

**Issue No. 52**

**July 2018**

# *Ensouth*

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

**N South**

**Advocates**

C 62B Super Mart – I,  
DLF Phase 4, Gurgaon, Haryana 122009

## At a Glance

1.	<b>Managing Partner's Message</b>	3
	<b>Print Media</b>	
2.	<b>Comment: POSH Retribution</b>  In a world where men and women are being increasingly thrown together in the workplace, society has taken an antagonistic view of the mating game.	4
3.	<b>Comment: Fake News</b>  Though the Madras HC has said that forwarding a message is equal to accepting and endorsing it, it is debatable as to what is fake news. It's all a question of perception...	6
4.	<b>Comment: Triple Whammy</b>  The irony is hard to miss when a law designed to provide security to Muslim women within marriage hastens its dissolution by sending the errant husband to jail.	9
	<b>Our Speaking Assignments</b>	11

## **Managing Partner's message**

India is widely believed to be over legislated and under-governed. It is also probably "over-judgmented" on issues where no judgments are required. That is not the worst of it. We are now also becoming a society whose laws encourage social hostility and strife. We unleash CBI investigations without the slightest evidence and jail peremptorily when we should merely investigate. We also also created a legal regime which is unnecessarily neurotic and hyper-antagonistic.

This time, we investigate three examples of this kind of 'legally sponsored' antagonism and hostile aggression.

First, in **POSH Retribution**, we ask if the law should react to aggressive displays of mating behavior by promoting public lynching as opposed to delivering a pep-talk.

Second, in **Fake News**, we examine the wisdom in the Chennai High Court's view that "forwarding a message is the same as endorsing it". In culmination, we ponder on the nature of 'truth' and question the very concept of Fake News.

Third, in **Triple Whammy**, we marvel at the logic that has transformed the attempt by the courts to protect women from *Triple Talaaq* by hastening the end of the marriage and sending the errant husband to jail.

Finally, we share our upcoming speaking assignments.

Happy reading!

**Ranjeev C Dubey**  
(Managing Partner)

## **Print Media**

### **Comment-1**

#### **Posh Retribution**

#### **Sexual Harassment of Women at Workplace Act: POSH Act.**

**In a world where men and women are being increasingly thrown together in the workplace, society has taken an antagonistic view of the mating game. What is needed is empathy, not judgement**

#### **Ranjeev C. Dubey**

Considering their impact on TRP ratings, if sexual harassment didn't exist, advertisers would have to invent something like it. Hardly a week goes by without one celebrity or another "coming out" as a victim of sexual harassment. Last month, it was singer-actress Meesha Shafi. It's a buzz so compelling that even actor Ranveer Singh got on the streetcar! A lot of it may well be true, of course, not least because these allegations often pertain to intensely competitive industries with limited opportunities. Nevertheless, no one sees any irony in the idea that the #MeToo movement—originally intended to empower women—has ended up incentivising them to retrospectively redefine themselves as victims. On the subject of the media circus that then ensues, the less said the better.

The problem is not that the media makes a gladiatorial circus out of sexual harassment; it's that the law itself incentivises this redefinition. In 2013, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, popularly called POSH, was enacted. The legislation's intention is clear enough. All workplaces must have an Internal Complaints Committee (ICC) to deal with such allegations. They are designed as some sort of combo all-purpose judge, jury and jailor and have been granted powers normally reserved for civil courts to discover evidence and enforce the attendance of witnesses. In culmination, ICCs can order disciplinary action and compensation. For good measure, ICCs have been granted certain powers to enforce interim measures, too.

#### **KANGAROO COURT**

We need to have this law in context. The Indian Penal Code already specifies a range of offences against women that sends a man to jail for three years for a first offence and seven years for a repeat. These provisions include 354 (outraging the modesty of a woman), 354A (sexual harassment), 354B (assault with intent to disrobe), 354C (voyeurism), 354D (stalking) and 509 (insulting the modesty of a woman).

Civil courts are already empowered to grant compensation in tort law. What this law does is create a new kind of civil court within the workplace and confers on untrained

laymen the powers of a court. This is alarming. It is hard enough to get justice from a regular court with an experienced judge: imagine trying to get it from a kangaroo court of corporate czarinas!

But what is objectionable about POSH is the "attitude" that it promotes. It's a problem of cultures as much as of interpretation of interpersonal human behaviour. All POSH expects of us is that we should set up a supplementary mechanism to achieve a quicker crucifixion. If a grievance ends up as a corporate and media circus, well, we complied with the letter of the law, so what more do you want? Surely, this cannot be a good answer.

To truly address this, it is critical to come to terms with the true nature of the problem. This has several components. At the very outset, we have the problem of interpretation of behaviour. All employees shine up to their bosses or try and get along famously with their colleagues to gain professional advantage. It is easy for the other party to interpret this as an invitation. When it comes to the mating game, one way or another, almost everyone is "trying their luck". Women have it harder mainly for statistical reasons. Only about 15 percent men are gay and it still being a crime, most of them are truly underground. In the ordinary course, I would not interpret any guy's behaviour as an invitation to a sleepover. With 85 percent potentially straight men in play at work, women run about six times as much "risk" as men!

That does not mean that the mating call of the male shark is always unwelcome at work. At a Bombay UBS Transformance seminar in March 2018, the audience was polled. How many women had ever propositioned anyone? Eight out of 40 said they had. Perhaps there were more. How many men had never propositioned anyone? No one raised their hands. How many men and women never wanted to be propositioned? No hands went up. It's obvious. Everyone wants to be in the mating game. It's a game of whom. The real problem is that the mating game has no agreed rules. It's easy to get it wrong.

## **WORK-LIFE BALANCE**

Here is the central rub. There was a time when people had this exotic thing called Work-Life Balance. The mobile phone threatened it with instant messaging. Then the internet eroded it in the 1990s when BlackBerry ushered in the era of emails on handheld phones. WhatsApp has now performed its last rites. Today, everyone works 24/7 and there is little social life outside the workspace. If you want down time, you ask an office colleague to step out for a drink. Men and women are being thrown together as never before, yet society is taking an increasingly antagonistic view of the mating game. Thus, while interaction magnifies, the rules by which it may be conducted progressively narrow. To add to the confusion, the matchmaking aunt is extinct, too. Matrimonial matches win catches at work! Wouldn't you then expect that familiarity breeds attempt?

And what form should we expect such attempts to take? The cultural scripting that defined this business of wooing decades back was clear: men should woo aggressively and women should succumb reluctantly. A million women around the country still seek out movies featuring the single biggest personification of this cultural construct: Shammi Kapoor (who else!). They thoroughly enjoy what appears to be a very abrasive, and physical, form of conquest. Anybody who came of age in the 1960s and still has a libido knocking on his door would think this is the way to be. Has much changed in the way heroes woo their girls in the movies now?

The thing to understand is that, cultural constructs apart, a range of genetic compulsions drive behaviour. Very briefly, every species seeks immortality by passing down its genes. Extinction stalks those who fail to mate. This is why one in seven people worldwide have a bit of Genghis Khan in them. Not for nothing did Abraham Maslow put sexual union as the most basic of his needs. Sigmund Freud did better, putting it at the heart of the human mind!

To try to understand something does not necessarily mean to become an apologist for it. The truth is that a lot of work spaces exhibit a wide range of mating displays ranging from entirely physical enhancements like lipstick and beard trims through supplementary adornment such as designer wear and accessories to wealth displays like cars and mobiles. Norms of social behaviour that expand contact, enhance mating displays but repress engagement cannot but be a cauldron of unspent raging passions that occasionally boil over. The point here is that sexual harassment, for want of a better word, has to be seen in its overall context.

In the irrationality that is POSH, there remains no space for recognition of the idea that biologically, genetically, indeed, as central to the evolutionary impulse across species, procreation and mating lies at the heart of all animal behaviour. Suppressing it in specific contexts is a process we call "socialisation". As people may not truly understand the rules of engagement in office, we need merely recognise that the office environment requires another kind of socialisation training.

Bluntly put, I do not believe corporate best practice is achieved by setting up a committee empowered to burn witches at the stake. We need empathy and behavioural training, not judgement. Instead, POSH has restructured our world into one where any proposal you make to a lady results in either a great and memorable relationship or a great tryst with criminal law. In the face of a law that fights instinct using the crudest of tools, retribution cannot kill the brinkmanship any more than AIDS killed promiscuity.

**Comment-2**  
**Fake News**

**Though the Madras HC has said that forwarding a message is equal to accepting and endorsing it, it is debatable as to what is fake news. It's all a question of perception...**

### **Ranjeev C. Dubey**

When journalist-turned-politician S Ve Shekhar casually forwarded a social media post suggesting that women journalists needed to sleep with their bosses to keep their jobs, he found himself accused of crimes under Sections 504 (Provoking Breach of Peace), 505 (Public Mischief) and 509 (Insulting the Modesty of a Woman) of the IPC. Facing arrest, Shekhar pleaded that he forwarded "ideas" without great thought, whether or not he agreed with them. In any case, he argued that he had no intention of committing a crime.

The Madras High Court was unimpressed. Words may be said in the heat of the moment and regretted later, it ruled on May 10, but putting such words in writing meant that the author knew the consequences of what he had written. In culmination, the Court established a remarkable new legal principle: "Forwarding a message is equal to accepting and endorsing the message."

At a superficial level, those of us who have suffered at the hands of compulsive forwarders of perverse social media trash will be gratified that the law now requires citizens to behave like responsible adults. Some of us will probably be relieved that it will now be a tiny bit more difficult to circulate obvious fake news without facing the consequences. But there is a price to be paid here. Gossip is a key tool for social bonding in a wide array of cultures and gossip is always replete with "fake news".

If tattle was a problem, would Shobhaa De even exist as a phenomenon this side of *Stardust*? To put it in perspective, it seems that sending a clipping of a potentially defamatory newspaper article now to a friend is the same as defaming that person! For that, we are all wide open to a range of potential crimes on any given day.

### **MISREPRESENTED IMAGES**

Take this example. On April 29, 2018, union minister Piyush Goyal recycled old NASA photos showing urbanisation trends in India to congratulate PM Modi for the spectacular "elimination of darkness from the lives of fellow Indian villagers". It was later revealed that the pictures were not taken the night after India achieved complete electrification but highlighted patterns of human settlement. In connecting the old image with the new reality, did the minister become liable to a case of misrepresentation and cheating (Section 415) because of its impact on voters in Karnataka? At what point does any image or illustration acquire the absolute obligation to represent the truth, the whole truth and nothing but the truth? Those who dislike intellectualisations of everyday realities would argue that this obscures the issue. Social media circulates more easily identified outrageous "lies" than "credibly possible" forwards. What's so hard about

understanding that you cannot circulate a news item about the death of a gorgeous film star of yesteryears before she has passed on? However, the plot coagulates considerably when the news is not just skeleton events but a narrative of it.

Often, news is very rarely just news. A dog dying is not news. That he was clubbed by the neighbour is news. That the neighbour bit the dog, thus killing it is even better news. News isn't about data reduced to their bare knucklebones; news is real world stories worth telling. How the story is told depends on the paradigm—the frame of reference—that is applied to the event.

Many gangsters have died in UP within the last year. Are they dying because the UP police is trampling on their human rights in staged encounters or are they dying because finally, the gangsters have lost political protection and are getting what's coming to them? If these are indeed "encounters", the Supreme Court may enter the picture, creating a narrative that could win or lose elections. Isn't that what happened to UPA2 with the coal mine scam and the 2G scam? Judicial activism created a political narrative of corruption under UPA2: six years later, the mining scam is off the radar, Spectrum Raja is home free but the Congress has been reduced to 44 seats in the Lok Sabha. What truth are we talking about? Should we now have laws to regulate narratives?

## **EUROPEAN PLAN**

Europe seems to think so. Many journalist bodies there have established new trust and transparency standards for their members to follow. Worried by Russian meddling in elections across the continent, Brussels is working towards a Europe-wide plan to tackle fake news online. How far will it go? Europe is genetically more liberal than many other parts of the world. It is hard to make a fake news law that doesn't also clearly violate free speech.

The results may well be different in societies like Malaysia where a jail term of six years was imposed recently on those who circulated fake news. Critics argued that the government of the day merely wished to silence criticism of the scandal surrounding the 1MDB (Malaysia's state development fund) sovereign wealth that rocked the administration of the former prime minister, Najib Razak. As Malaysia ranks 144th out of 180 countries in the 2017 World Press Freedom Index, this may not be quite the benchmark to aspire to! The bottom line is that for all our constitutionally mandated "reasonable restrictions in the public interest", it is difficult for India to create a law to regulate the venomous hate-spewing and outright lies in social media because of our new-found sympathy for liberal thought.

The law also needs to help people get a grip on the definition of truth. Are the nomadic Gujjar tribe discriminated against by the state or are they primitive hunter-gatherers who do not recognise property rights and will equally squat on your wheat field, steal your apples, or kidnap your cow without remorse? On the determination of this

question depends our reportage of the Kathua rape case and its associated conspiracy theory. Is Kashmir's political turmoil a terrifying struggle of a besieged people to free themselves from the Indian yoke, or is it a vast extortion racket run by a perverse set of cynical politicians who escalate their demands every time the flow of central assistance slows down as it did when Modi came to power?

Almost every piece of news is capable of being fake news. We could elevate the debate further. Hindus certainly don't believe that the individual is supreme. Yet, is there any practical evidence to support the existence of a God or is that fake news too? What about reincarnation, *karma*, *samsara*, *atman*... to what legal standard will you verify the truth of these things before you forward a feel good message of piety and kind cheer? If you stop long enough to think about it, very little of who you are is anything more than an arbitrary, ideological construct untested against available evidence. "Truth" can easily be argued as mainly a projection of the ideological baggage one carries in one's head.

In a world where metaphysical concepts cannot be "proven" by legally recognised evidence, any law that deals with fake news would not counterpoint truth against falsity: it will cherry-pick permissible fake news versus impermissible fake news!

### Comment-3

#### **Fine Print: Triple Whammy**

**The irony is hard to miss when a law designed to provide security to Muslim women within marriage hastens its dissolution by sending the errant husband to jail.**

**Ranjeev C. Dubey**

The Muslim Women (Protection of Rights on Marriage) Bill, 2017, reminds me of the doggerel about the Chaubay who went on to become a "Chhabbe" but came back a Dubey! There is grotesque irony in the idea that a law designed to provide security to Muslim women within marriage hastens the break-up of the marriage by sending the erring husband to jail! When the Supreme Court called upon the legislature to set up a law on triple talaq, creating a new class of criminals was not quite what it may have had in mind!

A little context would not be out of place here. Recall that a five-judge bench decided by a narrow margin of three to two in *Shayara Bano v Union of India* that the practice of triple talaq was unconstitutional. Justice Rohinton Fali Nariman (with whom Justice UU Lalit concurred) ruled that it was not "essential religious practice". He then held that the practice is whimsical, arbitrary and, therefore, void. Justice Kurian Joseph grounded his decision on this essential question: Since the Quran does not sanction triple talaq, can it be legally right? In culmination, he ruled that the divorce practice is not integral to religion nor can religious practice override fundamental rights. In his view, what is

bad in the Holy Quran cannot be good in Shariat and what is bad in theology is also bad in law.

It was left to then Chief Justice of India JS Khehar (with Justice S Abdul Nazeer) to speak for the minority view. Justice Khehar held the practice to be a religious one and also that it was not contrary to public order, morality or health. He then ruled that a religious practice has the same status as constitutionally guaranteed rights, and that courts cannot interfere with them: only the legislature can! That set the ball bouncing back to where it should have stayed in the first place.

I must admit I find this judgment deeply disappointing. To understand Justice Khehar's logic is above all to understand that he applied not enough of it. In his own words, "Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion."

If Raja Rammohan Roy had taken this view, we would have had ladies flinging themselves on funeral pyres. Even more, the idea that personal law has the same status as fundamental rights is, to put it politely, extraordinary jurisprudential creativity! It shouldn't be that hard to understand that the issue is basically about equal protection of the law.

We live in a society that demands that both the Shani Shingnapur temple in Ahmednagar and the Haji Ali Dargah in Mumbai be opened to women. Indians overwhelmingly now believe women are equal to men and should be treated accordingly.

It's not every day that the Supreme Court constitutes a five-judge bench to advance the discourse on a contentious legal issue. This judgment was an opportunity especially since India is struggling to contain the excesses of religious fundamentalism. We think a loudspeaker atop a temple or a procession on the street is "religious practice", thus sanctifying bedlam. We "worship" our cows, creating room for vigilante goons to lynch cattle traders. We need our jurisprudence to take its next substantial step to eliminate religion as an acceptable public practice. In failing to do this, the judgment failed us. That does not mean that the legislature could not fix it. Did it?

A quick examination of this new statute reveals that there are just about four things it tries to do, of which three add value. Thus:

- The Bill declares: "Any pronouncement of talaq by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal." Since the Supreme Court has already done that for us, this is no benefit at all.
- Second, this law holds that "Whoever pronounces talaq... upon his wife shall be punished with imprisonment for a term which may extend to three years and

fine.” Thus, it prevents failing marriages from breaking up by sending the husband to jail.

- Third, it holds that “a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the magistrate”. Why a Muslim woman should merely “subsist” while Hindu men “maintain” their estranged wives is difficult to understand.
- It legislates that “a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband”. Given that the man is headed for three years in jail, would you say there are really other viable options?

From the narrow perspective of gender justice, there is precious little to show for the judicial time expended by the five-judge bench. Muslim women need to have the same benefits Hindu women do. If the Supreme Court couldn’t deliver complete gender justice without being accused of usurping the legislative function, then it was for the parliament to assume the jurisdiction it always had and do the right thing. Instead, it has engaged in peripheral symbolism that alters very little.

Cynical as it may sound, I am compelled to draw the conclusion that the political classes have done the most to provide maximum fodder to the frothing poison-heads on the idiot box while doing the least to avoid upsetting the delicate balance we call India’s political status quo.

## **Our Speaking Assignments**

### **Cambridge International Symposium on Economic Crime**

Venue: Jesus College, Cambridge, UK

Topic: Accounting for Unexplained Wealth – The Practicalities.

Date: September 05, 2018 at 9 am.

**-X-**