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Ensouth

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N South

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At a Glance

Managing Partner's message

With this one, we complete 50 issues of Ensouth! It has taken us thirteen years to get to this number. In this time, India has changed; indeed, we have changed!

Remarkably, the issues that confront us have not changed that much. That does not mean they have not become more starkly obvious. For our fiftieth issue, we focus on a subject that greatly confounds the legal community and another that confounds the whole nation!

First, in **Foreign Lawyers: the Global Desi**, we evaluate the seriousness of the threat of foreign lawyers on Indian soil and seek to understand what it means for resident professionals.

Next, in an entirely independent treatment of the same subject, in **Legally Xenophobic**, we contextualize the Law Ministry's move to allow foreign lawyers to conduct arbitrations in India.

Finally, in **Is Your Mind and Body Yours?**, we contextualize the issues around free speech and subject the Supreme Court's recent judgment to a critique.

Happy reading!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: Foreign Lawyers: The Global Desi

On the angst about the entry of foreign lawyers in India.

Ranjeev C. Dubey

When Chief Justice JS Khehar stated on July 8 that he supported the entry of foreign lawyers in India, he drew attention to an issue that has been boosting the testosterone levels in lawyers' canteens since Prime Minister Narasimha Rao liberalised the economy a mere 26 years back. Clearly, it's no coincidence that we are a 5,000-year-old living culture!

Shorn of the rhetoric and the emotionally appealing collaterally motivated argument, the truth of the matter is that when India decided to liberalise its economy in 1991, it didn't only mean that Indian lawyers could now routinely bill their foreign clients in dollars and drive about in BMWs. Soon enough, we realized that foreign money meant foreign lawyers, too. At this point, we used the same argument to protect what we thought was our turf that the "Bombay Club" led by Rahul Bajaj used to protect domestic industry. Before we are compelled to deal with competition, we argued, the government must give us time and space to level the playing field! Both groups found a sympathetic ear. The Bombay Club got the Foreign Investment Promotion Board (FIPB) and Press Note 18 (this made it obligatory on the part of foreign companies having joint ventures in India to obtain government approval), while lawyers got to keep the "reciprocity clause" in the Advocates Act. Both were designed to prolong the *status quo* and protect the paramount interests of those who controlled these sectors of the economy.

India rid itself of Press Note 18's successor in 2011 and FIPB in 2017. Lawyers now stand alone! The "level playing field argument" was probably well past its Best Before Date by 2010, but fortuitously, the "reciprocity" argument had taken hold of the Bar's imagination. This argument is grounded in Section 47 of the Advocates Act which empowers the Bar Council to prescribe conditions "subject to which foreign qualification in law obtained by persons other than citizens of India shall be recognised for the purpose of admission as an advocate under this Act". The issue, of course, is not the obstructing provisions of the Advocates Act since parliament can amend the law anytime it wants. Such changes would include permitting law firms to be registered as "legal practitioners" as opposed to just individuals.

The real issue is this: Are Indian lawyers truly prevented from practicing English, American or Australian law? Not a month passes when one PIO or another carrying the card of a global law firm doesn't knock at my door asking for business. These dynamic desi youngsters have passed relevant bar exams overseas and are free to ply their trade in those countries. If foreigners want to practice Indian laws, they should be most welcome to come, pass our Bar exam. We shouldn't insist that they should be Indian citizens, too.

On the face of it, Indian lawyers will benefit hugely by the entry of foreign law firms just as Indian accountants, merchant bankers and other entities.

What does the entry of foreign law firms really mean in practical terms? If we believe that thousands of *goras* will descend on our sacred soil, rent apartments in Preet Vihar and do our jobs at our salary rates, it's time to stop smoking that noxious stuff! The "India Desks" of dozens of London and New York law firms are already peopled by homegrown desi boys who have gone over, got their credentials and now adopt the roles of specialised India hands. We can more realistically expect that if permitted to do so, foreign law firms will register Limited Liability Partnerships in India, hire Indian lawyers and start practicing Indian law with a minimum amount of expat help. True, some foreigner lawyers may show up to begin with but expat salaries are hard to justify and Indians would soon take over. Isn't that what PWC, KPMG, Anderson, Deloitte and E&Y did in the accounting world? Business compulsions have an unbending logic across service sectors. This may be deflating, but we are not unique. We are most certainly not holy cows. Law firms are no different from Private Equity Investors, Merchant Bankers and Non-Banking Financial Companies. All have their regulators in varying measure, just like lawyers. It is wise not to get caught up in hoopla and spin.

At the heart of lawyers' apprehensions lies a deep incomprehension of what a law firm actually is. Everywhere in the world, service firms in most sectors of the economy are mere brand names under the umbrella of which local professionals drive their ambitions. Be it Airtel or Samsung, service entities these days manufacture little, design little, have few assets they own but consolidate the input of their vendors to create an imagined reality that they then sell to their loyal customers as a brand signifying quality. Because the brand has a value, the owners of the brand force their vendors to create superb products and follow best practices within the envelope provided by the local environment. That is exactly what a global law firm does. The vendors inevitably are local lawyers. So are the customers.

Global brands may bring fear of commercial colonialism and marginalization of local business, but when seen from a mature historical perspective, it expands the market and plugs it into the global one. India today is the design and IT hub of so many businesses that first came here only to sell stuff. Is it inconceivable that Indian lawyers would provide cross-border service to foreigners out of their India offices? Isn't this what liberalization is really about?

So why do we resist foreign law firms? The answer to this question depends on who "we" is. Clearly, foreign law firms wouldn't come here to represent a party in your run-of-the-mill "Magan Lal versus Chagan Lal" civil case in a mofussil town. For decades to come, 90 percent of Indian lawyers will remain untouched by the presence of foreign law firms in India. What about the other 10 percent? They are to be found in metro cities. Here again, a lot of the cut price district court-level work is of no interest to foreign law firms. So what are they interested in? The answer is broadly four things:

- Foreign law-related work originating in India. If Mahendra buys KTM or Tata buys Jaguar, they don't use resident Indian lawyers. A lot of Indian businesses are now buying foreign companies. The ability of a foreign law firm to catch the client early at the point of origin works for the law firm, while the ability to obtain foreign law service locally affords cost economies to the Indian client. This is a win-win for foreign law firms in India.
- Large corporate commercial advisory and transactional work of a purely domestic nature. It is not possible to run this kind of service without using large numbers of lawyers who understand Indian law. You can be sure that this service will not ride on the back of foreign-trained expatriate lawyers. No doubt you catch my drift.
- High-volume, low-value work of a repetitive nature. This is currently done by Legal Process Outsourcing but foreign law firms have been mulling over moving this work up the value chain using Indian lawyers augmented with the ever-expanding range of available Artificial Intelligence tools. Settling insurance claims through negotiation is an example of this kind of work. The service can easily be provided mainly by India resident Indian lawyers, many of whom are probably not currently employed by law firms.
- High-value domestic litigation, especially in the Alternative Dispute Resolution segment. Again, foreign law firms need Indian lawyers to run litigation under Indian law and not just because it's cheaper.

On the face of it, Indian lawyers will benefit hugely by the entry of foreign law firms just as Indian accountants, merchant bankers, private equity bankers, realtors, ad

agencies, hospitality companies and other service entities have. Considering how we have opened up our service sector without heartburn, it is perhaps too late to argue that the whole shooting liberalization lot was a bad idea. Yes, there are dividends and royalties to pay to foreigners but that is true of pizzas and potato chips, too.

We can expect foreign law firms to register Limited Liability Partnerships, hire Indian lawyers and start practicing Indian law with minimum expat help.

So who doesn't like the liberalization of the legal world? Law firm owners, of course! Law firm servants outstrip owners by a ratio of 50 to 1. If you tot up the figures, the objectors may well number a hundred, or two. Even here, I would want to draw some distinctions. The legal world follows the 80-20 rule, the same as most other service industries. Twenty percent of the clients bring 80 percent of the revenue and 20 percent of lawyers in a law firm do 80 percent of the work. Similarly, 20 percent of law firms monopolize 80 percent of the available work. When and if the legal sector opens up, who do you think has the most to lose?

Finally, bear this in mind. When a service provider enters a country, it has two options: it can start a greenfield and poach employees from its future competitors, or it can simply buy out a mid-sized competitor for a hefty price, change names and get going riding on that client list and infrastructure. As time goes by, it expands by buying out other smaller law firms. The market consolidates, leaving just a dozen or two dominant players. Those who don't sell either become very large or are wiped out. So long as the shakedown continues, like the Indian telecom market, the owners lose money and the market benefits. That is likely what India's current law firm owners are so petrified about.

Comment-2

Fine Print: Legally Xenophobic

To have international arbitrations in India, we need to allow in foreign lawyers.

Ranjeev C. Dubey

Predictably, when the Justice B.N. Srikrishna committee submitted its report to the Law Ministry last week advising the government to allow foreign lawyers to represent clients in international arbitrations being held in India, the legal community was in an uproar again. Yet again, we lawyers made it clear that we wanted foreign clients to help finance our BMW's, but not foreign lawyers! While the fault lines are pretty clear, the logic of the situation is not. What's going on?

To start at the very beginning, let's understand the compulsions driving the government. With 3.15 lakh cases awaiting adjudication by Indian courts, we have ourselves a logjam which at current case disposal rates will take 466 years to clear. We haven't enough courts, judges, infrastructure or national will to ramp up radically any time soon. Unless we can find a way out of this logjam, the risks associated with doing business in India will continue to be unacceptable for both foreigners and Indians. The widespread adoption of Arbitration is clearly the way forward.

There is pragmatic wisdom in this. China has shown us the way beyond reasonable doubt. When China opened itself to foreign investment 40 years ago, it had no judicial system to speak off. They had no well-developed concept of a 'legal person' (like a company or a LLP), no concept of a corporate veil between company and shareholder, and no concept of privately owned property, leave alone individual fundamental rights. Joint venture agreements were a nightmare to write and enforce.

Naturally then, any debate about contractual obligations, contractual comfort, risk profiling or liability indemnification between an foreign company and a Chinese one immediately trans-mutated into a debate about the legitimacy of the Chinese company as a corporate entity, to state nothing of the credibility of its balance sheet. So how were foreigners to write a local contract, leave alone resolve disputes under it?

This was by no means the worst of it. Chinese courts were not authorized to interpret the laws of China! China has adopted what is called the principle of legislative interpretation. This is rooted in the idea that those who make the law are in the best position to interpret it. This meant that Chinese courts were empowered to implement the law but not interpret it. It got worse. Courts were not necessarily or even substantially manned by trained legal persons - meaning judges didn't have a law degree - and the rules of procedure were rudimentary. Chinese administrators did not understand the distinction between executive and judicial powers, and they were just as likely to knock on the door and start to settle a dispute between private parties without invitation, like cops do in Punjab.

How did the Chinese fix the problem? In China, as in many other countries, the answer was arbitration. Till 1994, China International Economic and Trade Arbitration Commission ('CIETAC') handled all disputes with cross-border implications on an exclusive basis. There were till 1994 two separate systems of arbitration in China: one for domestic economic cases and the other for foreign-related cases. In August 1994, the new Arbitration Act of the PRC established a fairly contemporary system of dispute resolution in arbitration, and this applied to both domestic and international arbitration.

For all its failings, it worked well enough for China to attract as much foreign investment as it needed.

The point of discussing the way of the dragon is simply this. China had at all times, and still has, severe conceptual problems in the jurisprudential foundation of its legal system. You can't write a legal opinion on a great many corporate issues in China without running into severe difficulties. Yet, the system works well enough for the world to want to make in China or at least buy from the Chinese. Why is this? It's simple. The Chinese are pragmatists: they are fans of the Deng Xiaoping maxim "It doesn't matter whether a cat is white or black, as long as it catches mice."

The Chinese don't care about fundamental rights which at the best of times are hard for an individual to enforce. They are far more interested in lubricating the wheels of commerce which requires that commercial disputes be resolved quickly and cheaply. Indians are the opposite. Our judicial system expends incredible energy dissecting the jurisprudential underpinnings of arcane philosophical concepts (Do Indians violate the rights of angry bulls when Tamilians wrestle with them?), but barely focuses on simple things like quickly resolving commercial disputes. This is the heart of the problem with India's judicial system, and its solution. This is why the Government is so sensitive to the fact that unless you can resolve disputes efficiently in India, you can't seriously hope to make in India. Indian lawyers have a problem understanding this.

So what ails us Indian lawyers? For a start, there are the usual short term insecurities of coping with change. Won't letting in foreign lawyers - even if it's only in installments - mean irresistible competition portending self-annihilation? It won't of course but that doesn't seem obvious to most of us. Singapore and Malaysia have become regional hubs servicing the global arbitration market with remarkable rapidity. Their lawyers are swamped with work because they welcomed everyone to come and use their system. Why would India be different?

India's real problem is the difficulty Indian lawyers have with professional self-definition. What do we Indian lawyers do? We have simply failed to understand that we sell a service product called 'justice'. We don't seem to understand that to be able to sell this service, we have to deliver it at a realistic (and highly predictable) cost to a specific timeline and quality standard. We also don't seem to understand that if we do not have a quality product to sell, the client will settle for the next best option which is swallow pride and settle the dispute for a song. Finally, we need to understand that if we do offer a quality product, we will have the benefit of an expanding market for our service. By that token, at the heart of the Indian judicial tragedy is not that we have a

log jammed overworked system that has long ceased to function in any meaningful sense: it is that the service providers operating the system have no idea where our self interest lies.

Comment-3

Fine Print: Is your mind and body yours?

What an Indian's fundamental right to privacy really means

Ranjeev C. Dubey

When former Attorney General Mukul Rohatgi revealed to the Supreme Court during the hearing of the Aadhaar case in May 2017 that Indian Citizens did not own their bodies, social media had a general nervous breakdown. Who needs a cavity search from the local cop anyway? Lost in the cacophony was the central point Rohatgi was making. When the state decides who you are and what you may own; what you may eat, brew, drink and smoke; when you have physical liberty and when you should stay in jail; where you may live and when you are allowed to die, what is this ownership of the body if it's not a magnificent illusion?

This is no rhetoric. At a very basic level, Indian law takes away the most rudimentary control that any human may hope to have over his own body. Citizens cannot suffocate themselves at the end of a rope but the judicial system is entirely at liberty to do so. Women cannot terminate a pregnancy beyond a point or pick the gender of their babies. You cannot eat what you want (cows and pigs inclusive) and you can't ingest psychotropic substance because you want to. Our criminal justice is designed such that the mere allegation of a crime recorded in an FIR at the whim of the local SHO is enough to keep a citizen in jail for prolonged periods while investigations proceed at a leisurely pace. How can you possibly claim to own your body when central features of your body - your thumb impression, your iris design or your photograph for instance - are public currency used by the Government to control where you may travel, what you may establish ownership of and what education you may get? Given all these restraints, where does this freedom-and-liberty construct come from?

Blame it on the liberal values imbibed by British educated Indians in the early to mid-twentieth century! Liberalism first became a distinct political movement in the 1700s. John Locke argued that every human has a 'natural right' to life, liberty and property. Governments were created by people as a social contract and were not permitted to violate these rights. Liberal ideas supported programs such as equality of all individuals, democracy, secularism, civil rights, and freedom of speech, press, religion, and markets.

Curiously, as the decades ticked by, liberalism equally came to mean it's opposite i.e. an ever expanding welfare state. How did this happen? It was insidious. Since humans have a right to life, it became the government's job to take care of each life. Before you knew it, governments came under pressure to feed, clothe and house individuals who then stopped making any attempt to do it for themselves. Socialism, the very antithesis of liberalism, added greatly to this pressure till most modern industrial societies ended up in an amazing state of cognitive dissonance. Thus, all individuals were equal and free yet at the same time, those who had less equal had to be subsidized by those who had more. India was no exception. Today, we have a Constitution which is both liberal democratic and socialistic with only a limited sense of what it stands for. Faced with interpretation issues, courts have made up logic as they go along based on their intrinsic sense of what is 'the right thing to do'.

The bigger issue here is that when we peek into our souls, Indians have for thousands of years culturally been anything but liberal democrats. I remember communities inter dependence very well from my childhood. Communities came together in good times and bad, supporting each other despite their many differences. My grandfather was remarkably successful as a career bureaucrat under the Maharaja of J&K, with the result that his brother spent a lifetime more or less sponging off him. When my grandfather fell critical ill during the 1918 Influenza epidemic caused by the H1N1 virus, the brother demanded that he buy him a separate house before he died! Indians believed that good fortune is fated and must be shared with the family.

Even today, in my hill home in the poorer part of Jammu and Kashmir, if someone dies, every family shows up at the funeral with a log of wood, it being understood that the family of the deceased can never hope to afford a whole funeral pyre. The commitment to family has traditionally been far greater. The point of this digression is that when it comes to core Indian values, family and community trump the Individual by a mile. We do not own our bodies any more than we own the sweat of our labour: the family does. This is the heart of the argument for arranged marriage. This is also why my mother advised me quite clearly three decades back she had the right to have grandchildren and I better spruce up my act!

I believe this why the courts have in the decades since Independence repeatedly held, albeit with some hiccups, that Indians did not truly have a fundamental right to privacy. Lurking in the back of their minds were perfectly legitimate fears, of which the issues around the Ratan Tata case were a typical example. In 2010, Tata filed a petition in the Supreme Court claiming that the Radia Tapes had invaded his privacy. It was a difficult case. Ratan Tata may have the right to speak privately to his lobbyist but the subject of

the conversation - 2G spectrums - was a common public good and the issue at hand was a scam to defraud the Indian Exchequer. Did Ratan Tata have the right to privacy or did the public have a right to know what conspiracy was being hatched? If Tata's privacy right was paramount, the police could be prevented from investigating a crime.

This is only the beginning of the issues the digital era have brought upon us. All manner of service providers have access to our information. Is it okay for a bank to give out data of cash balances I hold to the local drug-and-extortion lord in west UP? If that is not okay, how it is okay to link my bank accounts to my Aadhaar account and force me by law to disclose my information to an undisclosed private company who has no corresponding statutory obligation to maintain my privacy? Forget Aadhaar, what about all the other intrusive investigation that goes on unchecked in our computer and smartphone lives? I find myself invaded most by Google. Last week, I went to Banggood, a Chinese website, to look for LiPo batteries and now find my browser swamped with LiPo battery ads.

It's not just an internet thing. It's everywhere. What about hospitals? I hate to think of the day when remote diagnostics will become standard operating procedure, especially for the aged and the immobile. At that point, 'they' whoever they are, will own not just my body but my mind too. What about hotels and their ubiquitous CCTV cameras? They know where I live, when I come and go, what I eat, when I bathe and with what soap. It's the same for airports and shopping malls. You don't have to be a fan of Jason Bourne movies to see how much surveillance we suffer in our daily lives. This doesn't mean we shouldn't worry about Aadhaar. It means that we should worry about privacy as a general issue.

There is too a related problem. Privacy laws around the world are built around consent. Citizens may have privacy rights but in agreeing to use any service, they are free to waive their rights. Naturally, internet service providers and others force users to give up every right they possibly can. One body of opinion argues that in using these services, we have made a choice to trade in our privacy rights. I must disagree. To ask citizens to either give up their right to their body and soul or go live in a Himalayan cave without any facility is perverse. Want to live in Gurgaon? Please sign an agreement consenting to a cavity search of your entire family if something is stolen from within 100 meters of your house!

This is the main reason why during the course of the hearing of the Aadhaar case, the Supreme Court agreed to constitute a nine member bench to determine whether Indians have a fundamental right to privacy. After considerable deliberation, our apex

court has delivered a 550 page judgment in the case of Puttaswami J v UOI [WP(C) 494 of 2012], much of the monumental volume of work being delivered by Justice D.Y. Chandrachud. I am delighted with the decision. It's a magnum opus. That said, I do ask myself if the work was necessary. The judgment takes a long and very scenic drive along the shores of the ocean of liberal thought starting from Aristotle, through John Stuart Mill, the idea of 'natural inalienable rights', to modern day Ronald Dwarkin. The judgment then traces the right to privacy in the Indian context including its international commitments under the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). Fortified thus, the judgment holds that:

"The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationship"

The judgment then proceeds to decide that:

"Privacy of the individual is an essential aspect of dignity. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty."

So there we have it: a formerly unrecognized fundamental right to privacy. Does this mean that privacy can never be invaded? Of course it can, but to do so the court has said, three conditions must be met. First, privacy cannot be encroached without a governing law to justify it. Second, such a law must be reasonable with a legitimate aim. Finally, the means adopted by the law must be proportional to the objects sought to be achieved. This sets the framework in which Aadhaar will be tested in the foreseeable future. Since, the Union Government has commenced the process of establishing a data protection law already, the Court has refrained from doing more.

Do we now have privacy in the way Ratan Tata wanted? Yes and No. We have the jurisprudential framework in which such a fundamental right has been recognized but we are very far from having a hand on a stick citizens can beat privacy violators with should they cross the line. The truth is that for any individual to successfully assert any right in a court of law is a daunting prospect. It takes time, money and will. For all practical purposes, the only way for citizens to have such rights is for the legislature to give us laws that make privacy easily enforceable. Given the cavalier attitude with which successive governments have dealt with the issue so far, I am further than ever

from dancing on the ceiling. In my heart, I do still believe that what the Supreme Court has so inalienably given us, the legislature will most certainly try to take away through what they will claim are reasonable exceptions in the public interest. This tension between the executive that wants to control us and the judiciary that wants to liberate us will determine the fate of privacy in the nation, and of its citizens.

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