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Ensouth

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N South

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

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Managing Partner's message

Welcome to the 38th issue of Ensouth. Inadvertently, it seems to have acquired a bias against ideological biases! Two thirds of it is devoted to gender empowerment issues.

First up, in **The Future of Firebomb Feminism**, we examine the manner in which allegedly pro-women laws have victimized women and falsely send them to jail enmass, sometimes for abetting rapes that never were!

On the flipside, **Sexuality, Gender Identity And Justice** examines the soul searching within the Indian judiciary in developing a rational response to the challenges posed by the LBGT community.

Finally, to return to the topical, the grave consequence of the widespread breakdown in India's civil judicial system is reviewed in **Jailbird Republic**.

Happy Reading.

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: The Future of Firebomb Feminism

If you are a woman and live in India's Rape Capital, the good news is that you are at a much lower risk of rape than sensationalists would have you believe.

Ranjeev C. Dubey

Modern attitudes to permissive relationships may have served to greatly enrich the lives of some business executives but the price they come at doesn't receive quite the same attention. You will be amazed at the energy we lawyers put into privately advising managers on the fallouts of office romances! I will put it to you bluntly: bad performance apart, the biggest risk you face right now in getting chucked out of your job comes from your ex-lover embarrassing both of you with a nasty criminal case. And why might that be, you may well ask?

Let me explain. One of the mind numbing ideological generalizations of our times is that Indian women can't be protected enough because all Indian women are oppressed. In the upshot, progressively more draconian pro-women laws and procedures have been promoted in a politically correct nightmare of activist frenzy and anyone who opposes this has been labeled a monster who should be ritually drawn and quartered on Main Square at high noon. The result is a class of litigation that is providing windfall gains to many very angry women. Two are particularly lethal: (1) Section 498A which seeks to punish a husband or his relatives for being cruel to a married woman, and (2) Section 375, i.e. Rape. To the first of these, I now turn.

In the decade or so that I practiced law in the trial courts in the 1990s, it was standard operating procedure for all divorce lawyers representing the wife to look at screwing the husband in a busted marriage under two different laws: anti-dowry provisions and Sec 498A of the Indian Penal Code. It made perfect sense. By the time the case was in court, it was all about the MONEY anyway. So dowry laws allowed us to walk into the husbands home and pick up practically everything of value on the ground that it came with the wife, whether it did or not. Truth never interfered with a good opportunity. As for the rest, we targeted the in-laws to pressure the husband into a generous FINANCIAL settlement. There was a catch though: the cops were always skeptical and it was sweaty work.

Strident feminism in the decades since has changed this. Today, if you make a 498A allegation, the cops immediately scoop up everyone you name regardless of age or gender and consign them to the dungeons. Quicker than you can say Bail Bond, the husband's family buy their peace and pay off the wife. The ones that don't or can't, spend the same or even more money to engage in the ultimate rich man's hobby: criminal litigation. High Courts around the country - and that include Delhi, Jharkhand,

Karnataka, and Punjab and Haryana - have been alarmed at these shenanigans. Finally, the Supreme Court has now intervened in a case featuring the usual story of dowry demands by the in-laws. [**Arnesh Kumar v State of Bihar** in Criminal Appeal 1277 of 2014 decided July 2nd, 2014]. Some of the court's observations are truly enlightening.

From statistics published by the National Crime Records Bureau ("Crime in India 2012"), the Supreme Court learnt that in 2012, 192,762 people were arrested under 498A, up by 9.4 per cent from 2011. Some 4.5 per cent of all crimes reported nationwide were Section 498A crimes! It gets worse: 6 per cent of all people arrested by the cops across India were accused of 498A crimes. Here's the irony: a quarter of those arrested were women! The court also noted that of the 372,706 cases pending under this provision, 317,000 were likely to result in acquittal! Naturally, the court could see the location of the one true sin in the matrimonial city. Naturally, it reminded the police that arrests should be made only where necessary. It even created a procedure for the police to follow when they made - or chose not to make - an arrest, and that includes recording reasons for making arrests. The upshot I guess then is that while the police still retain great discretion to screw the groom, every broken marriage will not immediately lead to an arrest.

Unfortunately, no such optimistic note can be tooted about the ever expanding incredible reports of rapes that now do the rounds of TV and print media every day. I live in India's 'Rape Capital' and I read a lot of papers. A fair number of cases are about willingly accompanying the accused to some out of the way place or thinly populated block of flats and then being raped after consuming a drug laced drink. In a variation of the theme, ladies accompany friends (who they sometimes meet on social media) to HOTELS and then get raped by them.

On a ball park, about half of the reports I read are about women who say their consent was obtained on the promise of a job or a marriage. Clearly, as the law is currently being administered by the cops, sleeping with someone in exchange for a job is fine but to then fail to provide such a job is not a breach of contract, it is rape. Agreeing to live with someone without marrying him for a decade or more is fine but if the women then decide that she wants to get married, and he doesn't immediately agree, she has been retrospectively raped for a decade. What remains after you exclude all these pumped up distortions is what the Nirbhaya type horror is really about: infants and minor girls violated, village girls picked up by hoods and gang raped and so forth. It seems like the Rape Capital has exaggerated its achievements.

Look at the statistics: our Rape Capital reported 1,441 rapes in 2014 of which presumably half are genuine cases. In comparison, the Rape Capital also reported 1,693 road accidents in which 1725 people died in 2013 of which presumably half were women. Clearly, a woman has a greater chance of dying on the road than of being violated. How come I don't see every traffic accident followed up with WHOLESALÉ arrest of all the accomplices (people sitting in the car), long period of detention, bitter

court battles for bail, sensational news reports, 20 year jail terms? Isn't that because a car crash has no ideological bias?

Even the Delhi High Court has had enough of the monkey circus. The week before the court closed for vacations at the end of May 2014, we had three different judges dealing with false cases. Justice G.P.Mittal and Justice Suresh Kait quashed two different FIRs, one claiming rape of a minor and the other of a young executive. Later that week, Justice Kailash Ghambir faced a case of a girl who had consensual sex for two years and then claimed rape because the guy wouldn't marry her. The judge couldn't bring himself to sympathize with the girl's plea that she was being threatened and blackmailed by the boy and ran the risk of being killed if she blurted out the truth. He took the view that rape cases were being used as "a weapon for vengeance and vendetta". I can add blackmail and coercion. If you are a young business executive facing a failing marriage or are just someone who had adopted a permissive lifestyle, you are right on course for a tryst with 498A, rape or both.

So what is the nutshell here? If you are a woman and live in India's Rape Capital, the good news is that you are at a much lower risk of rape than sensationalists would have you believe. The bad news is that if your marriage falls apart, in an environment where the court system works really really slowly, getting a satisfactory settlement just got harder because Sec 498 lost its coercive power. On the other hand, if you are a man, the good news is that courts are beginning to push back the crazy laws that are making victims of grooms. The bad news is that while the courts may still be sympathetic to your plight, it's going to take a legal eagle charging a fancy fee a lot of sweat, toil and tears to get you out of the crap-hole.

Comment-2

Fine Print: Sexuality, Gender Identity And Justice

The fallout of the Transgender judgment though is a matter that hasn't yet started to become apparent, let alone begin to be resolved.

Ranjeev C. Dubey

In 1970, Alvin Toffler used the term "Future Shock" to identify a state of psychological trauma resulting from too much change in too little time. Forty Four years on - for at least parts of the judiciary - this is the living reality. How else do you explain one bench of the Supreme Court saying that for a man to have penetrative sex with another man is a crime and for another bench to say that to mutilate your body and transform from one gender to another is your constitutionally guaranteed right? What this is going to do to the HR departments of any corporation in Modi's new conservative *sirkar* is of course a whole new can of worms!

To start with the gender bending, the issue as the bench in the **National Legal Services Authority v UOI** [CWP 400 of 2012 decided 15th April 2014] so compassionately put it is simple:

"Seldom, our society realises or cares to realise the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex."

On the contrary, confronted with the transgender issue, if we are not immediately reduced to jeering simians like a bunch of incurable patients in a loony bin, we probably end up sympathizing with the traumatized parents of the transgenders. The question then is this: should Hijras, Eunuchs and gender benders be granted status as a third gender with all legal protection? In other words, does every Indian have the right to determine his or her sex orientation and, more importantly, his or her gender identity? The court thought so for three reasons. Noting that Asians in general have not traditionally had problem with the transgender identity, it observed that the British for the first time introduced laws to victimize those between genders (!) by adding *Hijras* to the list of the Criminal Tribes Act 1871 and making sex *"against the order of nature"* a crime under Section 377 of the Penal Code. This marginalization of transgender people means that they have few employment opportunities, forcing them into jobs that greatly increase their exposure to Sexually Transmitted Infections including HIV. A detailed 2010 study by the UN Development Program in India revealed that the incidence of HIV was 7.4 per cent amongst men who have sex with men as opposed to the overall adult HIV prevalence of 0.36%. For those who care about these sorts of things, the total number of transgender and *Hijra* male sex workers in India stands estimated at a mere 235,213 and for male sex workers at a similar figure.

That takes us to the second limb of the judgment. If you look at the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24 January, 2008), Para 21 obliges states to *"protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity"*. India signed this convention but its law is completely binary in its gender ideology including laws relating to marriage, adoption, inheritance, succession, taxation and welfare. In Indian law, what you are born as is what you are, and if no one can quite tell what you are when you are born, you don't really exist and can now dance on red lights to survive. What should a court do when a country signs a convention but then does not align its laws with its international obligations? The court took the view that if Indian laws are not in specific conflict with such international covenant, the court will apply these covenants without parliamentary intervention.

Third and finally, the judgment draws upon constitutional principles. Since Article 14 speaks of persons generally, transgender persons too are entitled to the equal protection of the laws including employment, healthcare, education as well as equal civil

and citizenship rights. Similarly, Article 16(2) prohibits discrimination "*on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them*". So too the protection of personal liberty under Article 21.

We can immediately see the problem here. What is every citizen going to do with its right to determine its gender identity and its sexual orientation if Under 377 of the Penal Code, you will send a person to prison for giving any expression to that sexual orientation? This matter came up for consideration before the Supreme Court in **SK Kaushal v Naz Foundation** [CA 10972 of 2013 decided 11.12.2013] and the petitioners asked the court to declare that a law that criminalizes consensual sexual acts of adults in private is unconstitutional. The court did not oblige, holding that this law did not:

"criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation".

The judgment has been widely criticized. Issues of gender identity and sexual orientation are inextricably intertwined and to criminalize one while singing odes to diversity of the other is incomprehensible. Many felt that the court had vented its prejudice by drawing this perfectly invalid distinction between identity and conduct in order to avoid dealing with a very substantial constitutional challenge to an archaic law from an ancient time created by an alien nation in search of cultural hegemony over a subject people. Now that the Supreme Court has agreed to hear a curative petition on this issue, we can hope that it the matter will soon be resolved.

The fallout of the Transgender judgment though is a matter that hasn't yet started to become apparent, let alone begin to be resolved. The frame in which this judgment has been rendered is one where an individual either has no defined gender at birth or finds a conflict between its mental orientation and its gender at birth. At no stage is there a debate about a person who has a fickle view on what its gender identity is. I mean, do you feel like a girl today, or this month? If you are not condemned to endure the gender of your birth, what gender are you condemned to endure? I mean do you go to the Minister of Human Resources and mandatorily declare your gender at 18 years of age when you become legally an adult?

And what if further physical or psychological changes alter your orientation over time? I have a friend who decided he was terminally gay years after he was married. His wife was a beautiful, intelligent and compassionate girl too who everybody absolutely adored, so he must have really struggled. What if you go to therapy at age 40 and are cured of whatever made you think you were a guy at 18? When is your gender ever really final? I mean as a matter of law, your declaration at age 18 (or whenever) that you are this or that gender is perfectly arbitrary and cannot bear nexus with any objective that any law on this subject would try to achieve. Inevitably, when these

issues get tested in court, the law will be pushed to be more flexible, more permissive, less certain.

Think of it in corporate terms. You hire a top lady banker for a CEO and next day she shows up as a guy. Or one that dresses like a lady one day and a guy the next. We already know of cases where breast implant surgeries are reversed because the extra weight is cumbersome and hard on the lower back. What if gender cross overs do the same from time to time? You can say that you don't want to trap a person in its gender at birth: are you ready to trap that person in any gender at any time at all or are we all allowed to change our minds on a monthly basis? How are your armed forces even going to function?

Think of it in terms of gender sensitization measures that India has instituted in recent years. As AAP's law minister in Delhi belatedly discovered, you can't arrest a women at night. Every damn accused faced with eminent detention is going to have this epiphany, grab his wife's sari and try to disappear in the night like Baba Ramdev in the Ram Lila Maidan while the cops cool their heels outside his door waiting for the sun. Are Neanderthals going to come dressed as babes to interviews so that they may take advantage of a reservation quota for some government sinecure? Is everybody going to absolutely cease making all physical contact with absolutely everybody because it may be viewed as sexual harassment?

As for me, my concerns as a small town Hindu and the manager of a law firm are trivial but very pressing. Do I have space for an extra loo? If guys can change their orientation at will as part of their fundamental rights, how will I prevent fraudsters from becoming women to fulfilling their wildest fantasies in office? Are loos going the way of hair dressers: becoming Unisex? Heck, will there even be a gender anymore? Who is going to perform my last rites?

Comment-3

Fine Print: Jailbird Republic

It seems that the default way to enforce resolve disputes these days is to employ the services of swashbuckler Station House Officers and file criminal cases in order to intimidate or imprison those with whom you do not agree.

Ranjeev C. Dubey

The great tragedy of our democracy is not that 22.1 per cent of the members of the last Lok Sabha had criminal cases against them (of which about 60 per cent were accused of violent crimes such as murder, robbery, kidnapping, extortion, rape, and so forth). The great tragedy is that our system of administration of criminal justice is

unable to convict a politician in less than 17 years or keep him in jail for longer than 75 days. Feel free to call these the 'Laloo Limits'. In this, the criminal courts are not alone. In recent months, unable to enforce its rules, a top level regulator has been compelled to invite the Supreme Court to intervene in its ongoing battle with Sahara. So, while resentful bystanders may gleefully rub their hands as they see the Supreme Court slowly but relentlessly push India's tenth most powerful man back on the Lambretta from which he launched his career selling salted snacks, the law only allows the court to jail Subroto Roy for six months in an attempt to make him disgorge Rs. 10,000 crore to Sebi. If Saharasri survives the long hot summer without a cooler, he would be free to leave in early September. There are of course a hundred other penal sections of a hundred other statutes to keep Saharasri alternately boiling and freezing in jail indefinitely but if this does happen, how can you not conclude that the law would have been misused in the bargain? To me, this irony is a befitting illustration of what has become of the rule of law in my motherland.

Think about it: what has happened to the way the law is applied circa 2014? When I became a lawyer 34 years ago, if a mining tender was incorrectly awarded, you invoked the principles of Administrative Law, approached a writ court and had the award quashed. Today, if you award a coal mine incorrectly, everyone agrees that the best ways to deal with it is to hand it over to the CBI! Again, if you engaged in an electoral malpractice - like using a government employee to run your campaign - your rival went to the Allahabad High Court under the Representation of People's Act and overturned your election, even if you were Indira Gandhi. Today, if you engage in electoral malpractice - like shooting your selfie outside a polling station and putting it on social media - everyone agrees that an FIR should be recorded. Yet again, if you sold a new car that started to disintegrate rather faster than the Ambassadors of the time did, your customer went to a consumer court and forced you to repair the car for free till it came up to your customer's standard. Today, you should not be surprised at all if the local Thana registers a case of fraud and cheating and then pressures you into giving him a different car. It seems that the default way to enforce resolve disputes these days is to employ the services of swashbuckler Station House Officers and file criminal cases in order to intimidate or imprison those with whom you do not agree.

Here is a little primer on the risks you run when you run your business these days. I will give you two examples. A seriously wealthy Punjabi client of ours who has not lived in India in 50 years decided that he needed to give something back. So he created a trust and started to construct a large college campus. As usual, he ran into building contractors who did not quite share his philanthropic ambitions. They cut corners, saved on cement in the sand, switched Rs 150 marble for Rs 60 marble, and hired coolies for masons. Inevitably, the building began to look like it came out of one of Salvador Dali's nightmares. Inevitably, the contractor was sacked. In retaliation, the contractor sent in a legal notice demanding the remaining value of the whole contract as damages, not the profit he would make on the deal if he had actually finished the construction of the building. The client treated it with the contempt it deserved. Next

thing you know, the contractor has a warrant issued against the philanthropist who now feared for his safety and couldn't come to India till the dastardly document was recalled. No luck. The magistrate in Ludhiana could probably see the publicity potential of parading a celebrity before his court in full media glare. The application to recall the warrants made no headway and it wasn't till the High Court intervened that the wolf retreated from the door. You can imagine the cost of that legal action in comparison with the contractor's total dues!

Here's another example from the same illustrious state where this kind of thing seems quite the fashion. One of our clients licensed a distributor for its products. The partnership didn't do too well and business volumes were dissatisfactory. Our client terminated the license. A week later, the local SHO summoned half the board of directors after registering a case of Misrepresentation and Cheating. He wanted them in his office next day and let it be known that he would nab any accused who didn't show up in 24 hours. The client hired a retired inspector to liaise on this one. The SHO revealed to him that the local MP was pressuring the cops to play opening bat for the distributor. Where do you go to fix this one? Since a complaint has been filed, a court would expect the cops to investigate. Why should the court interfere? Going to the cop was not an option. Isn't it normal to summon someone to a cop station and then arrest him? I mean at the very least, it saves on fuel for the Maruti Gypsy. The client did not want half his board of directors behind bars. Guess what the client did? He went to the MP! The cop went out of the loop, the politician became the loop, the hoop and the coup, and in time, the case got withdrawn.

On a really blunt and angry day, this is the way I would put it: the dysfunction in our civil courts has reached a point where SHOs have replaced judges as the first port of call when a citizen's grievance needs redressing. Inevitably, somewhere in the shadow, there is always a politician lurking with intent, and a bit of lip licking salivation. The question I find a little bit harder to understand is this: for all its sagacity, maturity, capacity for structured strategic thinking, why does our judicial system and all those who serve it not see that their own dysfunction is one of the biggest challenges facing our society? We know these are some of the brightest minds our country has. Is this reality really so hard to see? Is it that nobody cares? Or are we a nation of sophists highly skilled at rhetoric but incapable of coming up with an implementation plan. I mean, we have invented our own rocket science so we can get stuff done if we want to, right?

Here is the other irony. As officers of the court who drive the delivery of justice as well as impede its delivery, if they want to, you would expect that lawyers would have a pivotal role in fixing this systemic problem. As it turns out, lawyers have not responded to this problem by lobbying to make courts more effective, faster, better, or more. Instead, every constitutional lawyer in the hallowed portals of the Supreme Court has now become a criminal lawyer!

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