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Ensouth

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N South

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At a Glance

Managing Partner's message

With all the laws being passed in recent months, it seems that once again, like so many times before, India sits on the threshold of great change. Is it real this time, or once again, we flatter ourselves only to deceive?

As we wait for the fine print of these new laws to resolve themselves, this Ensouth confines itself to ideological issues alone.

First, in **Is IPR Moral**, we question the legal and ethical construct by which the vast bulk of humanity is denied the fruits of human knowledge so that the corporate profits of a few may be protected.

Next in **Self Inflicted Wounds**, we recall once again the deep dysfunction in our legal system and ask if the nation's interest is best served by proliferating the judiciary's hold on all specialized tribunals.

Finally, in **Why deny the Individual's Right to Die**, we question the law by which, not we along, but the judges of the High Court, decide when we are allowed to die.

Happy Reading!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: Is IPR moral?

The idea that some people can capture knowledge and exclude others from using it is dubious at best.

Ranjeev C. Dubey

Consider this scenario. A dominant world power forces all other countries to sign a treaty acknowledging that its IPR will be respected. It then creates laws allowing its citizens to register food grain grown in other nations as original inventions in its own country.

The world power now uses the IPR treaty to force these countries to pay its companies if they want to eat food grain anymore. This is no silly Hollywood B movie. This is TRIPS for you and if you think paying American companies royalty for the privilege of eating rice in India is a fantastic notion, Google for the RiceTec case. I am not here to engage in US bashing. I am merely demonstrating to you that at a very basic level, there is something deeply immoral about the idea that elements of nature, or indeed knowledge itself, can be 'owned'.

It really comes down to what we believe can be 'owned' by an individual. We are accustomed to the idea that land can be privately owned. One hundred years ago, this was certainly not so for the forest dwelling people of Madhya Pradesh. In this, they were not alone.

Native Americans found the idea outrageous. How can anyone 'own' the earth, the sky, the rivers, the birds, the beasts? They could not understand how they could be forced to 'keep off the white man's land'. It wasn't because they were tribal nomads. South Africans have no trouble with the idea that entire savannah grasslands, and the lions that live on it, can be privately owned. Not so Indians.

Can a company own the tigers of Corbett National Park? Indians still cannot accept that rivers can be privately owned. You couldn't sell the Narmada if you wanted to. If you think about it, what can or cannot be owned is a perfectly arbitrary ideological construct. There is nothing obvious about the idea of IPR.

Naturally, not all manner of IPRs raise this issue in quite the same way. Since I don't have a book to write here, I will confine myself to Patents. The US Supreme Court, for instance, has ruled that only three subjects are not patentable: laws of nature, natural

phenomenon and abstract ideas. That does not prevent you from patenting a Liger if you can get a lion to love a tiger. Don't laugh. Ligers only exist in captivity but there are mules in this world. If the Americans had been around when they first showed up, the Indian Army would be paying the Americans royalty to haul up supplies to Siachen.

Part of the problem is the way IPR laws operate. Most of us men of business see ownership of land as a store of value, and if we are wise, a revenue stream. The difference between us and the forest dweller is not that they don't have 'income' from land. The difference is that we believe we can prevent others from using land we own without paying us for the privilege. It's the same with knowledge. Knowledge brings revenue but there is nothing 'natural' about recognising the right to prevent others from using that same knowledge for free.

When you set up a system of exclusive ownership, the heart of the moral issue general revolves around who you exclude. When open pasture lands were sealed off under new English law in the early 1700s as part of the Enclosure Movement, those engaged in agriculture appropriated the right to economically exploit land to the exclusion of herders, thus impoverishing them. When the British established the Indian Forests Act, they suppressed the community rights of those who lived in or around the forests and cut off their resources. The extent to which any society supports IPR determines the extent to which certain excluded classes are impoverished, and forced to pay for things that were formerly freely available to them. IPR is a kind of expropriation, however you look at it. How do you justify that?

Generally speaking, IPR is defended most often on the basis that it promotes human welfare through economic advancement. We view IPR from the prism of their economic outcomes. Is protecting IPR more economically efficient? Will it bring better and faster innovation? Will the profits from this round of innovations more efficiently fund the next round of innovations? In making these economic calculations, we do not concern ourselves with the morality of appropriating knowledge in the first place. That is the heart of the moral issue around ownership of IPR. The results sometimes can be very disturbing. Let's take some examples.

The first world has been very quick to grant agriculture patents to food companies engaged in the genetic engineering of new varieties of food. These companies have forced farmers to buy seeds from them year after year, preventing them from using part of the produce of the previous year as seed for this year, even though they have last year's produce (which is much cheaper) sitting in their store.

This has delivered control of the food chain to food companies, increasing the food insecurity of those who engage in small scale farming and cannot afford to buy these high priced seeds. In turn, small scale farmers have been compelled to use lower yielding seeds, increasing their per unit cost of production squeezing them out of the market and into a cycle of subsistence production. The immorality of the situation is grounded in the fact that these seeds were not created from thin air. Agricultural

companies took seeds that occur in nature, seeds in which all farmers have a collective community right, and then genetically modified them to yield more, or be more disease resistant. Over a period of time, because of the increased profits, the original 'naturally occurring' seeds disappear from stock leaving only the GM seeds behind. In this way, nature's gift comes under exclusive private ownership. Thus are community rights converted to individual rights to the exclusion of the very community that owned those seeds.

This problem has now become much bigger than GM foods and threatens many common cultural rights. Indian grandmothers have a motherlode of home remedies passed down from generation to generation: turmeric as skin conditioner, neem as insect repellent, cloves as analgesic, and so forth. The law as it stands today allows innovators to modify these substances, or add them to others to create a cocktail which they can then claim as new and therefore protectable IPR. What belongs to everyone does not of course belong to anyone so a movement to combat this appropriation is always weak. We are witnessing a phenomenon where common knowledge is being progressively appropriated by companies. The larger problem though is that legal procedures prescribed to fight off such attacks have two built in biases: (a) those without a generous budget are shut out of the redressal system, and (b) the conceptual framework of what is good 'evidence' to 'prove' the existence of prior traditional knowledge is heavily located in a paradigm foreign to indigenous communities. In this paradigm, knowledge is only knowledge if it exists in a journal or a database or is otherwise recorded somewhere. You goose is cooked if your grand mum didn't go to school or faithfully publish her remedies in Good Housewife when she had the chance.

This moral hazard becomes particularly prickly when we deal with health-related issues. Let us assume that a devastating epidemic hits the globe. It is found that a patented drug is capable of combating the disease but costs a very great deal of money. Should we allow the patent holder to earn super profits as the formulation flies off the shelf and into the blood stream of wealthy sufferers, even as millions die because they haven't the price of the remedy? Whose welfare are we talking about here: the rich, the unwashed millions or the corporate shareholders of pharma companies? You could argue the Social Darwinism case. You could argue that even if 20 per cent of humanity die, the other 80 per cent who could afford the drug profit from the pro-research incentive regime we have because it will guarantee that another drug will be available when the next epidemic comes around. But is it really just a numbers game? Are the poor what they are because they are too dumb to do better? Or is it all about access to education and training?

At the end of the day, it comes down to a simple question: Does everyone have fundamental rights, or is there some sort of financial caste system in place by which, the variety of rights we can claim depends on our purchasing power? Are all human beings entitled to basic food, healthcare, dignity and respect? Or do we need to buy these basic rights? There are no simple answers here because in life, nothing is free:

someone somewhere always pays the bill. What makes the IPR issue particularly prickly is the idea that someone didn't lose his life because no one wanted to foot a medical bill; he lost his life because someone else needed to turn a higher corporate profit a great deal more than he needed to live.

Comment-2

Fine Print: Self-Inflicted Wounds

We must realise that generalist judges cannot be the optimal resource to run specialised tribunals.

Ranjeev C. Dubey

When the Supreme Court directed the Government of India to establish a National Disaster Mitigation Fund in May 2016, Finance Minister Arun Jaitley observed that India's judiciary was destroying its institution structure "step by step, brick by brick". Who is responsible for this judicial activism is a matter of debate, but there is no debating the fact that the judiciary is spreading its tentacles in all directions, with unintended collateral consequences. The issue really comes down to how the judiciary defines its core mission and priority: an institution that provides quick, effective justice in the everyday humdrum world of living and conducting commerce, or a visionary think tank dispensing jurisprudential principles on matters of state policy?

Generally speaking, as societies develop and become structurally and technologically complex, preserving order requires the creation of a variety of new and complicated laws. Some of these laws require domain expertise, others create too much room for newer types of high volume litigation, yet others require a unique mindset to adjudicate on. India's evolving IPR regime is typical of laws that require high domain expertise. Our tax regime is a great example of a legislature inventing new taxes, opening doors to a bewildering variety of new litigation. As for the need for a special mindset, I can do no better than identify BIFR, a tribunal designed not to adjudicate on rights and obligations, but to revive businesses. To cut to the chase, the era of the generalist judiciary is well behind us. This reality is widely recognised, yet our judiciary continues to be generalist in orientation, structure and organisation.

The solution has always been common knowledge. India has for decades legislated a variety of specialised tribunals into existence. These are designed to be run by specialists who can very quickly decide a lot of cases. The reality is different. These tribunals are stuck in a logjam no different from the one being suffered by the courts. Reason: India's tribunals end up mimicking Indian courts in skillsets, structure and procedure, with predictable results. Let's look at a typical recent example.

The Competition Commission of India is an antitrust body created to promote competition, combat anticompetitive practices, prevent abuse by dominant enterprises, and so forth. It's a proactive job, rather different from the after-the-fact autopsies judges normally conduct. It takes some years of academic and in-market commercial experience to understand the dynamics of markets, to comprehend how certain behaviours distort markets, and to acquire expertise in this discipline. For this reason, this body, by its very constitution consists of a chairperson and between two and six members. All of them are eligible for appointment if they have "special knowledge of, and such professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy", among others.

Any institution is only as good as the people who run it. The current Chairman is a former IAS officer who served as secretary in the Union Ministry of Women and Child Development. Two members retired from the Indian Economic Service, one of them several decades ago. One is a retired IAS officer who served as secretary, Food Chemicals and Fertilizers. Another member is a former judge of the Delhi High court, before which he was variously a Metropolitan Magistrate and a member of a Rent Control Tribunal.

The 'constitutional problem' carries into the Competition Appellate Tribunal. The qualification for the job includes "professional experience of not less than 25 years in competition matters including competition law and policy, international trade, economics, business", etc. In reality, this tribunal has three retired Supreme Court judges serving it. As for the rest, we have a former director in the Ministry of Corporate Affairs, a former secretary of CCI, an IAS officer and a bureaucrat formerly with the Central Board of Direct Taxes. I do not question the competence of these respected personalities in what they do, but anti-trust regulation is not their core competence. Does great expertise in serving government or the judiciary constitute 25 years of specialised knowledge of international trade, finance, accountancy, management, and so forth? Surely, to acquire great expertise in international trade, you have to be a trader, rather than a civil servant issuing trade licences to traders, or a reader of legal tomes citing judgements on trade!

Indeed, my fundamental objection to the way we constitute tribunals goes beyond the absence of domain expertise. Ageing is irreversible and inevitable. Our respect for our elders ought not to eclipse our pragmatism. If a senior judge is still on top of his game, I don't see why his tenure should not be extended within the judiciary, his services used to decide the crores of cases that await judicial attention. I don't see the logic in retiring him from court work and appointing him to a specialised tribunal, forcing him to learn new skills. It makes more sense to promote the evolution of an ecosystem of independent professionals who specialise in relevant skills.

Why does India believe that all domain wisdom resides only in its bureaucrats and its judges? I put it down to an extraordinarily optimistic self-belief, which is reflected in the courts' judgements. One example will suffice. The original Companies Amendment Act 2002 envisaged tribunals substantially run by technical members. Chennai lawyers did not agree. In Union of India vs. R. Gandhi, President, Madras Bar

Association [(2010) 11 SCC 1], the court was called upon to decide if transferring the powers of the High Court under the old company law to the NCLT violated the doctrine of separation of power, thereby eroding the independence of the judiciary. Given the kind of jurisdiction that had been transferred, the Supreme Court of India took the view that where "jurisdiction to try certain category of cases are transferred from Courts to Tribunals only to expedite the hearing and disposal or relieve from the rigours of the procedural laws, there is obviously no need to have any non-judicial Technical Member". This means that if courts fail to do a job well, any institution you create to do the job better must use the same people who couldn't get the job done in the first place!

This was by no means the deepest cut. The court took the view that "it is erroneous to assume that company law matters require certain specialised skills which are lacking in Judges". Having thus decided that judges were expert enough to decide technical matters, it also went on to increase the term of appointment of members from three years to five because "a term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over". Clearly, after holding that retired judges were technically competent, it expected them to be taught the job!

Now, we may adopt the cynical narrative that legal judgements on such matters are only turf wars between bureaucrats and judges seeking to slice the post-retirement employment pie. I'd like to take a more liberal view. Everyone, not just judges, is sceptical of executive intentions and wants to keep a wary eye on how tribunals function. They do this by inserting retired judges into them. Lost completely in translation is the idea that generalist judges cannot be the optimal resource to run specialised tribunals. The descent into dysfunction is thus paved with perfectly good intentions. The judiciary is preoccupied with socially engineering a more ethical society. Deep down, the tribulations of business struggling to resolve commercial disputes before a judiciary that barely functions is not really on the agenda. It is upon this distorted priority that the judiciary must introspect. Is it unfair to ask any institution to perform its key role before it assumes new ones? Is it wrong to be realistic in assessing one's capability, modest in one's ambition, and crystal clear in one's understanding of where one's karmic duties lie?

Comment-3

Fine Print: Why deny an individual's right to die?

Finding a dignified way to end life must be part of everyone's right and the law should facilitate this choice.

Ranjeev C. Dubey

India is currently witnessing a great battle seeking to redefine the idea of 'being Indian'. How we regard life itself is a very good example. Thus, suicide, euthanasia and Santhara — the very heart of any society's ideological construct — are being debated as never before. Trying to find a pragmatic balance between these conflicting self-identities is the Supreme Court of India, an institution conceptually designed to uphold the rule of law, not evolve new national ideologies. Confusion clouds our thoughts as the battle unfolds.

As the law stands today, trying to commit suicide is still a crime, but for how long? At the top of the pending legislative business list is the Mental Health Care Bill 2013, which seeks to convert an attempted suicide into a mental health issue triggered by "a presumption of severe stress".

Meanwhile, the Minister of State for Health has stated that the government plans to delete Section 309, which criminalizes suicide attempts. At one stroke it seems, the Judeo-Christian idea that our life is not ours to lose, is being jettisoned out the window.

Many moralities

To be fair, the Judeo-Christian ideological construct was never coercively enforced on people whose religious beliefs clearly differed. The Jains, for instance, have fasted unto death for several thousand years without interference. This changed on August 10, 2015, when the Rajasthan High Court decided in Nikhil Soni v. Union of India that the Jain practice of Santhara was illegal. In effect, the court held that you are free to believe what you will, just so long as it is consistent with the Judeo-Christian moral framework.

If you stop to think about it, at the heart of the controversy lies the issue: what is this 'morality' to which my right to practice religion is subject? Is it Hindu morality, Jain morality, Judeo-Christian morality, or some other? This is the question the Supreme Court has taken upon itself to decide when it stayed the orders of the Rajasthan High Court on August 31, 2015.

The issues raised in the appeal dramatically personify the ideological disconnect. The Akhil Bharat Varshiya Digambar Jain Parishad has claimed a distinction between suicide and a vow intended to purify the soul. It has pleaded that "this vow is not taken either

in passion or in anger, deceit, etc. It is a conscious process of spiritual purification where one does not desire death but seeks to live his life, whatever is left of it, in a manner so as to reduce the influx of karmas".

It argues that "Suicide is undertaken by a person in severe bouts of passion in anger, depression or hatred — antithetical to the concept of peaceful and joyous renunciation which is the basis of Sallekhana or Santhara". The Jains claim as sacred what others consider criminally profane.

Matters of belief

No doubt, it will be many years before the Supreme Court decides these issues. Nevertheless, the Court appears to have been motivated by a simple reluctance to engage in adjudicating on countervailing religious beliefs.

Thus it is that the very next month, on September 28, 2015, the Supreme Court declined to interfere with religious practices once again, stating that it would not ban the centuries old tradition of animal sacrifice by various communities. It observed: "We cannot shut our eyes to centuries-old traditions. We cannot start examining the relevance of animal sacrifice in each religion…"

Personally, I would not read too much into the court's observation. I suspect Raja Ram Mohan Roy would have had as much success in persuading the Supreme Court to ban sati as he did with Bengal's Governor William Bentinck. Indian courts appear increasingly unwilling to allow religious practices that offend its fairly modern outlook.

That still leaves open the question whether we should treat our lives as belonging not to us, but mainly to God, and then to the local police station. Crudely put, aren't there circumstances in which some people are better off dead, even by the most humanitarian standards? Nothing brings this central dilemma into focus as does the problem of euthanasia.

We have struggled long and hard over the fate of Aruna Shanbag who, as we know, was strangled while being raped and remained in coma for 36 years. Eventually, in *Aruna Shanbaug v Union of* India, the Supreme Court refused to accept 'active euthanasia' as legal but tried to mold a solution suitable to 'Indian conditions' (whatever that meant) by which some people would be 'permitted to die'. It laid down tight conditions in which 'passive euthanasia' may be implemented so long as it was bona fide and in the best interest of the patient.

To get there, it prescribed that the subject, or its next of kin, must approach a High Court, have a team of doctors appointed (comprising 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.

I was severely under-whelmed by this decision. When death goes from being a natural process to a 'legal procedure' requiring the services of a lawyer to facilitate, it does seem odd.

A question of life

There is something unreal about adding additional burdens on courts already buried under the weight of cases that have no hope of being decided within one's lifetime.

When most people do not survive without water for longer than five days, the distinction between active and passive euthanasia becomes hard to understand.

We are already at a point where medical sciences can prolong life indefinitely without offering an acceptable quality of life.

Life then means a person who may not function very much beyond the digestive system, end to end. What this person's family suffers as a result requires no comment.

At the end of the day, however delicately you may want to put it, to insist that we must all live for as long as technology makes it possible for us to do so, is to argue that we must live for as long as we have money to pay bills generated by the intensive care units of hospitals.

How did the value we place upon human life so seamlessly transform into shareholders' value?

Even more disturbing is the idea that while others may in circumstances take these decisions for us after we have become incoherent and dysfunctional, we cannot be permitted to opt for a dignified end to our lives at a time of our choosing.

Whose life is it anyway?

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