proportion to the purity of our means". To me, this is self-evident. To shoot someone down in the street to rid ourselves of evil is wrong: it's wrong in Kashmir, it's wrong in the Ansal Plaza basement in south Delhi and it's wrong in Gujarat. I don't like encounter killings and I don't like people who break laws because they think it's good for the country.

This is not an error unique to the exalted Apoplectic Aam Aadmi himself: it's an epidemic. We regularly hear calls for the castration of rapists, the summary execution of politicians and the arrest without trial of the corrupt. What happens when someone from a radically different ideology makes these same calls against immodest women who bare their legs, dissenters from the ruling party ideology or people from a religious minority? After all, cutting off hands and noses, stoning people to death, sending people to the villages for cultural re-education or deporting them to Siberia after a populist kangaroo trial is only another ideology at work using the same logic. When we decide that due process does not matter, that we can pre judge and condemn anyone based on our own ideological position, we are indistinguishable from the Taliban. As I read the stuff I do on Twitter and Facebook, we Indians have indeed all become Taliban.

Behind this mind-set though is an even larger problem: we seem to have lost sense of the limit of our jurisdiction. Everyone is neither competent nor entitled to be the judge of everything. Processes, procedures and institutions are created to balance the social choices we make: to drive consensus amongst latent contradictions. To argue that we should bypass these processes for a larger objective is only one step away from the Wild Wild West, where every man is only as good as the gun he has. In this, it's not just the Apoplectic Aam Aadmi who falls short. All of us - even our judiciary - misses the target.

I am not ungrateful for the moral compass the judiciary sets us from time to time. Nevertheless, the fact is that the judiciary is far better at hurling well aimed ethical principles at its subjects rather than the dysfunction in its backyard. When you get past the systemic failures, the inevitable obstructionist defence tactics, the impossibly prolix procedural rules, the excessive pressure on a creaking infrastructure, the tardy professionalism of the cogs in the justice machine and a thousand other things besides, you still have to deal with the basic fact that very often, the judiciary can't make up its mind on the limit of its own jurisdiction! What is going on in the world of alternative dispute resolution is a very good example.

I do freely admit that I am no believer in Arbitration. In the Fineprint [Bleeding By Arbitration](#), I argued that privatising justice by outsourcing it to independent service provider is an unmitigated disaster. The disaster has magnified immeasurably over the years because Indian courts have never been able to decide where they stand on a variety of arbitration law related questions. Take first the question whether Indian courts have jurisdiction to interfere arbitrations being held outside India. This is an important question for corporate lawyers because we set up international cross border agreements all the time and we need a dispute resolution mechanism which works for both sides. In 2002, the Supreme Court settled this question in *Bhatia International v Bulk Trading* [(2002)4SCC 105]) when it decided that Indian courts did have jurisdiction over arbitrations being held anywhere in the world unless parties had specifically agreed that India courts will not have jurisdiction. Subsequent judgments expanded on

this theme. In *Venture Global Engineering v Satyam Computers* [(2008) 4SCC 190], the Supreme Court said that an Indian could always challenge an award made outside India in the same way that it could challenge a domestic award. In *Citation Infowares v Equinox Corp* [(2009) 7SCC 220], the Supreme Court said that Indian courts could appoint arbitrators in foreign arbitrations as well. Then came the great turnaround of 2011. In *Videocon Industries v UOI* [(2011) 6SCC 161], the Supreme Court now said that when parties have decided to arbitrate outside India and be governed by a foreign law, Indian courts have no jurisdiction at all. Next year, in *Bharat Aluminium v Kaiser Aluminium* [(2012) 9SCC 552], the Supreme Court agreed with the two judges and held that if an arbitration is held outside India, Indian courts have no jurisdiction.

So, what about all those sorry suckers who had taken the Bhatia International decision seriously and written their contracts on that basis? The Supreme Court understood the issue. It ordered that this new law would only apply to contracts made after September 6th, 2012! Whether judicial fickleness can be addressed by conjuring magical cut-off dates out of the air is one of those existential question which blows without answer in the wind. Since it takes forever to have a court decide anything in India, parties will, for a long time, have a law applied to them which the Supreme Court clearly thinks is wrong to begin with!

Here's another example. When a judge appoints an arbitrator because the parties fail to agree to appoint one, is he just appointing an arbitrator in an administrative sense or should he go into the hotly contested questions in a judicial sense? If he is acting judicially, he will have to examine whether the parties had an arbitration agreement, whether the disputed question is arbitrable, whether an arbitrator should be appointed at this stage and so forth. Conversely, if he is acting administratively, he simply appoints the arbitrator and lets the arbitrator decide whatever the parties are arguing about. Now, back in 1999, two judges of the Supreme Court decided in *Ador Samia v Peekay Holdings* [(1999) 8SCC 572] that a judge acted administratively. In 2000, this was reaffirmed by three judges of the Supreme Court in *Konkan Railway v Mehul Construction* [(2000) 7SCC 201] and then again by five judges of the Supreme Court in *Konkan Railway v Rani Construction* [(2002) 2SCC 388] in 2002. You would think that was judges enough! Not so. In 2005, seven judges of the Supreme Court decided in *SBP & Co v Patel Engineering* [(2005) 8SCC 618] that in appointing an arbitrator, a court acts judicially.

This is a repetitive pattern in many areas of law, especially in taxation. For as long as I have been in law practice, eminent benches of the Supreme Court have unsettled settled principles of law. Lawyers advise clients based on the latest judgment, but judgments reverse themselves all the time: what does that do to the quality of legal advice we give? The problem is that many of these judicial U turns are motivated by a genuine desire to alleviate the specific plight of parties based on a subjective perception on who has been wronged. In doing this, the judiciary twists the law one way and then another, undermining the objective application of the very dispensation it is here to

uphold. Law then becomes not a principle to be objectively applied, but an instinctive and subjective application of "the right thing to do". No one stops to ponder the perfectly obvious point that your wrong may not be my wrong and your sense of what is right may not be mine. Do we want a society run by rules, or one run by emotions and subjectivity?

You don't have to be Mahabali Vetaal to understand how this plays out in other areas of our life. A judge may passionately believe it's ghastly to be gay, but if as a society, we wish to retain the fundamental right to personal liberty in our private space, then by what logic can we protect that right in what we eat or wear but not in who we consensually have for a sexual partner? Surely, the right to pursue our spiritual faith as we see fit should include the right to patiently hear out Wendy Doniger's alternative history of Hinduism. In both these cases, the judicial system has failed us just this year because it has paid homage not to the objective rule, but the presiding judge's own sense of what is the right thing to do.

If it's not perfectly obvious already, allow me to repeat that this Fine Print is not about judicial fickleness: it's about the risk we run in acting on our subjective beliefs rather than the objective rules we have all collectively rightly or wrongly established. When we seek to do the right thing without adhering to both the form and spirit of the rules we have created for ourselves, all of us undermine the very ideas we believe we are upholding. Therefore before we set out to change India, let us at least agree to abide by the rules we have already agreed on, and use the right means to get to the right ends.

Fine Print: Blowing Away Whistle Blowers

You can kill a man's career, or discriminate against him till he stops progressing in his work. So how is our new Whistle Blower legislation protecting the weak from victimization?

Ranjeev C. Dubey

Election fever this time has sent the outgoing government scurrying in search of a brave new world of probity, the main manifestation of which are: (1) a whistle blower protection law and (2) a Lokpal law. Is it fair to expect that the Whistle blower legislation will herald in an era of integrity in public life?

If you live in India and want to address the corruption problem, what is it that you want first? At a pinch, I'd say five things. First, you should be allowed to kiss and tell without fear of retribution. What better way to prove that a bribe was given than to have the guy who gave it, say so? This is possible if bribe giving is legal but bribe taking is not. That is not the law right now. While Sections 7 to 11 of the Prevention of Corruption Act 1988 go to great lengths to define and punish public servants for corruption but Section

12 also states that "Whoever abets any offence punishable under Section 7 or Section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment" etc. If paying a bribe sends you to jail, how will anyone persuade you to admit that a bribe was paid? How often are you likely to catch anyone 'red handed' so to speak?

Naturally, there is a lot of hypocrisy and the double talking jive around this issue. If we make bribe giving legal, won't that make bribery more brazen, more widespread? Shouldn't we draw a distinction between giving a bribe to get what is your right anyway, and giving a bribe to get ahead of the others (like in a coal mine or telecom spectrum queue)? I don't buy most of these arguments, not least because we've had the Prevention of Corruption Act for 25 years and it's not been spectacular in achieving its goals, or won't you say? That apart, what is a right for one man is a privilege for another. In a country where so many live without electricity and water supply, is getting a power connection a right or a something you need to jump the queue for?

In fairness, Section 24 of the Prevention of Corruption Act also states that "a statement made by a person in any proceeding against a public servant for an offence under Sections 7 to 11 or under Sections 13 or Section 15, that he offered or agreed to offer any gratification...or any valuable thing to the public servant, shall not subject such person to a prosecution under Section 12". That is not enough! This section is talking about confessing to a sin in a statement in a legal proceeding: what if someone proves you guilty independent of the confession? In this age of video graphed stings, the bribe giver will be up to his neck in it long before he gets to a statement making stage.

I wouldn't stop at making bribe giving legal either. Once bribe giving is legal, also incentivize the briber giver to whistle blow. Create a law which forces every bribe taker to return the money he took to do the job he did. As the construct then goes, if someone asks for a bribe, no problem man; go buy a cheap pen camera in Palika bazaar and go video graph the deal as it is made. Then get what you asked for and ask for the money back! Heck, the department may even give you a extra reward for turning in the slime who took a bribe from you.

Which takes us to the second "must have" for any whistle blower law: absolute secrecy. Remember Satyandra Dubey? If you've forgotten, check out the facts in the ten year old April 2003 Fine Print [Legislating for Whistle-blowers](#). Satyandra Dubey was murdered because he blew the whistle on corruption in highway building. He is by no means the only one. If you check out Wikipedia's "Attacks on RTI Activists in India", you will see a very long list of assaults and killings. If you are not guaranteed absolute secrecy when you complain, every dirty politician and his hoodlum contractor will have a supari out on you. If you are blowing the whistle about something more than peanuts, your life isn't worth more than peanuts.

Anonymity is key; that is a no brainer. But guess what the new Whistle Blower legislation does? Section 4(6) requires that "No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure". The law isn't interested in protecting the identity of the whistle blower; it wants him to stand up on main square and stop a bullet from a country made Katta.

Oh, and by the way, it gets richer. True to bureaucratic type, it's not enough to disclose a crime; you have to do it in a prescribed format complete with declarations. Check out Section 4(3): "Every disclosure shall be made in good faith and the person making disclosure shall make a personal declaration stating that he reasonably believes that the information disclosed by him and allegation contained therein is substantially true." That sounds like a sophisticated piece of drafting we are going to need a lawyer to help do right! It's hard not to think that this isn't about protecting whistle blowers: it's about setting up so many hurdles to whistle blowing that a bunch of complaints get rejected because they aren't made according to the 'rules'. Sounds familiar?

Of course, we can sympathise with the bureaucracy for this piece of work-shirking. But seriously, will allowing anonymity really mean that the government will have to go on a wild goose chase every time it receives a mischievous anonymous tip off? I hope not. Clearly, the guy receiving the complaint needs to be able to touch base with the complainer, even if it's only to get more information or a clarification or similar. At the same time, the complainant needs to have the comfort of anonymity. What is the downside to allowing the complainant to crouch behind the wall of an anonymous e-mail ID or a "care of" address? Since every-one can always be tracked down in this information age, the law should specifically state that the complainer should not be tracked down but should leave some means to be contacted if necessary.

This directly brings up the third point: security. I would have expected any whistle blower law to expend a lot of energy in setting up a secure witness protection program with a liberal budget. What we get is not a word. How can you even claim to have a credible Whistle blower law when the protection of whistle blowers isn't even on your event horizon? Should I be subjecting this law to a critique, or just be falling about helplessly on the floor laughing derisively?

So it's on to the fourth point: preventing persecution. There are two different levels of this stuff. If you are thinking insider whistle blowing, think IAS officer Ashok Khemka. The man has suffered 40 transfers in 22 years because he refuses to engage in dirty dealing. His exploit in exposing Vadragate is well documented. On the other hand, if you are thinking about a public spirited individual, think RTI Activists Rajendra Kumar. On October 15th, 2013, he committed suicide outside the Chief Secretary's office at the state secretariat in Bhopal by consuming poison because he could not deal with the false cases against him any longer. In his suicide note, he named 33 people who were torturing him since 2006 because he revealed that they got their jobs on the basis of

fake caste certificates. You can kill a man in a million ways, or make life so onerous for him that he decides to save you the trouble of thrusting the knife in. Not that every persecution of every whistle blower necessarily ends in death. You can kill a man's career, or discriminate against him till he stops progressing in his work. So how is our new Whistle Blower legislation protecting the weak from victimisation? Don't be silly: the legislators didn't think that is an issue at all. 'Victimisation' is not even a defined term in this law.

With that, we now come to our fifth and final point. We know that people have complained about corruption in the past and died for their beliefs. We know that more often than not - even in Satyendra Dubey's case - bureaucracy has failed to act on these disclosures. In this environment, how should whistle blowing complaints be investigated? The new whistle blower legislation decides to address this issue by prescribing a preliminary internal investigation by a designated 'Competent Authority'. This guy is required to forward to complaint to the relevant Head of Department for comments on the other side of which, the case gets sent out to the police if there is any substance in it. Now, I don't want to knock the cops who, at least in Delhi, are for us with us always, but the fact remains that these guys are so busy protecting VIPs they can't investigate these same VIPs for corruption. Besides, how exactly is the pot going to call the kettle black? That is the Lokpal Bill issue all over again. If you don't have an independent investigator, you don't have anything. I need not say more.

So as I stand back and look at this new legislation, try as I might not to be deliberately cynical about its potential for heralding change, I am compelled to conclude that this is another piece of grotesque tokenism legislated with the hope that it will fool enough of the people for long enough a time to get another election result in the bag. After that, well, there is always Louis XIV's Le Deluge.

Fine Print: My Wages For Your Sins

Why in this world of paralysed time and frozen turbulence, Supreme Court senior counsels are not taken seriously till they make Rs 10 lakh a day!

Ranjeev C. Dubey

"Can't you see", Pink Floyd's singer song writer Roger Waters berated us in 1984, "it all makes perfect sense, expressed in dollars and cents". This must be why Supreme Court senior counsels aren't taken seriously till they make Rs 10 lakh a day! I mean if you are that good, why isn't someone putting their money where your mouth is? Which takes us to the fundamental question: why are top gun lawyers being paid so much?

Snipped off the trimmings, I would say it comes down to the cumulative impact of three reasons. At the root of it all sits a pertinacious legislature mating out (like Lord Tennyson's Achilles) "unequal laws to a savage race". I am not being bitter. The main

purpose of many laws is a kind of perverse 'wealth re-engineering'. As if that wasn't bad enough, we have an enviable bouquet of ridiculous laws that the Law Commission can't see. The internet is awash with such lists but here is a quick sampler. Section 309 of the IPC sends you to jail for a year for failing to successfully commit suicide but is perfectly happy for you to succeed. At 18 you are old enough to elect an idiot as your political representative but it is another 7 years before you are old enough to drink to your dumb choice. You can't be a pilot if your leg isn't 3 feet long!

On a more serious note, we have on our statute books a plethora of laws that criminalise a CEO of a company because the drinking water supply isn't up to scratch or the walls of the worker's canteen are not smooth enough or a women worked there at night (try the Factories Act 1948). The Industrial Disputes Act 1947 is a whole lot worse. Not only can't you start an industry without a dozen approvals and permits, you can't fire any but the last employee to be hired, modernise a plant without a 21 day "Change of Conditions of Service" notice or shut down the place without a babu's approval. Here's the bottom line: when you make impractical laws that fly in the face of the times in which we live, you are going to end up with people who can't both follow the law and run a business that makes commercial sense. Courts then become the magic wand that cures political diseases.

That brings up Reason No. 2. Our fabled "functioning anarchy" has added immeasurably to its historic dysfunction by allowing the political classes to use the government to further their own acquisitive agendas. Since all governance yields political funding, administrators can't take any decision at all without permission from the political classes. We have examined its impact on UP's sand mining licences ([Enter The Sandman](#)) in the past. Simultaneously, sale of government jobs over the years has resulted in an entire class of civil servants looking for ways to recover their entry investment into bureaucracy. Naturally, a grievance rooted in the quest for fairness in governance cannot be addressed "administratively". You have to go to court.

When you put these two factors together, what you get is a system of administration which funnels disputes relentlessly at very high volumes into the justice machine, clogging it, resulting in an irremediable logjam. That is our problem number 3. It has become so absurd now that if you take Prime Minister Manmohan Singh's word for it (at the conference of Chief Ministers and Chief Justices in 2004), a sample survey conducted in Karnataka revealed that the Government was a litigant in 65 per cent of all civil cases, sometimes on both sides of the dispute. If you are now going to set up Lokpal type laws, how long will it be before the same is true of criminal cases? In 2008, Prime Minister Manmohan Singh informed the Lok Sabha that our courts are clogged with 30 million cases of which 4 million are pending before the High Courts and another 65,000 before the Supreme Court. In 2009, the Chief Justice of the Delhi High Court released a report stating that given present disposal rates, it will take 466 years for the courts to clear the backlog. Justice V.V.Rao of the Andhra Pradesh High Court did not

agree. In his keynote address on E Governance in the Judiciary in March 2010, he calculated that it will take only 320 years!

I can believe either figure because with 15 judges per million, we have a 7th as many judges as USA (100 judges per million) in a society that is at least seven times as dysfunctional. In a world where 30 million cases are up for decision, what makes your particular cry of anguish so evocatively heartrending and why should the court care to give you priority time? Some cases will never be decided, or so it seems. My law firm is currently handling a 44 year old case in final hearing in the Supreme Court where some 3500 acres of land was acquired for the Navi Mumbai project without paying a paisa. Four decades later, we are arguing about whether the Land Acquisition Reference court had jurisdiction to decide the owner's title or not. Meanwhile, many of the former owners -mostly poverty stricken peasants who slowly starved to death in the decades since - have lost whatever remained in sustaining the ensuing litigation costs.

In this crazy state of dysfunction, what can you possibly achieve by going to court with your grievance? The truth is that most people don't go to court if they can possibly avoid it: those that do have no choice. Those who understand how the racket works simply apply the rule of [Buffalo Jurisprudence](#) and let the other sucker go to court (see the June 20th 2008 Fine print "[Buffalo Jurisprudence](#)"). Are we surprised then that there is no respect for the law? That apart, when the warring parties do get to court, the whole game is about getting interim orders. These interim orders last as long as the case does: if yours lasts 20 years, your lawyer really does deserve a healthy bonus. In India today, litigation is really about interim arrangement', and that's what people like me make a living doing.

So in this world of paralysed time and frozen turbulence, let us redefine our expectation from a lawyer. You want the guy to move the system that you know moves very little. You also want to use the system to fight a predatory state that has legislated perfectly 'legal' but immoral laws designed to unfairly victimise you. You are probably going to court asking them not to apply a bad law. You can take it that the court would not be super enthused about doing that for you.

That's not the worst of it. Courts have no means to establish truth except through records and 'Official records' are deemed to be the most credible. Yet, the Government thinks nothing of cooking up the records to get to you, which means that when you fight the government, your goose is cooked and you go to court to uncook it. Is that a tall order or what?

As a lawyer though, what really bothers me is that I am a legal service provider, and my ability to generate business depends on my ability to provide a quality product at realistic prices with expeditious delivery schedules. How do you think English law firms have spread their wings across half the English speaking world, to say nothing of China? They are not selling service: they are selling jurisdiction. They tell you that the

English legal system is superb and English courts are quick to fix problems. They ask you to write contracts under English law so that they can be adjudicated in England. How would you rate my chances of going to China and successfully selling Indian law to them on the ground that our courts can provide cheaper, faster and better service than those far away white colonizer supremacists with their high costs and their bad Sunday work ethic?

It doesn't end there. We undeniably have a problem, but who is trying to fix it? It's not the legal community. If a client has a problem with his lawyer, who does he go to? It's not the Bar Council. Have you met anyone lately who successfully sued his lawyer for substandard service? How about delays in court? Who do you petition if a court is taking too long to decide your case or the judge is not up to scratch? Of course you've read the Contempt of Court Act! Forget about you, you are only an ordinary citizen: what about me? As a service provider, I am vitally interested in fixing the legal system. Where do I go? Where is that forum that is agitating for a better, faster, more efficient legal system? We just had our High Court bar elections. The trial court bar elections are up next. I don't see candidates circulating sophisticated well-conceived papers promising to take concrete steps to fix the justice machine. I see a lot of promises about claiming additional 'rights' for lawyers: chambers, priority parking, stuff like that. Lawyers agitate like labourers in a sweat shop all the time for more privilege, never for a system that works efficiently for their customers.

In this environment, when the justice machine is being relentlessly ground into the dust till it risks being reduced to a wasteland, if you can actually get a lawyer to deliver you any kind of justice at all in terms of interim arrangements, what will you not pay him for the privilege of having him represent you?