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Ensouth

The E-magazine brought to you by

N South

Advocates

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

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1. Managing Partner's Message

What a year 2011 has been!

Powerful people – racketeers, ruling party politicians, leading businessmen, even independent auditors - have been sent to jail and held without bail. A High Court judge has been impeached for the first time in India. Street protests have forced the Government to legislate an anti-corruption law in India. Then again, other paradigm shifting legislation - on judicial accountability and on whistleblower protection - has been introduced in Parliament. Without doubt, 2011 will go down in Indian history as an inflection point. What comes out the other side is an exciting prospect. We do wish you a happy new year and a great 2012!

Meanwhile, let us see what 2012's first Ensouth has to offer. We begin with the topical in **Historic Hostility** and examine the nature of the compliance challenge in India, placing it within its historical context as we analyze the issues.

Next, we return yet again to the thorniest of India's developmental challenge. In **Pandora's real estate box**, we analyze the Supreme Court judgment on the Greater NOIDA land acquisition and understand both the issues and the reasons why the Supreme Court took the view it did.

Finally, in response to India's biggest street protest since Y2K, in **Melas with Missions**, we subject the idea of legislation by street protest to our critique.

We welcome your feedback!

Ranjeev C Dubey
Managing Partner

Comment-1

(This column appeared in the July 8th, 2011 issue of Business World)

Historic Hostility

(A historical contextualization of the Compliance Challenge in India)
Ranjeev C Dubey

Rejecting completely my recent writings arguing that corruption in India had a systemic basis (Systemic Scamming), the expat CEO of a Fortune 500 company let me know the other day that we had amongst us a large population of people who were in principle perverse about ALL laws! "Everybody knows that you are expected to drive on the left but any number of citizens will drive on the right. You will throw rubbish on the road when the bin is ten feet away. Standing in a line takes a few minutes more and you have all the time but you just won't. I can't persuade my employees to follow the simplest of company rules. Why can't people just comply?" I could feel his pain for sure but I could not sympathize with his condemnation. There is an entirely rational basis why Indians have so much trouble following laws in India.

Let's start with the rather narrower subject of corporate compliance. The fact of the matter is that most global corporations set up their compliance laws in the obscure belief that there is something universal about compliance generally, a bit like the law: "Thou shall not kill". This is bunkum of course. There is no such thing as universal law or compliance because there is no such thing as universal history. At the end of the day, all laws are historically contextualized.

As a general proposition, the laws we make, the rules we frame and

the compliance we expect all flow from three interconnected factors. First, there is the state of the economy and the economic institutions that power it. Somalia doesn't need an insider trading law just as Norway doesn't need a law on inheritance of ancestral property in a joint family. Second, compliance rules flow from the objectives of the compliance regime. Trust me, Saudi Arabia doesn't want a competition law and Germany doesn't want agricultural land ceiling law. So far, all of this is fairly obvious: where our understanding of the problem hits a wall is when we fail to appreciate how the history of a people impacts their attitude to law and compliance. Indulge me in explaining what I mean.

What does the briefest understanding of medieval Indian history tell us? Right to the British period, competing feudal states dominated south and central India. North India first experienced Afghan rule as early as 1206 and for the next 750 years, Persians, Turks, Mongols and Huns - all foreigners - rampages all over the northern plains. What makes this period interesting from our view point is that every dynasty, indeed every king of every dynasty, set up his own laws that lasted as long as his life, or more frequently, his mood. In this unstable world of ever changing opaque laws and rule by executive fiat, what do you expect will accumulate in the collective subconscious of the ruled? Can anyone argue that medieval Indian kingdoms were anything but predatory? Do we expect prey to sympathize with the predators, or their laws?

Okay, all this is medieval alien stuff you may argue: modern Indian law started in the British period and we have had 250 years to get used to it. Not so. It's not as if the British empire in India did any better than the Mughals or their predecessors. There are studies aplenty to show that the East India Company maximized profit and inflicting misery. The Great Bengal Famine of 1770 was no natural disaster. Peasants were forced to grow "cash crops" to feed British industry rather than food. As a result, 10 million people - that is one in three - died of hunger. Large areas were depopulated and returned to the jungles for decades. Direct British rule since 1858 did not create utopia. India exported primary goods and imported manufactured goods. Domestic industry was decimated and this too is well documented. Why would Indians trust British laws, given who they benefited? Many of those same laws are still on the statute books, or hasn't anyone noticed?

Just so you don't think I am xenophobic or anti British, it's not as if we did any better after 1947. Independent India inherited British institutions, governance structures and bureaucratic attitudes. Socialism sought to control the commercial impulse of its people, creating the quota-license-permit Raj. In the context only of the attitude to governance, how were the British fundamentally different from central Asian warlords and how is post-independence India different from the Government of the British Indian dominions? Why would we expect Indians to identify with their current colonizers or the laws they create?

The essential upshot of 800 years of Indian history shows us that Rousseau's social contract theory has no application in India because there is no "consent of the governed". The Government and its laws continue to be viewed as predatory. A good example why would be the absence of any relationship between tax and service. Just to make a point, I live in Gurgaon and all around me are people who pay some very serious taxes - each enough to pay the salaries of more than a few senior civil servants - but they don't get health care, pension, social security, police security or infrastructure in return. Indeed, they are excluded from the very Government clubs, quotas and facilities that their tax payments fund. There is no concept of "tax payer's money". No one will ask them how their money gets spent. While we are on the subject, don't tell me that they can vote in their representative because we all know how parliament functions too, or doesn't. I may understand why this must be so, but a great many Indians do not. I don't blame them.

It's no different for business. I fall about helplessly holding my belly and laughing till I cry as I watch corporate honchos mouth platitudes about compliance and probity when everyone knows that if you don't pay large sums of money to the provident fund inspectors and the state electricity boards and the multitude of tax guys and who else besides, you are going to get hit so bad you'll have to fund an institute to train top flight shrinks just to treat your post-traumatic stress. For the average Indian, the government is a school yard bully who steals your tiffin every other day. In this country, the worst thing that can happen to you is not the mafia; it is a government on your case. Stick around and see what a rabble rouser can do to someone like the Tatas in Bengal.

That is not the worst of it. What does compliance get you? Businesses in India seem to thrive where there are no laws, of which cross border outsourcing is just one example. When the government smells money, it comes over and says "okay, just to make sure you behave as a responsible member of society, we are going to set up a regulatory structure which we expect you to comply with". Lofty isn't it, but what does it mean in practice? It means crazy rules that get interpreted according to the mood of the interpreter, and it means inspectors, lots of them, with all kind of pre-emptory powers to harass and condemn, accuse and prosecute. This monkey circus is backed up by an ascorbic media which feeds on churning out contrived Infotainment that can destroy your reputation, and your business. Out here in the badlands, regulation is extortion by a fancy name. The wise man would say that the best thing you can do in India is live well below the radar screen. Lots of people could own Audis and BMW's in India but it's in less than twenty towns that they can be sure that they won't be subject to extortion demands by their very protectors for their lack of modesty.

So to summarize, the Government and its laws are controllers, not enablers. Compliance is in a sense a question of succumbing, not cooperating, leave alone pursuing one's civic duty. Many laws have no general application

public purpose to them at all. Following the law is sometimes the worst option because it can quickly erode value in your business, or your life. Every compliance invites additional scrutiny, every compliance return is an invitation to an additional show cause notice. If you want to survive, your best bet is to not be noticed at all and if you are, to try to stay one step ahead. It is a jungle out there...and the lion king is contemptuous of you. Doing things the way the lion king says you should is unlikely to do anything for you. It works for the lion though!

Comment-2

(This column appeared in the August 6th, 2011 issue of Business World)

Pandoras real estate box

(The truth about the Supreme Court's
Greater NOIDA land acquisition judgment)

Ranjeev C Dubey

Depending on the side you take, when you stop to discuss the land acquisition controversy in Greater NOIDA at the eastern edge of the national capital region, you either come across as a callous social Darwinist or as a bleeding heart Fabian socialist. To add to the angst, you can agonize about what you think of the Supreme Court leaving thousands of flat owners in limbo. It doesn't help that this judgment — Devinder Kumar versus State of UP delivered 12 May, 2011 - has opened the floodgates to thousands of similar claims from other villages. When the wine flows more freely on a weekend as the evening progresses, party wags question the wisdom of the judiciary. As for me, I question the wisdom of those who think anything is fine just so long as urban elite participants of the new globalized India (i.e. people like us) can have whatever they want as cheaply as they can.

Let the facts speak for themselves. The reality of land acquisition laws in India is considerably uglier than anything I have ever said (see [Land Acquisition Angst](#)). For instance, Section 17(1) of the Land Acquisition Act 1894 allows the Government to take possession of any land within fifteen days of a notice of acquisition without hearing the owners and without making any announcement of any compensation! The chaos currently reining in GNOIDA is a direct result of the Government of UP deciding that the land was urgently required for the "planned industrial development of Greater NOIDA" without hearing the owners because (a) hearing delays would result in squatters may take over the land and (b) impatient entrepreneurs would go off to other states.

To take the case of one particular group of villages as an example, the Government notified its intention (under Section 4) on 10 June, 2009 and made its proposal three months later. Within a month after that, the Industrial Development Department asked the Law Department for its opinion. Two weeks later, the Industrial Development Department decided not to wait for an opinion, put up a note and obtained the Chief Minister's approval in early November. The whole process took five months total in a

world where the Government can't take out a notice inviting tender in a year! Why didn't the Government ask its own legal department if it could use Section 17? The records show that the government was afraid owners would obtain stay orders!

That is not the worst of it. GNOIDA started proceedings to change the use of the land to "Builders Residential Schemes" in September 2009. Please note that in June, the land was notified for industrial purposes and by September the Government had already decided to hand it over to builders for residential purposes! The Government formally proposed the residential conversion scheme on October 30th 2009. The Committee constituted for that purpose considered it on November 1st, 2009, approved it the same day, and the Government notified it on November 9th. By December 30th, 2009, all procedures were complete and the land use had been changed.

Now, we need to remind ourselves of several legal principles here. It is true that flats have to be built for workers in an industrial zone too but it cannot be legal to take land for industrial use and then build no industries at all. In law, this is called "colorable exercise of jurisdiction": when power is exercised in bad faith, with improper motive, to wreck vengeance, and so forth. Second, a Government cannot say that it will not follow administrative procedure because it doesn't want its citizens to seek legal protection. Third, a Government cannot take away a citizen's rights to be heard against an acquisition because it is afraid of squatters. Can any Government decide not to follow a law because it is incapable of dealing with a law and order problem?

As it turned out, the original residential scheme did not get a good response because of the economic recession in 2009-10. GNOIDA now decided that the best way "to earn more profits" was to utilize the land "for multi storied housing complex, through a builder's allotment scheme." So here is land you are taking from farmers on the cheap, without hearing them, without making a compensation award and then you are trying to make "more profit"? Surely, that is what in delightful Indianism would be called daylight robbery. The terms on which land was given to builders was scandalous. Plots no less than 60,000 square meters in size — one as large as 2 lakh square meter — was given over at a price of Rs 10,000 per square meter on a down payment of 5 per cent! Worse, the builders could subdivide the land and sublease the plots to third parties. If this is not unconscionable, what is?

At any rate, this is not how the Constitution of India works, at least not when people like you and I lose our lands. No man can be deprived of his property without authority of law. When a government compulsory acquires a property for a public purpose, the owner has a right to persuade the Government to drop the acquisition. The land may be unsuitable, it may cause him grave hardship, other land may be available...who knows what he may have to say. You have to let him show cause and have his say.

When the Supreme Court got into the specifics of the cases, the picture only looked grimmer. The record did not show that residential housing was urgently required in the area. The record showed that some land was released from acquisition because the owners had already built houses on them. A large chunk of land was not acquired because it was owned by a politician. In these circumstances, if you were the judge, what would you do?

Before you answer that question, let us politically contextualize the issue. At all relevant times, Ms Mayawati was Uttar Pradesh's chief minister who we know is a dynamic lady given to reminding us that she is the "daughter of a sweeper". She started out as a teacher, joined a non-political outfit floated by Kanshi Ram in 1984 and by April 2007, while filing her assembly election nomination papers, had declared her assets at 52 Crores. By the time she filed her income tax returns for 2008-09, her income had risen to 60 Crores even though she had no known sources of income. In explanation, she famously stated that her income flowed as gifts and contributions of ordinary party workers and well-wishers who showered their love and affection on her! By the end of the year 2009, she had joined Shah Rukh Khan and Sachin Tendulkar as amongst the top tax payers in their respective fields.

The entertainment did not end there. Since the Income Tax department didn't believe her and started an investigation, her income fell drastically immediately thereafter. In the following year, her income had dropped to a more modest one Crore. She now equally famously claimed that her income had fallen because as chief minister, she could not now accept love and affection gifts.

Meanwhile, her depleted revenue stream has not prevented her from building a grand Mughal style pink *haveli* in the Greater NOIDA area on a 40,000 square meter plot owned by a family trust. The grand parks on both sides of her house - one called Gautam Buddha Park and the other one called Ambedkar Park - are both maintained by GNIODA to a standard that you wouldn't believe any public authority was capable. The pictures are all over the internet.

If you had an ear to the ground in Delhi in 2009, you would have heard that builders funneled large sums of money into political coffers to obtain quick allotments of land without complications. So now, as members of India's righteous and very enlightened elite in good standing, if you were confronted with these facts on a judge's chair, what would you do? On the one hand, you have farmers who have had the land wrenched out of their hands by a state government determined to enrich builders and act in utter disregard of its own laws. On the other hand, you have thousands of future flat owners waving their allotment letters in your face. Which side will you pick? Perhaps, like a trained judge, you will do what 99% of judges in this country do. You will close your eyes in contemplation and say, "a legal issue

is placed before me and this is what I have to decide". That is what the Supreme Court of India did.

It is another matter that the court did decide to do something about the allotment holders and ordered that their money be returned. This is still a ball in play. All the farmers who are now clamoring to have their land returned haven't the slightest intention of putting on their dhotis and yoking themselves to an ox to go ploughing in the fields. We know it's about the money. We know that the politicians made their killing. We know that the builders always have and are going to still make a killing. Surely the farmers of all people deserve to make a small killing. If in the bargain, the costs of these flats rise a bit, you know it's all completely academic because in ten years' time, these same flats will still be worth ten times what it costs to buy them.

Comment-3

(This column appeared in the September 10th, 2011 issue of Business World)

Melas with Missions

(The absurdity of legislating through street protest)

Ranjeev C Dubey

It is truly said that when taxi drivers start to talk about the stock market, it's time to get out. My own mantra is that when simple minded laymen take to the streets to agitate on legal fine print, it's time to head for the nuclear bunker. In the last two months, India has been witness to two truly surreal *melas*, both led by incongruous national solution providers in search of a rational definition of the problem. Both, I am convinced, are manifestations as much as of the desperation of our polity as for India's appetite for political absurdity.

Let us consider the essential facts. In June of this year, a TV yoga guru packaging himself as the next great messiah lasted four days into his great anti-corruption jamboree before he fell off the stage disguised in a sari and found himself in police custody. We then found that all his years of yoga did not train him to survive one week into a hunger strike without medical intervention. It later turned out that he had been land grabbing in Hardwar and his second in command had forged documents to get a passport. Looking back, we can sport a twinkle in our eye and slap our thighs in silent mirth in but at the time, everyone and their insane uncles took him seriously enough. Even then, we knew that the man wanted India to "nationalize" properties overseas and sold dodgy medicines with names like Divya Pidantaik oil which use cow urine as an ingredient. If we still followed him, it is because so many of us were beside ourselves with frustration.

The frustration is still very real. It is no body's case that India doesn't have a problem with corruption, least of all the ruling party. But then, it is also no one's case that the ruling party is not trying to do something about it. It is nobody's case that this government does not have a comprehensive

multi-pronged approach to the problem. It is nobody's case that this government has not introduced the Judicial Accountability Bill. It is nobody's case that this government has not already tabled whistle blower legislation in parliament. It is also nobody's case that this government is not trying to get some sort of Lokpal legislation into the statute books. It is nobody's case that this government has not successfully steered the first impeachment of a judge. The frustration comes from the multitude of power centers and vested interests that will simply not let this, and perhaps any other, government do what needs to be done.

Who then can argue if movie stars and retired cops damn the entire legislature for these follies? Even as I write this piece, the government is trying to get some sort of regulatory order into the manner our sports bodies are structured and governed. Voting on these measure are people who have everything to lose if these sports bodies do get regulated. The result is paralysis. Indeed, you could easily argue that despite all its moralistic rhetoric about the Lokpal bill, the opposition has comprehensively undermined India's attempt to legislate against corruption and pretty much everything else by paralyzing parliament for the best part of a year, or more. What principle of political absurdity allows the opposition to be the noisiest in condemning the ruling coalition on the corruption question?

In this backdrop, we then had another *tamasha* played out in August by a desperate group of well-meant citizens led by the incongruously anachronistic retired army truck driver. For sure, this was a man with far greater credibility than the TV yogi but his brand of absurdity came from both the things he believes and the specifics of the cause that he was ready to die for. He wants death penalty for corruption, he recommends public flogging for boozers and he wants compulsory sterilization of young men in the best Sanjay Gandhi and emergency tradition. Yet, we followed him, because, as I have said, we are desperate enough to draw a distinction between the man and message. Unfortunately, it was just as hard to believe in his well-intentioned self-righteous attempt at suicide.

When you get past the high decibel rhetoric, what you have left in the whole Lokpal *tamasha* was a bunch of issues that bear no relationship to the hype that has been created around them. It seems to me that most people don't have the foggiest idea what Anna wanted. We need to suffer this understanding to appreciate the absurdity of the Anna fast.

First Anna wanted the Lokpal to investigate the judiciary while protecting whistle blowers and victims of corruption. In turn the Government wanted a separate Judicial Accountability and whistle blower legislation? On a toss-up, do you care just so the job gets done? Second, Anna wanted all levels of the bureaucracy and all MPs to be under the preview of the Lokpal. The Government felt that it was enough to investigate senior bureaucrats, it being understood that a clean senior bureaucracy will mean cleaner departmental inquiries and consequently, a cleaner lower bureaucracy. The

real question was this: could the Lokpal handle complaints against a million *babus*? As for MPs, there's the question of parliamentary privilege which required some pondering. Third, Anna wanted a national Lokpal while the Government did not want to disturb our federal structure. I wouldn't want our constitution jettisoned for a Lokpal either. Fourth, he wanted the politically tainted CBI to be run by the Lokpal while the government wanted to keep its sleuth. Frankly, so long as the Lokpal had the ability to investigate, I don't care whether it's the CBI or Lokpal Bureau of Investigation?

And so it went on point after point. On removing the Lokpal, the government wanted to reserve that right while Anna wanted the Supreme Court to do so. Anna also wanted the Lokpal to determine his own budget, determine how far it would delegate its functions to its subordinate officers, proactively prevent corruption and sue the corrupt in court. He also wanted special fast track benches to hear corruption cases. He wanted higher punishment for wealthier people! The government wanted Lokpal to investigate complaints against its own staff while the Anna wants to create another independent entity that will police the Lokpal! About the only issue on which I think everyone, including Singh our King, could agree was that the Lokpal should have jurisdiction over the Prime Minister. That point was easily taken and as easily conceded by the Government.

Am I the only one who thinks that most of these debates are either about fine print or genuine differences of opinion? We can argue backward and forward about this or that provision and there are probably as many views as there are people. This is not the heart of the issue. A democracy must embrace all shades of opinion if it is to function at all. It cannot be good liberalism to say that we will do things my way or I am going to starve myself to death and start a riot. I cannot for the life of me find an issue here that justifies a life and death ultimatum to the country. Legislation is a long and complex process with multiple levels of consultation and compromise. As a lawyer, I cannot accept the idea that one small group of no doubt well intentioned souls can thrust their will down my throat by intimidating me with their suicide threats to accept their vision of what the brave new India should look like.

As it finally turned out, Team Anna dropped many of their demands with the result that they would have ended up in substantially the same place if the fast had never begun. So what is the net takeaway from this particular *mela*? Officially, the difference between the position on the eve of the fast and the position at its conclusion was only that parliament had passed some resolutions supporting (a) citizens charters, (b) to consider some sort of mechanism for the lower bureaucracy and (c) structure state level lokayuktas. In effect, they only promised to be well intentioned when the Lokpal legislation finally showed up at their door. We will soon see how their intentions play out into actions.

Since this is India's 9th attempt at Lokpal legislation in 43 years, I

suppose this resolution is no mean feat. Perhaps we should be pleased because at the best of times, nation building is a slow, ponderous, slippery path. On reflection though, the real benefit of the *mela* may well have been in the 'awakening' it brought, bringing to the street, people who are widely seen as defeated and listless. Although a rhino like hide seems to be mandatory for those who enter politics, notice may well have been served on members of parliament that this legislation needs to be passed. If you are brutally honest, you will agree that this is small ticket achievement for the massive effort the nation made. You could be forgiven for asking yourself if this *mela* was everything it was cranked up to be. Perhaps, when it all comes down to dust, you will concluded that while we Indians have always loved our *melas*, we have now progressed to organizing *melas* which have an ostensible mission even though in the long run, its only so much redundant drama, symbolism and emotional purgation.

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