

**Issue 42**

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# *Ensouth*

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

***N South***

**Advocates**

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## **Managing Partner's message**

It is truly with the greatest of pleasure (and not a little self-satisfaction) that we bring to you a sample chapter of my new book "**Legal Confidential: Adventures of an Indian lawyer**". Penguin released the book this week and this is how they describe it:

*"Legal Confidential is the story of rookie lawyer Ranjeev Dubey who joins the profession motivated by a desire to help people get justice. As he slogs his way in the corridors of Delhi's trial courts, he realizes that the legal system is anything but fair. He stumbles upon a quirky world of corruption, sleaze, adultery, eloping couples and clients willing to pay for legal service 'in kind'. He survives the 'killing field' of litigation for twelve long years, biding his time.*

*When he gets an offer to join a law firm, Dubey believes he has finally arrived. But has he? The world of corporate law is one of intense power play, destructive politicking and the merciless pursuit of revenue. In a short time, he learns the tricks of the trade and steadily climbs up the ladder. Soon he gets too big for the firm and his partners decide to ambush him. What follows is an explosive showdown."*

I have tried, as honestly as I am able, to reveal to my readers the real world of law and lawyers. You will find no sugar coated elevated romanticism here, only a brutally honest narration of the facts, not without humor I trust. I do hope you will find the time to leaf through the book. I can assure you whatever your reaction, boredom will not be one of them!

**The book is widely available in bookshops across the country, including all major airports. If you prefer to order your copies on line, these links will lead you directly to the orders page:**

### **Amazon:**

<http://www.amazon.in/Legal-Confidential-Adventures-Indian-Lawyer/dp/0670088390>

### **Flipkart**

[http://www.flipkart.com/legal-confidential-adventures-indian-lawyer-english/p/itmec4h6grgyfujt?pid=9780670088393&ref=L%3A735147975965557906&srno=p\\_12&query=legal+confidential&otracker=from-search](http://www.flipkart.com/legal-confidential-adventures-indian-lawyer-english/p/itmec4h6grgyfujt?pid=9780670088393&ref=L%3A735147975965557906&srno=p_12&query=legal+confidential&otracker=from-search)

If you prefer to support your local bookstore, it is available as follows:

Gurgaon: Om Book shop, G13-16, MGF Metropolitan Mall,

Teksons, Shop No 95, DLF Galleria, Phase 4

Delhi: Midlands, 20 Aurobindo Place Market,  
Crossword, Level 1, Select City Mall,

And all leading bookstores in Khan Market and Connaught Place.

Bombay: All Crossword Outlets

**Should you experience difficulty in placing your order, please write to us at [Suresh@southlaw.com](mailto:Suresh@southlaw.com) and we will arrange to supply you a copy.**

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This time, given the delay in publishing Ensouth, we have an expanded repertoire of pickings for you.

First up, **Contextualizing Euthanasia & the Right to Life** is a critique of the law on the subject, firmly set in its modern context. We are at a point in human history where life can be indefinitely prolonged without providing anything like an acceptable quality of life. In these circumstances, what do we expect the law to do for us?

Next, in the face of a criminal legal system clogged to the brim, in **Reimagining India's Legal System**, we ask if the primary aim of criminal law should be to heal the wounds of the victim or pander to the outrage of the bystanders. In that view of the matter, is compensation for the victim a better solution than jail time for the perpetrator?

That brings us to this foremost example of political criminality in India today i.e. the Vyapam scam. How will we ever convict the all-powerful guilty if we are unable to protect the highly vulnerable witnesses? In **What really hurts about Vyapam**, we discuss what measures are necessary before the upcoming trials can be brought to a successful conclusion.

Finally, we take a ruthlessly practical look at the greatest challenge facing family law in India today: living-in, as opposed to marriage! As is often the case, our courts have been abreast of developments, sometimes even ahead of the curve, evolving laws unseen, while the legislature enacts its despicable pantomime of power play to the disgust of the nation. In **Law and Living-in**, we debate the impact of the some of these evolving new laws.

We do hope you enjoy this bumper issue.

Ranjeev Dubey  
(Managing Partner)

**LEGAL CONFIDENTIAL: SAMPLE CHAPTER 1**  
**THE ADVENTURES OF AN INDIAN LAWYER**

**Ranjeev C. Dubey**

**1. The Learning Years**

I had two years of experience as a lawyer when I suddenly found myself handling a number of divorce cases. The story began when I represented Mrs Hardeep Kaur against a charge of marital cruelty. She was seventy-eight, had a forbidding moustache and very bad knees. Her middle-aged daughter-in-law wrestled her into court every time the case came up for hearings. Clearly, the old girl had always been built for comfort, not speed, but her cantankerous eighty-two-year-old husband found no joy in her embrace. Despite his immaculately tied turban and his flowing white beard, he was something of a Dirty Harry on steroids, always looking to 'make his day' on some imaginary provocation. He out-yelled his lawyer at every hearing, generally about not very much at all. He picked on the opposing lawyer (which was me) and the judge too, leaving everyone holding their sides and falling about laughing.

Mrs Hardeep Kaur's children didn't see the humour in it though. All of them—the old man, my client, the kids and the grandkids—lived in the same 500-square-yard bungalow in Green Park. They ate out of a common kitchen. It was a happy joint family, but the old man wanted a divorce. That put the kids in the impossible position of defending their mother against their father. The grandchildren—one of whom was my age—said that the old sardarji was seriously south of sanity. I was fascinated by the idea that the legal system had no institutional mechanism to stop geriatric loonies from suing for divorce long after their prostates had given up the ghost. The whole system was designed to promote litigation. And litigation, once started, could go on forever. At that point of my life, I pretty much stopped reading fiction. With this stuff going on around me, who needed a made-up story?

Hardeep Kaur's case didn't progress very much of course. Neither judge nor defendant wanted it decided. In time, I realized that the old *surd* didn't want it ended either: he was in search of emotional catharsis, not resolution. I made some professional progress riding on the back of that case. A joke can be a great foundation for a career. As the years went by, I got more and more of the same. A lot of my clients were women. I particularly recall a woman whose husband was a DTC bus driver. He

liked to gamble, and since he didn't win much, there was never enough money at home. She picked up some jobs as a housemaid to cover the bills—sweeping floors and washing dishes in the Karol Bagh area—but he didn't like her going out to work. Their marriage went downhill and one day, he sued her for adultery. He claimed to have come home early and stumbled on her getting it on with the neighbour. There were no witnesses.

It was a bullshit story on the face of it, the kind of story a third-rate lawyer would cook up and hope to brazen it out. Adultery is notoriously hard to prove in India, unless the woman gets pregnant and her husband is in another country the whole time: like the much loved Nepali cook with his pregnant wife at home! I was pretty cocky about the case. The problem with cocky is that you know you can win, so you start to get reckless. Inevitably, I royally messed up the bus driver's cross-examination. Let me explain. You can't get a divorce under Hindu law only because your wife is found naked in bed with a guy watching *Kaun Banega Crorepati*. For adultery to be proved, you have to prove penile penetration. In my youthful exuberance, that is where I took the guy's cross-examination.

'So when you pushed the door,' I asked the guy, 'wasn't it locked?'

'Jhuggi doors don't have locks, sahib,' his eyes twinkled. No alarm bell went off in my naive head.

'So, when you entered, what was your wife wearing?'

'She was as naked as the skull of her bald lover, sahib,' he giggled.

The judge cringed. He stopped the stenographer and commanded him to write: 'They were in a compromising position.'

'So where were they at the time?'

'Both were in bed, sahib!'

The judge was now red. He commanded the stenographer to write: 'They were in a compromising position.'

'Who was lying on the left side of the bed?'

'He was on top of her, sahib!' The guy was laughing.

The judge held his head in embarrassment. He commanded the stenographer to write: 'They were in a compromising position.'

I was too far gone to care.

'What was he doing when you saw him?'

'He had put it in and was "taking her's", sahib'.

The judge couldn't believe this was happening to him. 'Write, they were in a compromising position,' he barked. Then he turned to me. 'Vakil Sahib, client *bacha rahe ho, ya maze le rahe ho?* (Are you protecting the client, or entertaining yourself?)

Here's the deal. If a man claims he stumbled onto his wife getting it on with someone, all you need do is go on and on cross-examining him about the lack of witnesses. You can ask him how is it possible that when tiny mud huts stand shoulder to shoulder in a jhuggi colony full of unemployed adults and unsupervised kids, his wife found this beautiful patch of scrumptiously screw-worthy solitude to commit adultery. You can ask him why you should possibly believe such a nakedly self-serving story. You can assail his character. You can suggest he is a morally challenged loser who gambled away his family fortune and cannot be trusted. Heck, you can call him a lying bastard and a rake. What you cannot and should never do is help him flesh out and detail his story. You must never ask a question the answer to which you do not already know. You should definitely never explore your profound insights into legal principles and let that dictate your cross-examination. At the end of the day, what a judge thinks of a witness is all about human sensibility, not legal principles: it's to the man inside the judge to whom you must appeal. I had messed up big-time.

It wasn't the end of the world: many lawyers lose nearly won cases, but this one remains by far the worst cross-examination I have ever conducted. Mercifully, no harm was done. One year later, when the matter was finally argued before another judge, the whole testimony was nothing but a series of statements saying 'They were in a compromising position', which meant nothing. I buried my blunder under the previous judge's embarrassment and saved the client from damnation. That's the thing about being a lawyer. Everyone gets paid to do a job right, but how many have so much fun doing it?

Occasionally I got to represent a male client in an adultery case. Once a shopkeeper from Chandni Chowk—portly, swarthy but rather lacking in self-confidence—wanted a divorce because his wife was carrying on with his unmarried younger brother. They lived in one happy joint family somewhere in Dariba Kalan. The moment he walked out the door for work, she scampered across to the teenager's room and they locked themselves in for hours. He had known about the affair for a long time: he came to see me because he could find no way to end it. 'Doesn't your family know?' I asked. Of course they do, he told me. So what do they say? He was crestfallen. They say that if you can't satisfy your wife, you cannot complain if your brother does. What does your wife say? She says I visit your brother because he makes me happy but I am

your wife and it's your duty to 'maintain' me. Doesn't she recognize that it is wrong for her to sleep with your brother? No, she says all this goes on in other families all the time so what is the problem? Have you told your family that you want a divorce? Yes and they do not approve. What do they say? They say that marriage is a *janam janam ka bandhan* (a bond that spans lifetimes) which small things should not be able to change. It was culturally insightful stuff, and better than reality TV: better even than pornography!

It didn't end well though. I filed the case and we had a couple of hearings. The wife showed up with half of my client's family supporting her. They didn't say anything: just stood behind her and glared at my client through the hearing. As far as they were concerned, what went on between husband, wife and brother-in-law was private, whereas washing dirty linen in public humiliated the whole family. They were quite ready to produce six witnesses to say that the wife never visited the guy when the husband was at work. Six months later, he stopped coming. Eventually somebody told the court he had committed suicide.

\* \* \* \* \*

The divorce practice monkey circus had to end sometime. For me, Sharmila was the last one. I guess either the disgust or the self-loathing finally got to me. Sharmila was one of those irresistible self-possessed girls the hotel industry loves to employ. She was beautiful in a characteristically Bong way. She had the curves to launch a thousand Khajuraho temples and her light chocolate skin was clear and smooth as soft clay. She didn't mince words either. Her husband was a nice guy, no question, but he was a crashing bore. She had been married seven years and she knew exactly what her life would add up to if she didn't get out right now. Her parents couldn't comprehend her problem. Her mother-in-law hung on to her skirt and begged her not to do this. Sharmila characterized herself as a very good daughter-in-law, a reasonably exciting wife and an absolute bitch in bed.

'I want to experience life completely, Ranjeev', she told me candidly. 'I sleep with who I like, when I like, where I like. And I want this life without strings or guilt.' In time, she asked about my fees, adding that the hotel industry doesn't pay well but she liked me, etc. I got her the divorce.

Talking of divorce cases, here's one I couldn't do because the lady in question wouldn't let me. I knew Sandy Dutta socially. He was one of those charismatically impish young men with mischief in his eyes, piercings in his earlobes and a big, banging chopper bike in the driveway. His charm was irresistible. I thought his wife Ruma was a complete woman. She was a competent interior designer, a talented landscape photographer, an avid trekker and a nurturing soccer mom. She radiated great inner beauty. We intermittently heard of trouble in their paradise. He drank too much and he was rumoured to be abusive. They fell out eventually and filed fourteen cases against

each other. He accused her of infidelity, which no one seemed to believe. The guy he accused wasn't just a close friend: he was a thorough gentleman trying to help her. Other people who tried to help her also had to bite a legal bullet: Ruma's brother-in-law got arrested for stealing Sandy's jeep, even though Sandy had lent it to him. When it came to anger management, Sandy was a full contact litigation client!

Ruma consulted me once but settled for a woman lawyer to represent her. The case dragged on for a decade and then, when enough legal fees had been paid, they settled it out of court. That happens often enough. This ancient land with its 5000-year-old living culture regularly calls for blood: when enough has been spilt, the parties reach a compromise, or one of them dies.

I heard Sandy's side of the story a decade later when he came by to see me about something else. He said he hadn't been angry about being cuckolded by his best friend. He was angry because he had been manipulated into a vasectomy before he was cuckolded! He blamed his father-in-law. 'I admired the Colonel, yaar.' he thumped the table. 'We had two kids and the bastard said why are you assaulting my daughter's hormones with these birth control pills?' So off I went to Dehra Doon and twenty-four hours later, I was dry as a funeral drum. All I got to show was Rs 500 and a 2-kg tin of *shuddh* desi ghee while my buddy got to hump my fertile wife.'

By this time, he had remarried several times. His current wife was a lot younger, and the daughter of a powerful politician. She didn't think her parents would ever say yes to this much married rake so she ran off to Delhi with him. The girl's father reported a kidnapping, and an arrest warrant turned up at his door. In turn, he stalled the warrant with a well-aimed bribe and produced his new bride in a local court to prove she had accompanied him willingly. You could say the girl's parents were pissed off. They bided their time. A year later, they found out he was attending a wedding in their town. This time, his estranged mother-in-law filed a complaint stating that he had molested her! The warrant of arrest landed up at the mandap of the wedding. Fortunately, Sandy's host could retaliate with some heavy pull so Sandy could slip away. By the time the same warrants reached Delhi, he had his anticipatory bail in hand.

Sandy is what every lawyer will call a dream client. Successful law practice is always about getting yourself a bunch of Sandies! They can be individuals, they can be companies, but for one reason or another, they always need lawyers. Many top-gun lawyers have made their careers riding on the back of just one client. The best character profile of a client is the guy who likes to live on the edge of legality and financial solvency. You get them aplenty. It's not that they can't make a profit doing things legally, working the percentages. They just have to run close to the edge. They over-leverage their business till it totters in bad times. They illegally shore up the stock prices of their publicly listed company. They trade in their own company's shares on the side. They creatively interpret regulations and run a dodgy business model with a respectable external face. When the crap hits the fan—and it always does—they run to

the lawyer. Never say no to clients who can't say no to some crappy get-rich-quick scheme they know will blow up in their faces.

\* \* \* \* \*

When I look back at my career and recall all the crazy characters I have represented, I ask myself if this is why I became a lawyer. For sure I didn't become a lawyer just because I thought it was good fun. Not that I mind that it turned out that way. What's there not to love about having fun being a lawyer? Unfortunately, a lot of it was also not fun; it was incredibly hard work with not enough sleep and no money at all. Of course, most people didn't have money at the time so who cared? It was a great time to be young, not least because of the tectonic cultural shifts going on. Asha Bhonsle and Robert Plant delivered screaming solos from the same radio station. Dope and dupattas were purchased from the same pavement in Chandni Chowk. Jamawars and jeans were worn together in winter. Meanwhile, urbanization and mass migration were shattering the old joint family social structure. Everyone, even my dad, wore a bell-bottom safari suit. The soft-focus Punjabi wannabe Bong superstar hero—and I mean Rajesh Khanna—was done and dusted: reduced to special appearances and a procession of remakes of Tamil hits. The Angry Young Man was well established, to a point where he was making movies about his own real-life marital infidelities! The politics was deafening, and exciting. Indira Gandhi had kicked India's tryst with destiny squarely in the belly with the Emergency. After her ouster in 1977 (the year I joined the LLB programme at Delhi University), a Jurassic idealist (Morarji Desai) ran the country assisted by a motley crew of ideological oddballs, caste jugglers and court jesters. That didn't last either. The country went to the polls in January 1980 and the old girl was back. That is when cynicism became the new normal in Indian politics. This is the year I became a lawyer.

I don't recall puffing out my chest because I had completed my law degree. Everyone remembered that India had recently been screwed over by lawyers. That gallery of eminence included Bengal's Chief Minister Siddhartha Shankar Ray who advised Indira Gandhi to declare the Emergency, President Fakhruddin Ali Ahmed who signed the order, 'kitchen cabinet henchman' D.P. Dhar who ran a parallel government during the Emergency, newly promoted Chief Justice A.N. Ray who leap-frogged over three of his seniors so that he could write odes to Mrs Gandhi in his judgments, and indeed much of the Supreme Court of India with the notable exception of Justice H.R. Khanna.

Law at the time was a family profession of fathers, children, and cousins, all with uncles who were judges. You always needed a godfather to go to. If you didn't have a godfather, your faith in the Godfather (who art in heaven) greatly exceeded your common sense. I had a potential godfather, even if it was a long shot. A distant aunt had married Uncle Syal who struggled for thirty years to run an inherited business in

terminal decline. When it finally went belly up, he joined the maverick law firm of Duli Chand Singhanian.

Uncle Syal was amused that I wanted to be a lawyer. He didn't think a pretty kid from a snooty school in Rajasthan would survive a brutal contact sport like law practice in India. I wasn't going to be daunted. He had no job for me but he had good advice. 'You are not a lawyer till you have learnt to survive in the Tees Hazari courts,' he told me. 'This is the only place for you to test your mettle as a man, and as a lawyer. Besides,' he added for good measure, 'unless you want to depend on your father for a very long time, this is the only place a young lawyer can make a small living.'

He was right, of course. Throwing me into the deep end was one way of testing my survival spirit. If I didn't make the cut, I could always tuck my tail in and go home to Dad's business. As a career launch, it was a huge improvement over becoming a *basta* vakil (a bag-carrier), carrying files for a hotshot Supreme Court senior for the rest of my life, standing behind him cheering and applauding his brilliant arguments just to get at the sorry crumbs he would throw me when the mood took him. I needed to find someone to work for.

This was a tough one. Every successful trial-court lawyer those days had dozens of juniors. Like the largest and most dominant carnivorous dinosaur with its long powerful tail, the worth of a lawyer was measured mainly in terms of the number of juniors who followed him from court to court. What chance had I to learn anything when so many attention-seeking juniors played groupie with the hotshots? When so many love you, is it the same? What about the competent but less successful lawyers? They had a certain amount of work, it's true, and besides, youngsters could interact with this class of senior: perhaps learn something. I joined one for a bit—without pay I'll have you know—and found this wasn't true. The client hired them because of the personalized service they provided. Their juniors never had the chance to represent the client in court. All the juniors ever did was run ahead of the senior as he went from court to court to tell the judge that the big boss was arriving, or was on his legs in another court, or had a runny tummy and wasn't going to show. It was a dog-shit job for dummies: like playing a plastic trumpet for a fake Mughal emperor in a budget Bollywood costume drama of the 1940s. In six months, I was ready to slash my wrists.

It was about this time that I noticed that over on the other side of Tees Hazari's Central Hall, there sat a beatific old man who always had this Buddha smile. On a particularly bad day, I stepped up to him and asked him what he thought of the profession. He was encouraging. 'It's the profession of kings, my son,' he declared. 'To be a lawyer is to be a master of your destiny. You need not bow to any man. If you don't like a client, there is always another. If a judge doesn't like you, there is always an appeal to be filed. No one can say anything to you.' I must have looked encouraged because he continued, 'Remember also that lawyers command a lot of respect'. 'Respect?' I countered, waving my arms at the riff-raff in the Central Hall. 'Make no

mistake, my boy,' he warned me, 'in society, it is fear that begets respect. Everyone fears a lawyer.' He paused reflectively. 'There is one problem though,' he shrugged. 'When you have teeth, you have no chickpeas to eat. By the time you get your hands on the chickpeas, you have no teeth left to eat them with!'

Thirty years later, I recall his prophetic words and chuckle. I didn't know it then, but my luck was about to change very quickly.

-X-

## **Print Media**

### **Comment-1**

**Fine Print: Contextualizing Euthanasia & The Right to Life**  
**India's euthanasia law is completely unsatisfactory.**

**Ranjeev C. Dubey**

The path to hell, when not paved with good intentions, is still generally wrapped in a great deal of moral sermonizing. This is above all true of the recently resurrected euthanasia debate on TV and in print media. Somehow, the preserve-life-at-any-cost argument has drowned out every other viewpoint in a deluge of righteous rhetoric. Lost in all this is one fundamental question: is the right to continue a life quite the same thing as securing a life worth living for those we force to continue to live?

To revisit the root of the controversy, India had no law on Euthanasia till Ms. Pinki Virani moved the Supreme Court asking that King Edward Memorial Hospital, Mumbai stop 'force feeding' Aruna Shanbag who had then been in coma for 36 years. Aruna Shanbag, a rape victim, had been strangled with a chain while being sodomized. The oxygen supply cut off, Aruna's brain had shut down permanently. Virani asked that Aruna be allowed to die in peace and dignity. The Mumbai Municipal Corporation and the Dean of KEM Hospital both begged to differ.

Inevitably, the ball came to rest at the door of the Supreme Court. In *Aruna Shanbaug v Union of India* [AIR2011SC1290], the Supreme Court recognised a clear distinction between 'active' and 'passive' euthanasia and proceeded on the basis that 'active euthanasia' was not on the table for debate at all. It looked at legislation across the globe and noted that passive euthanasia was legal in a whole host of countries, amongst them, Ireland, United States, United Kingdom, France, Netherlands, Luxemburg and Belgium. As a general proposition, it all came down to informed consent. If a patient asked that his life be ended, the law had to be certain that he understood the choice he was making. Accordingly, the Supreme Court tried to find a solution suitable to 'Indian conditions', whatever that means.

The Supreme Court therefore ruled that the decision must be taken by either the patient, or his or her spouse or close relative. If no close relative were to be found, a body of persons acting as next friend or a doctor attending the patient could take the decision so long as it was bona fide and in the best interest of the patient. Second, the Supreme Court ruled that a High Court order was mandatory. It held that when presented with such a petition, the High Court was required to appoint a team of doctors (comprising of a neurologist, a psychiatrist and a physician) to report to the court, issue notices to government as well as close relatives of the patients and hear them all before allowing the euthanasia plea to be implemented.

As far as I am concerned, this is very far from a satisfactory situation. On the very principle of it, I like a law that leaves citizens free to do or not do something based on clean legal principles, rules and guidelines. I didn't like the license permit quota raj of approvals, of hiring lobbyists and making applications and incurring costs and fixing petty bureaucracy to process these applications. Similarly, I don't think citizens should need court permission to die, if they want to, or lawyers to process their permissions. Our courts are overflowing with cases they have no hope of deciding for decades. The last thing we need is for courts to actually become administrators and perform the roles of supervisory boards of hospitals granting approval to medical decisions. That is not my only objection.

Second, the right to life must include the right to not live. I've had two aunts who declined all medical assistance after they learnt their situation was terminal. They withdrew from all society and then basically waited to die. Their deaths were not pretty, not by a long shot, and they were coherent to the very end. If they had been given a choice, I suspect both would have at some point chosen a quick exit over the prolonged painful lingering decline they suffered. Active euthanasia may be culturally alien to some of us but any debate premised on a sense of humanity must dwell on the inhumanity of asking a fellow human being to suffer just because a doctor, or a relative, is too squeamish to end a life when asked to do so.

Bear also in mind that there is something deeply problematic about the distinction between active and passive euthanasia. If withdrawing life support or medication makes euthanasia passive, what about withdrawing food, or better still withdrawing water? A healthy person denied water may not live for much longer than 5 days. If you will forgive the insensitivity, there is always a passive euthanasia solution for every situation. If you think about it, this kind of euthanasia is not culturally alien to us either. Jain monks still starve themselves to death, and to no one's disquiet.

The real difficulty here is that it is not merely the terminal who need help to secure an easy exit. Medical sciences are already at a point where life can be prolonged indefinitely, even though an acceptable quality of life can't be secured. What you have then is a severely disabled person who barely functions, but is perfectly functional in

the sense that the digestive system works, end to end, but maybe not so much else. I've had an uncle who lived more or less in a coma for some eight years after he had his stroke, severely stretching family resources. The ensuing budgetary constraints meant that the children could not get the education they deserved, bringing relations within the family to point break. He died without ever 'regaining consciousness. Which cannon of humanity justified the price the family pays for the choice they were not allowed to make? The cynic would argue that for the law, the right to life includes the right to make those who love you miserable.

Which brings us to patients who find themselves in hospital, surviving only because the laws says the machines must not be switched off except by a court order. That may not be what the relatives are told. Still the fact remains that at the end of the day, for so long as there is someone to pay the bills, a hospital may add Rs. 50,000 to its top line for everyday a court takes to decide a euthanasia case. Courts take years to decide anything at all. The idea that our sense of humanity and our compassion should transform seamlessly into shareholders value is deeply disturbing.

Confronted with this reality, I ask myself what do I expect from the law? The first thing I don't expect is elevated moral obscurantism. I ask for recognition that the right to life is thus transformed by the pressure of the marketplace into corporate bottom lines and ESOPs. I want recognition that continuing some lives is emotionally and financially unaffordable in some cases. I expect the law to be pragmatic. It comes down to common sense, the right to choice and the ubiquitous questions around informed consent. If I want to die, or I am too far gone to tell but rational well-wishers around me think I should, then hey, it was a great ride while it lasted! Why cling to the ephemeral?

## Comment-2

### **Fine Print: Remagining India's Legal System**

**We need to re-imagine our criminal law to address the wounds of the victims of crimes, not the outrage of the bystander.**

### **Ranjeev C. Dubey**

There comes a time in everyone's life when they must stop to radically rethink their priorities. For nations, we call them inflection points, sometimes cultural transformations. For mature managers, we call them midlife crises! In every case, it's about testing basic ideological assumptions about what we believe we want, or should. India has many institutions that deserve this kind of critical scrutiny. I believe our much respected but deeply troubled legal system is one of them.

The problem of course is that like many epic stories, you never quite know

where to start, or how far back you should go. Let's pick just one piece of it: plea bargaining. Plea bargaining is a central part of American jurisprudence. It takes too much time and costs too much money to convict a guy and walk him through the many appeals till he reaches jail: why not make a deal with him and ask him to admit to a lesser crime? That's what the Americans do, but we Indians frown on this practice because we see it as letting someone off the hook. We just don't trust the bargainers. We suspect our famously corrupt processes will allow killer drivers to plea bargain convictions for jumping red lights and for politicians siphoning money in Cattle Fodder Scams to plea bargain convictions for inflicting cruelty on animals!

What we get for our upright zero tolerance stance is criminal courts clogged with cases they aren't going to decide for 20 years. In these twenty years, jailed accused will be rotated through hearings every month in rickety old armoured buses accompanied by dozens of policemen tasked to prevent them from escaping. It's a huge investment of manpower, automobiles and diesel, with little to show for it. It makes no difference if the accused is on bail. He still goes to court every month, spending one day every four weeks pointless kicking the dust outside the court.

Given this well know reality, when the Madras High Court took the initiative to encouraged a 'compromise' between rapist and victim in the case of V Mohan v State (Crl.A.No.402 of 2014), it seemed reasonable for us to stop and say: "okay, here a new thought on how to deal with law's arrears". Instead, we had twitterati terrorists frothing at the mouth and feminist activists bursting arteries in their anger. The Supreme Court's reaction a week later echoed the outrage. Justice Deepak Mishra observed that it would be a "spectacular error" to adopt "any kind of liberal approach" in sexual assault cases. Why did everyone find the Madras High Court's approach so outrageous?

Let's briefly revisit the facts as we know them. The victim is an unwed mother of a baby girl. The accused claims she consented to the relationship. Her consent was irrelevant because she was a minor at the time and the law deemed it a rape anyway. The accused was convicted to a jail term of seven years and ordered to pay compensation of Rs. 2 lakhs as well. The girl is an orphan who lives with an adoptive mother. She faces a very uncertain financial future. I suspect that sending her violator to jail will not materially alter her existential realities.

So in a maverick moment of original thinking, the court referred the matter to the mediation centre. It ordered the convict to deposit Rs. 1 lakh in the bank, the interest of which would be paid to the victim. It released the convict on conditional bail and asked him to join the mediation effort. What happened next depended exclusively on the girl because if no solution was found, the convict would be back in jail with little to show for the money he put in the bank. If it worked out, the girl would be financially secure and the guy would be out of jail working hard somewhere to secure the future of his baby daughter. It seemed like a reasonable deal for the girl to make, but ultimately, it was her call.

Clearly, what you think of these steps comes down to the narrative you buy into. If you think a violent man brutalized a young virgin deserves whatever the law has in store for him, then its jail or nothing. Ditto if you think this is a nasty Casanova who seduced a mere child. It's a crime for a man to seduce an impressionable minor but I do think it isn't quite the same thing as sexually assaulting a girl. This should be relevant to how we think of the crime. Besides, these are cultural constructs, inspiring legal ones. My grandmother married at 16, as did my paternal aunt. Conversely, if you think they were two young people in puppy love who became victims of the law and were then brutalized by the inevitable coercive police process, your response may well be very different.

This is why many societies still favour compromise and satisfaction for the victim over state sponsored retribution. In Denmark, Venezuela, Indonesia, Camaroon and Chad, the Legislations provide that if the perpetrator enters into or continues a marriage or registered partnership with the victim after a rape, it gives grounds for reducing or remitting punishment. To my mind, marriage is not germane to the issue, effective solution to the post rape financial issues is. Everyone understands that victims of all crime need help. Sending the perpetrator to jail is not help enough, not by a long shot.

State support for victims is gaining in popularity worldwide. India has such measures too but they don't work well. A study of the Manodhairya Scheme launched in 2013 after the Mumbai Shakti Mills rape case shows that only a handful of victims have been compensated. The State's Women and Child Development Department disburses the funds to district level committees which receive all the applications and scrutinise them. Rarely do the districts receive adequate funds. In the Pune district for instance, 174 cases of rape and child sexual abuse were registered out of which 122 cases were sanctioned for a total payment of Rs. 3.26 Crores. However, the state paid out only Rs. 1.92 Crores so the district committee decided to compensate only 73 victims, keeping the remaining 49 on the waiting list. At the time of the publication of the report in June 2015, only 17 of 73 victims had actually been compensated. The victims either had no bank accounts or were allegedly untraceable!

You could argue that the state is not best structured to provide succor to misfortune or you could argue that there are too many kickbacks blowing in the wind. Either ways, the idea that the state must compensate victims of certain crimes is grounded in the idea that the state is responsible for citizens and must pay because it failed to protect its citizens. Why this should mean that the convict should not pay for the injury he has caused, but cool his heels in jail instead, is less than clear. We hear it argued that allowing convicts to compensate victims of their crimes encourages rich criminals to engage in them knowing they could 'buy their way' out of jail. This may well be true but whose choice is this to make: the state, or the victim? Whose injury is it anyway?

That takes us to the profile of rape cases now hitting cop stations. How many of them are of strangers befriended on Facebook, followed up by meetings in hotels culminating in allegations of rape? How many others are accusations of rape because consent was obtained on a false promise of marriage? A false promise of marriage is established by the victim's statement alone and it is marriage she wants. Why not let her have her marriage? Once the accusation is made, the case takes a life of its own where the lady has no more control over what happens next. Events now serve principally to quench the fire in the souls of drum beating women's activists. If the accused does marry her, what does jail time do for either of them? In many jails across India, especially Delhi's Tihar Jail, the usual welcome accorded to a rape accused is to be gang raped by hardened criminals within the jail. As I see it, those who demand that rapists be compulsorily sent to jail are really saying they want the rapist to be gang raped in jail. I understand the idea of an eye for an eye, but that still doesn't help the victim of a crime to heal all wounds.

So any which way I look at it, we need to re-imagine our criminal law to address the wounds of the victims of crimes, not the outrage of the bystander. In many circumstances, money for the victim may well be the most appropriate solution. Forcing the perpetrator of a crime to compensate the victim strikes me as the most logical solution. In any case, if the victim is happy to receive a sum of money for the injury suffered, why should a third party (like the law) have any opinion on the subject?

### **Comment-3**

#### **Fine Print: What really hurts about Vyapam**

**It is that those uncovering such scams cannot actually be protected, notwithstanding the Whistleblower Protection Act**

**Ranjeev C. Dubey**

Notwithstanding the flak directed at the Madhya Pradesh home minister, Babulal Gaur, for commenting that he could not secure the safety of Vyapam witnesses any more than Indira Gandhi could be protected, the fact remains that in the absence of an institutional structure designed to protect witnesses, mere administrative enthusiasm can never serve the purpose. The nearest we have come to such a structure is in passing the Whistleblower Protection Act, 2011, which finally received Presidential assent on May 9, 2014.

In the year since, it has not been implemented. Instead, the Centre has moved to substantially amend it to ensure that whistleblowers are prevented from disclosing a wide variety of information including commercial secrets and IPR.

The ensuing outrage of civil rights activists may well be misplaced though because, all else apart, the original law wasn't going to serve its purported purpose to begin with.

To my mind, any law addressing the 'corruption problem' is unlikely to be effective unless it has five basic features. First and foremost, the man most competent to prove bribery is the man who gave it. On the principle that the man giving a bribe is being forced to pay his way, bribe-giving should be legal but bribe-taking should not. That is not the law. 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.

Since most everyone "in the know" is complicit one way or the other, this law alone excludes most potential witnesses. Perhaps we would do well not to stop at legalising bribe-giving. We could incentivise the bribe-giver. The money disgorged from the bribe-taker should be returned to the bribe-giver together with 20 per cent of the penalties recovered from the bribe-giver as his reward. Citizens would then happily give bribes, get the job done, blow the whistle and get their money back.

Absolute secrecy is the second must-have for any whistleblower law. If you check out "Attacks on RTI activists in India" in Wikipedia, you will see a very long list of assaults and killings. The best way to protect a witness is to have his identity concealed. Instead, Section 4(6) of the new whistleblower law 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 seems disinterested in protecting the identity of the whistleblower; instead, it stands him up on Main Square for anyone who wishes to shoot at him. Naturally, anonymity comes with apprehensions. Allowing an informer to hide behind an anonymous e-mail ID or a 'care of' address may be overrated as an invitation to mischievous complaints and wild goose chases when everyone can be tracked down in this information age. Indeed, if anything, the law should direct governments not to track down informers except in specified circumstances.

This brings us to the third must-have: security. Witness protection is not about being followed on a morning walk by a baton-wielding policeman. Witness protection is about specialist security servicemen, safe houses, new identity papers, secret relocation and resettlement. This presumes an institutional structure grounded in a legal framework riding on a generous budget. We have none of this in India: now or in this unimplemented whistleblower law.

Next we have the problem of persecution and hounding. This occurs at two levels depending on whether the whistleblower is on the inside or outside. The insider suffers the fate of IAS officer Ashok Khemka. He is transferred 40 times in 22 years because he refuses to engage in dirty dealings.

The outsider suffers the fate of RTI activist Rajendra Kumar. On October 15, 2013, he committed suicide outside the chief secretary's office at the State secretariat in Bhopal by consuming poison because he could no longer deal with the false cases against him. In his suicide note, he named 33 people who had been torturing him since 2006 because he had revealed 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 into him. A credible whistleblower law must protect the weak from victimisation. Our law has not conceived of this reality.

Finally, we come to the question of who investigates the data and who deals with the witnesses. Our law prescribes a preliminary internal investigation by a designated 'competent authority' who is an insider. He is then required to forward the complaint to the relevant head of department (another insider) for comments, on the other side of which the case is sent to the police if it is found to have substance. Consequently, we have three players in the investigation game, all vulnerable to influence in one way or another. How would it work?

Arvind Kejriwal has ridden to power on the back of issues around this subject of which the Lokpal Bill is only one. The Supreme Court has recently dealt with it in the context of the Vyapam investigation. The fact is if you don't have an independent investigator, you don't have anything. The conclusion is inescapable: all things considered, you cannot protect your Vyapam witnesses, even if you want to.

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#### **Comment-4**

##### **Fine Print: Law And Living-in**

**Indian laws are now heavily women biased: a whole heap of legal benefits flow to women in both marriage and live-in relationships that don't flow in the other direction**

**Ranjeev C. Dubey**

Here's a confusing contradiction for the connoisseur: Indian courts are very slow to decide anything at all, but they are exceedingly quick to evolve laws to respond to ever-changing social mores. The battle over the rights of homosexuals may not be the best example of this, but in most departments of social engineering, they have the

bases covered, frequently ahead of the curve. That includes this new fad of living-in with someone, rather than getting married. Shorn off the rhetoric, it comes down to this: Indian laws as they now stand have made the whole Big Fat sangeet-churalavaan-phere circus irrelevant to the rights and obligations of those in non-platonic heterosexual relationships. If you have a mind to dispense with the glitz and the sleaze and simply live with someone, you can be sure the difference in your legal status is only in the money you didn't spent on the ceremonies!

In order to explain this new normal, allow me to break down the issues into the BIG FOUR questions and try and answer them. While doing so, bear in mind that Indian laws are now heavily women biased: a whole heap of legal benefits flow to women in both marriage and live-in relationships that don't flow in the other direction. The first and foremost question is the legal status of women in long-term live-in relationships. The short answer is that to all intent and purposes, they are wives. No law says so in so many words, but the way our laws are being interpreted has this inevitably result. A great example is The Protection of Women from Domestic Violence Act, 2005 which defines "domestic relationship" under Section 2(f) as "a relationship between two persons who live or have at any point of time lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage..."

This is entirely consistent with the view the courts have been taking since at least 2006 when in Lata Singh Vs. State of U.P., [AIR 2006 SC 2522], the Supreme Court observed that "a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or "live with anyone she likes". Our seemingly conservative judges are really quite progressive, I will have you know!

That still leaves open the question: what is a 'relationship in the nature of marriage'? In D. Velusamy Vs. D. Patchaiammal [AIR2011SC479], the Supreme Court reduced this issue to a bunch of four tests thus:

1. The couple must hold themselves out to society as being akin to spouses;
2. They must be of a legal age to marry;
3. They must qualify to be married, and that includes questions like being of sound mind and being unmarried; and
4. They must be living together voluntarily for a significant period of time.

Naturally, not all live-in relationships become "relationships in the nature of marriage". As the court so evocatively explained, "If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage". Similarly, spending weekends together or making one night stands or even having a long term "F\*\*k

Buddy" does not create that type of domestic relationship.

So what is a good example of this kind of relationship? In *Indra Sharma vs V.K.V Sharma* [AIR2014SC309], the man was married with two children while the lady was unmarried. In 1992, she quit her job and started living with the man in a shared household. His whole family including especially his wife opposed this arrangement without success for some fourteen years. He helped his mistress start a business and financed it liberally. Things fell apart when he relocated the business to his home, introduced his son to it and eased his mistress out of the business. She went to court claiming that he forced her into multiple abortions and demanded maintenance. This is when the Supreme Court laid down our definitive Indian tests for what is a relationship in the nature of marriage thus:

1. The relationship must have continued for a reasonable period of time;
2. The two must have had a 'shared household';
3. The two should have 'pooled' their resources and financial arrangements, and that includes joint properties, common bank accounts, jointly owned shares, etc;
4. The two should have had an intimate sexual relationship, not just for pleasure, but for procreation and mutual emotional support;
5. They should have held themselves out as a couple in public; and
6. It should have been their intention to perform the roles generally attributed to a married couple.

In culmination, the Supreme Court threw out the lady's case because the guy was already married observing that if "the appellant's status is lower, than the status of a wife and that relationship would not fall within the definition of "domestic relationship". In the upshot, a maid yielding benefit to her Sahib can't claim an improved status, especially if he is married already!

Which takes us to the next question: can such a lady demand that the man maintain her? The answer is an unqualified yes. Sec 20 of the DV Act covers just such claims and it extends beyond living expenses to one-off medical expenses, etc. Indeed, courts have held that the general power given to Magistrates to help destitute women under Sec 125 of our Criminal Procedure Code would extend to such relationships. In *Chanmuniya vs Virendra Kumar Singh Kushwaha*, [2010 (83) ALR 459], the lady claimed that after the death of her first husband, she was married to the younger brother in accordance with the Katha and Sindur custom of the Kushwaha community. She claimed that they lived as man and wife for a long time but eventually, he refused to discharge his marital obligations towards her. Pronouncing her entitled to be maintained, the court held that if two people cohabit together for a long spell, there is no need to prove a marriage ceremony.

But is such a lady entitled to succeed to the properties of the man should his death precede hers? Again, the answer is yes, even though this law rides on the back of

a presumption. In Dhannulal Vs Ganeshram [2015(3) ADJ697], one Ganeshram and Bhoobasa Bai resided together for a long time. He was already married and had children from that marriage. Still, when the question of inheritance to his property arose after his death, the Supreme Court held that the "law presumes in favour of marriage and...when a man and woman have cohabited continuously for a long time..., the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin." As a lawyer, I can tell you it is practically impossible to prove a negative!

So what is the status of children born of such relationships? Once again, the law is totally clear on this point. In Bharatha Matha Vs. R. Vijaya Renganathan [AIR2010SC2685], the children of wife and mistress each claimed a share in the estate of the gentlemen concerned. Since the lawfully wedded wife was alive at all material times, the legitimate son argued that the other women could not claim a presumption of marriage, nor could her children claim inheritance. The Supreme Court ruled that since the Law of Evidence presumes that every child is legitimate, the mistress's children don't need to prove anything. So long as the property belonged to the man alone and did not belong to a joint family, these children could inherit a share in it. For good measure, I can add that it is not only inheritance that illegitimate children can claim. Section 20 of the Hindi Maintenance and Adoption Act 1956 require a man to maintain his children, irrespective of their legitimacy.

In the result, any which way I look at it, I don't see how it profits Indian men to live-in rather than marry. Men carry the same responsibility to both partner and children. If they bail out, they pay for the women's keep. When they die, the woman gets a share of the property. If kids are born of the relationship, they inherit too. Where's the percentage in doing it? That's not true of women. Men have no rights to a women's attention, income, property or monogamy outside of marriage. There is no fat dowry to pay or baraat expenses to bear. The man has to pay all the bills once the live-in arrangement gets under way. If the man turns out to be drunk or 'not good enough', the lady can run off without pain (yes, yes, Indirani Mukherjee) or better still, accuse him of rape. With arrest and jail facing him, he will part with whatever he has and cast himself out of her life. This comes with a host of fringe benefits too: no demanding In-laws or relatives to cope with being only the beginning. Who would not want perfect power with little responsibility?

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