INDEPENDENT DIRECTORS UNDER THE COMPANIES ACT 2013

By Mukundan Bharathan

Finally, almost 57 years after the Companies Act of 1956, India’s Parliament passed a new Companies Act of 2013, which received the assent of the President on August 29, 2013. The old Companies Act of 1956 had already outlived its tenure by 1978. Previous governments had recognized the need for a major revision of the Companies Act to reflect changing corporate governance norms, but failed to get the legislation enacted. Governments made efforts to replace the old Act with a new one in 1993, 1997 and 2000, but each time the bill did not pass, perhaps because it had a large volume of sections.

Indeed, the 2013 Act is so comprehensive, at 29 chapters with 470 sections, that all of its provisions have yet to be brought into effect and the rules to enforce the statute are still being framed. Thus, like the U.K. Companies Act of 2006, which took three years to fully implement, India’s 2013 Act is taking effect in phases, and it may take many months before it is completely implemented. Despite this, the Ministry of Corporate Affairs (MCA) has notified (brought into effect) large portions of the Act. All of the notified sections of 2013 Act are made effective from April 1, 2014.

New Provisions for Increased Accountability, Transparency and Better Governance of Companies

The 2013 Act has several new provisions relating to the roles, duties and liabilities of the independent directors. Out of India’s 1.3 million registered companies around 1.1 million are private limited companies and about 5,000 are listed on a stock exchange. Thus, most companies are held by directors who were their founding promoters. Under the new Act promoters/directors cannot serve as independent directors given their inherent self interest in all important company decisions.

For this reason independent directors must be independent of the promoters and management of the

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These are exciting times. India has a new government, and there is a buzz in the air caused by many and much-needed expectations on several fronts. In recent years, the economic slump that brought a downward dip in growth to dismal figures, coupled with reports of high-profile scams and disheartening prevailing statistics about what it takes to do business in India had definitely put a damper on both domestic and foreign corporations doing business in India. Amongst other concerns, corporate governance, or lack thereof, had caused a fair amount of flutter. Hopefully, all that will now become history.

For 58 years companies doing business in India were governed by what eventually became the antiquated Companies Act, 1956. Commencing at the end of August 2013, India’s Parliament put an end to a long wait for new and comprehensive legislation that is expected to herald a new era in corporate governance and change the way India Inc. functions. Most of the provisions (though not all) of the new Companies Act, 2013 were notified (came into effect) on March 26, 2014 and have been in force since April 1, 2014. A lot has been written on how the new law will promote self-regulation and raise the bar for corporate governance in various ways. Examples include rules codifying duties of directors’ duties, or prescribing more stringent independence criteria for independent directors or expanding the definition of “related parties.” As a large part of the Act is rule-based, the time to implement (a mere five days between March 26 and April 1) the statutory mandate has been perceived as rather short and challenging, both for companies and their advisers. In the month or so since it took office, the new BJP-led government of Narendra Modi has already taken steps to address some of these problems. Following meetings with stakeholders who perceived difficulties in the rules, the new government has undertaken to review problem areas and address concerns. The government has also notified selective changes. For example, on June 9, 2014, the Modi government mandated that companies with a paid-up capital of ₹50 million (versus an original threshold of ₹100 million) must have a full-time company secretary. Other potential areas requiring clarification may include independent directors, financial reporting, related party transactions and corporate social responsibility.

In this context, I am delighted to present this rather timely edition of the India Law News of the India Committee with a special focus on the Companies Act, 2013. While it is still early to examine the effectiveness of the enforcement of the new law, it is the right time to review some key areas of the legislation. As in the past, we have an excellent line of seasoned contributors. In the first article, Mukundan Bharathan, senior in-house counsel from GSK, analyzes key elements of the provisions surrounding “Independent Directors” and lucidly examines their independence. The legislation clearly defines the role of independent directors and has prescribed a detailed code for their functioning.

With an intense focus on corporate social responsibility (CSR), greater responsibility has been cast upon companies having a prescribed threshold, linked with net worth or turnover. Qualifying companies will have to spend at least 2% of their three-year average profit annually on CSR activities. Keeping the significance of this in mind, we present several short articles focusing on different elements of CSR. In the first one Lalit Kumar, a partner of J. Sagar Associates, describes this “Landmark Law” while in the second one Pankaj Jain, Founder/Principal of Impact Law Ventures focuses on “Salient
Issues & Challenges” of CSR. The third piece is by Ankita Srivastava, a lawyer from Nishith Desai Associates and she examines the issues from a unique angle in “Government’s Ambivalence Reflected – Law on CSR Doesn’t Address Social Business Policy,” while in the final segment Jane Schukoske, the CEO of SM Sehgal Foundation, provides food for thought in “Focus on Rural India – Law on CSR Boosts Actions To Address Social Inequality.”

The third main article is on a subject that impacts most Indian companies, foreign or domestically owned. The provisions of “related party” transactions will be game changers and Raj Barot & Mehul Modi (Principal of Next Frontier LLC and Partner at Deloitte, India, respectively) jointly analyze the issues including what it means for corporations in terms of additional burdens in “Companies Act 2013 – An Attempt To Increase Transparency And Accountability In Related Party Transactions.” In the fourth piece, Ajit Sharma, Partner in the Dispute Resolution practice at J.M. Sharma & Co, New Delhi examines “Dispute Resolution under new Companies Act.” Finally, Lalit Kumar of JSA brings a reality check and seeks to challenge some of the provisions in “Companies Act 2013 – Despite The Accolades, It Deserves Some Flak Too.”

At present some of the challenges arise from lack of clarity in interpreting the new provisions. Until the 2013 Act is fully notified along with all the rules, it will have to be read together with the Companies Act, 1956. There is scope for confusion here. Be that as it may, we chose the subjects on varied topics as they address issues that many of us confront in our daily practice.

This issue of India Law News also contains articles of general interest, including a highly topical article by Daniel Hantman on freedom of speech in India in the context of the case against Penguin India for allegedly violating Sections 153A and 295A of the Indian Penal Code by publishing Nancy Doniger’s latest book, The Hindus – An Alternative History. Also included is a case note by Debopama Roy on the aftermath of the December 2013 Supreme Court case reversing the Delhi High Court in its holding that Section 377 of the Indian Penal Code criminalizing gay sex was unconstitutional. Another case note by Chritarth Palli highlights a recent Supreme Court decision on how to reconcile conflicts between personal religious law and an evolving uniform civil code in a case involving the adoption of a child.

We hope that you will find these articles stimulating, informative and interesting.

Priti Suri
Guest Editor, Spring Issue 2014

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The last quarter has been an eventful one, both for India and the India Committee of the ABA SIL.

On the national canvas, the results of the Indian elections held over April and May is positive news for the US-India business community. With the end, at least for the present, of coalition politics, the paralysis plaguing the government recently is also expected to end. There is great hope that more investment friendly laws will be enacted, infrastructure projects will be cleared, and much-needed foreign investment will be promoted. Along with others in the India-US business space, the India Committee organized a teleconference to discuss the election results on Thursday, June 5, 2014. With speakers drawn from the press, think tanks and legal practitioners, the session provided a deep insight into what to expect under the new government.

In addition to this teleconference, the last few months have been busy on several fronts for the India Committee. On February 13-15, the ABA India Committee, along with the Society of Indian Law Firms and Services Export Promotion Council, held our biennial conference in New Delhi. The sessions provided insight and practical experience from lawyers on a wide breadth of topics relevant to India-US business. An insightful report from conference co-convener, James P. Duffy, III, is also included in this edition of the India Law News. The conference was very well-received and fostered and deepened collegial relationships between the legal communities of India and the US. We are greatly indebted to Lalit Bhasin, founding co-chair of the India Committee, and conference co-convener, for organizing and supporting the conference, both administratively and financially, and to Jim Duffy and Eric B. Wulff, conference co-convener, for their tireless efforts that led to the success of the conference. We also extend our thanks to the many organizations that supported the conference and whose names are listed at the end of this issue along with photographs from the conference. You can learn more about the conference at http://www.events.iceindia.in/threadingtheneedle/index.html.

In April, a short two months after the New Delhi conference, a number of members got another opportunity to meet at the Section of International Law Spring Meeting in New York. The India Committee organized two sessions at the Spring Meeting. A session called Blood, Sweat & Tears: Corporate America’s Exposure to Slave Labor in the Supply Chain, examined the effects of human trafficking on the supply chain and measures towards diligence to prevent trafficked labor in the supply chain. With speakers drawn from India and the U.S. who have infiltrated military and corporate establishments to uncover underground trafficking, the session provided a moving insight into this global scourge. Second, the Committee organized a program...
called *Patent Protection for Pharmaceuticals in Developing Countries: Access to Affordable Drugs Versus the Cost of Innovation*, which highlighted the tension between compulsory licensing used by India to ensure access to affordable drugs to its large population, and the need for patent protection to enable pharmaceutical companies to innovate. With speakers from NGOs working to increase access to drugs and industry organizations supporting pharmaceutical companies, the session highlighted the ways in which the two can work together.

This is issue of the India Law News has a special focus on India’s Companies Act of 2013. Most of the articles were written before the results of the parliamentary elections were announced. It remains to be seen what impact, if any, the new government will have on the continued implementation of the Act. Our sincere thanks to Guest Editor Priti Suri, who herself is an Immediate Past Co-Chair of this Committee, for gathering an excellent panel of authors to bring clarity to this voluminous and complex law. We also express our gratitude to our editorial board for producing another issue on current developments in the laws of India. As always, we also express our heartfelt thanks to LawQuest for providing desktop publishing for the India Law News.

There is great cause for optimism in the U.S. India commercial relationship. The India Committee will follow any changes closely. We look forward to your participation in the Committee’s effort to help you counsel your clients in this rapidly evolving business and legal climate.

*Sajai Singh*
*Sanjay T. Tailor*
*Richa Naujoks*
company. They cannot be majority shareholders and cannot have any conflict of interest with the Company. Independent Directors are, nevertheless, entitled to compensation. They are eligible to receive sitting fees as well as a percentage of commissions on sales as approved by the board of directors. However, they can no longer be offered Employee Stock Options (ESOP).

An independent director needs to be impartial and must act in the interest of the company, its shareholders, society and the community at large. He or she should be selected for special skills that are considered to be in the interest of the Company, and must play the role of a watchdog/whistle blower and moderate all conflicts within the company.

The role of the independent director is more proactive now and being a whistle blower means not keeping quiet if there is anything suspicious in any of the dealings that come to one’s knowledge. To act as whistle blower, the independent director should have independent communication with the Key Managerial Personnel including CEO, CFO, Company Secretary, Functional Heads such as finance, legal, human resources and supply chain. In fact, internal audit firms and employees should also be encouraged to have an open discussion with the independent directors. Independent directors are expected to raise red flags and ask questions and act diligently. The independent director is no longer a rubber stamp and must cast a dissenting vote to any resolution he or she feels is prejudicial to the interests of all stakeholders.

The role of independent directors is so crucial that the 2013 Act requires that they be included in important committees for certain types of companies. The company’s committee on Corporate Social Responsibility (CSR) must have one independent director. The Audit Committee must have a majority of independent directors, and half of the Nomination and Remuneration Committee be also be independent directors. The requirement of one independent director on the CSR committee applies only to companies with annual profits of more than ₹ 50 million or where turnover exceeds ₹ 10 billion or net worth is over ₹ 5 billion (at the time of writing the exchange rate was ₹ 60 to U.S. $1).

Corporate Social Responsibility (CSR) provisions are also applicable to foreign companies. Every foreign company which has a place of business in India and conducts business activities in India and which has a branch office or project office in India, is required to engage in CSR activities as provided under the Act. A company may carry out CSR activities either by itself or through a registered trust, registered society or a company established by its holding, subsidiary or associate company.

The new Act requires at least one-third of the total board members to be independent directors. The one-third requirement under the old Act applied only to listed companies. The new Act applies to public listed companies as well as public companies having a paid up share capital of over ₹ 1 billion and over ₹ 2 billion in loans, borrowings and deposits.

The 1956 Act did not fasten any liability on independent directors as does the new Act. Only the managing director was held responsible as he was in charge of and responsible for the day to day affairs of the Company at the time of the commission of an
offence. Under the new Act, liability has also been extended to independent directors even though they have no day to day operational responsibilities. While courts were often lenient in applying liability to the actions of independent directors, they were held responsible for a default or the commission of an offence if they had the knowledge or if the offence was committed under their direction or control. To avoid liability, an independent director must now prove that he had no knowledge of the offence that was being committed, that he had raised red flags at time, and had asked relevant questions about the particular transaction that was ostensibly detrimental to the interests of stakeholders. An independent director will not be held liable if he or she can demonstrate that he or she acted diligently and cast a dissenting vote against the particular apparently irregular act.

Many companies in India provide for long terms for their independent directors. In the case of Reliance Industries Limited, one of the independent directors was on the board for over 30 years. Mahindra and Mahindra, another well-known company in India, had its independent director on the board for over 31 years. So is the case with another multi-national company, Colgate Palmolive, which has had the same independent directors since 1983. Infosys co-founder Mr. Narayan Murthy had suggested that independent directors serve for no more than three terms of three years each. Now under the new Act the term of the independent director has been capped at two consecutive terms of five years each and then a cooling off period of three years, at the end of which that independent director could serve again.

The issue that corporations now face is getting good quality independent directors especially when their term is limited followed by a cooling off period. Some people are optimistic that many good people will come forward to fill the pool to be created by the Central Government from where companies can choose their independent directors.

Interplay Between the Companies Act 2013 and the Amended Equity Listing Agreement of the Securities and Exchange Board of India (SEBI)

In addition to Sections 166, 134(5), 149 and Schedule IV of the new Act which set forth the qualifications of independent directors, Clause 49 of the Equity Listing Agreement of the Securities and Exchange Board of India (as amended in April 2013) sets out the code of conduct and the role, responsibilities and functions applicable to them. Independent directors are expected to use their skill and independence in implementing the best corporate governance for the company and in the interest of all stakeholders.

Some of the key provisions of both the new Act and their interplay with SEBI’s amended Clause 49 of the Equity Listing Agreement are highlighted below:

1. SEBI: Two-thirds of the members of a company’s Audit Committee and the Chairman shall be independent directors.

COMPANIES ACT, 2013: The Audit Committee must have majority Independent Directors

2. SEBI: An independent director who has already served on a company’s board for five years can serve only one more term of five years.

COMPANIES ACT, 2013: an independent director may serve up to two terms of five years each.

3. SEBI: Companies to disseminate Independent Director’s resignation letter to Stock Exchanges & on company website

COMPANIES ACT, 2013: Independent Directors must disclose reason for resignation to the Registrar

4. SEBI: A person shall not serve as independent director on more than ten listed company boards
COMPANIES ACT, 2013: A person shall not serve as director on more than then public company boards

5. SEBI: Every listed company must have a Risk Management Committee

COMPANIES ACT, 2013: Every company shall have a Risk Management Policy

Pecuniary and Criminal Penalties

There are other important requirements imposed by the 2013 Act. Each year independent directors must hold at least one meeting to review the performance of non-independent directors. Conversely, the Board must evaluate the independent directors.

The penalty for noncompliance of any provision applicable to independent directors may include a fine from ₹50,000 to ₹500,000 and up to ten years imprisonment. With current fast track courts, the National Company Law Tribunal and the teeth given to the Serious Fraud Investigating Office, directors guilty of having violated some of these provisions may find themselves being sent to jail sooner than under the slower judicial and tribunal procedures of the past.

There are many good independent directors presently serving on several Boards. However, an apparent scarcity of reputable and well-qualified candidates with the necessary talent and impeccable integrity essential for the job may make it difficult to fill in the positions of independent directors in other companies which are now required by the new Act to appoint them. Nevertheless, the new Act is a long-needed step to ensure more accountability, transparency and better governance of companies.

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corporate social responsibility (CSR) involves conducting business in a way that contributes to social good. Globally, there are efforts to set standards for businesses to follow – triple bottom line (people, planet, profits or prosperity), corporate citizenship, shared value, and inclusive growth. In notifying (i.e., giving effect to) Section 135 of the Companies Act, 2013 and Schedule VII of the Act, India has made a policy commitment to engage business more directly in contributing to equitable economic development and other social good.

Lawyers for corporations, NGOs and marginalized communities are preparing to advise clients and report on the expected investment of energy and financial support for wide-ranging CSR activities including social, environmental issues and protection of national heritage, art and culture.

Overview of the “2% CSR” Provisions

The CSR provisions are effective from April 1, 2014. Companies which meet one of the criteria as provided in section 135 of the Companies Act, 2013 will require compliance with the CSR provisions. Foreign companies with a branch office or project office in India will also need to comply with the CSR requirements if they fall within any of the criteria under section 135.

Such companies will need to constitute a CSR committee with at least three directors. Since a private limited company is required to have a minimum of only two directors, such private companies are exempted from having three directors on the CSR committee and can have only two directors. One of the three directors on the CSR committee has to be an independent director. Companies which are not compulsorily required to have independent directors on their board are exempted from the requirement of having an independent director on the CSR committee. The board of directors’ report will have to disclose the composition of the CSR committee.

Each CSR committee will have to frame a CSR policy recommending the amount to be incurred on CSR activities. The CSR policy must be approved by the board of directors. The contents of such policy must be disclosed in the board of directors’ report in the format prescribed in the annexure to the CSR Rules and on the company’s website, if any.

The amount to be spent has to be at least 2% of the average net profits made during the three immediately preceding financial years, giving preference to the local areas of its operations. While calculating the profit for the purposes of CSR contribution, neither the profits earned from overseas branches of an Indian company nor the dividend received from other Indian companies must be included, provided those Indian companies are covered and comply with Section 135. Expenditure incurred in India will only qualify. Expenditure incurred exclusively for the benefit of employees of the company and their families is excluded.

The CSR activities to be undertaken by the companies have to be within the purview of Schedule VII, which lists all the permitted CSR activities. Therefore, any expenditure on activities not permitted in Schedule VII will not qualify as CSR expenditure. The existing CSR programs and activities of companies will need to be aligned with the permitted Schedule VII activities. Further, activities undertaken in pursuance of company’s normal course of business are excluded.

CSR activities may be undertaken through a registered trust or a registered society or a non-profit company established by the company or its holding or
subsidiary or associate company. However, any trust, society or company not established by the company or its holding or subsidiary or associate company should have a minimum track record of 3 years in undertaking CSR programs.

Collaboration on CSR activities with other companies is permitted provided the CSR committees of respective companies separately report their CSR projects or programs. Political contributions shall not be considered as CSR activity. Companies can build CSR capacities of their own personnel provided the expenditure shall not exceed 5% of the total CSR expenditure of the company in a financial year.

The tax treatment, that is, whether or not CSR contribution may be deducted as business expenditure is still not clear. Those CSR activities in Schedule VII for which there is already a tax deduction available in Income Tax Act, 1961, for example, contribution to the Prime Minister’s National Relief Fund, are eligible for that exemption. Since the CSR Rules provide that activities undertaken in pursuance of a company’s normal course of business are excluded from taxation, it is unclear at this point whether CSR expenditure will be allowed to be deducted as business expenditures from the company’s business income.

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CORPORATE SOCIAL RESPONSIBILITY PROVISIONS UNDER THE COMPANIES ACT 2013: SALIENT ISSUES AND CHALLENGES

By Pankaj Jain

Under the Corporate Social Responsibility Policy Rules, 2014, the board of directors of a company has no flexibility to choose CSR activities outside of Schedule VII. The wording in clause 2 (c) of the Rules suggests that the board has the flexibility to include activities beyond those mentioned in Schedule VII. However, a subsequent part of clause 2 (c) as well as other clauses of the rules reiterate that activities should be restricted to headings covered under Schedule VII, which has the effect of removing board autonomy.

The Rules mention that CSR activities cannot include activities undertaken in the normal course of the company’s business. Greater clarity on what “CSR activities” constitute normal business would be useful, since under the present Rules while some training, skill-development, and literacy-related initiatives that are closely linked to a company’s business could be construed to fall in this category yet others might not. The Rules reiterate that activities exclusively for the benefit of company employees cannot be claimed to be CSR activities.

The Rules require that the company’s declared CSR Policy must include modalities of utilisation of funds as well as monitoring and reporting mechanisms. Since the Rules allow private/unlisted companies to form CSR Committees with just two non-independent directors and no independent directors, the monitoring and reporting requirements for such companies are somewhat less stringent.

Despite expectations to the contrary, the Rules do not permit the time-value of the contribution of personnel towards CSR activities to be included in the calculation of whether a company has fulfilled its CSR responsibilities. Compliance will be measured by the company’s actual spending and not by the value of services provided by its employees.

The Rules provide no guidance or clarity regarding the interplay between the CSR provisions of the Companies Act, 2013 and the provisions of Indian Foreign Contribution Regulation Act, 2013 (FCRA). The definition and application of “foreign source” in the latter may have some interesting implications on the “ability to give” and “ability to receive” of the donors and recipients of CSR grants.

The biggest concern is the FCRA and its wide definition of the term “foreign source,” which has not been addressed under the new law. A local arm of a multinational company or a company with an overseas shareholding of more than 50 per cent will find itself coming up against the FCRA every time it wants to contribute CSR funds to any NGO in India. The FCRA implications of each donation to an NGO from a “foreign source” company will have to be thoroughly evaluated to prevent an inadvertent breach of the law.

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rules to boost and encourage social business projects through CSR funding have not seen the light of the day in the CSR provisions of the Companies Act, 2013 that came into effect in April 2014. This omission in the CSR Rules reflects both short-sightedness and lack of understanding on the part of the government of the potentially positive impact that the convergence of CSR and social business could have created.

An attempt was initially made in the draft CSR Rules to provide a conducive atmosphere for corporates to develop and incubate new forms of business practices aimed at leveraging the far-reaching effects of the market to advance socio-economic development. “Social Business Projects” was one of the activities enumerated in Schedule VII under the draft CSR Rules.

The quality and quantity of investment that we are witnessing within the growing social business space is evident from the many social entrepreneurs and industry leaders in India who have adopted social business practices to bring about sustainable change. This model, developed by Mohammed Yunus (famed Grameen Bank founder and microcredit pioneer) inspired many entrepreneurs to plunge into the impact-based model of funding to create new and innovative forms of social businesses. The draft CSR Rules gave fillip to such entrepreneurs as the market began to realize the positive policy implications of synchronization between government prescribed economic policies and market led investment opportunities.

With the introduction of “social venture funds” which invests primarily in securities or units of social ventures providing restricted returns and the recently approved “Alternative Investment Fund” regime in India (pooling of investment funds from Indian and foreign investors (subject to the various approvals), many corporate stakeholders were hoping that the CSR Rules would encourage convergence of market-led investment models built around social impact projects and investment opportunities based on CSR spending.

It was largely expected that companies would be allowed to invest their CSR-dedicated funds in social business projects based on the principle of muted return in order to allow greater visibility and sustainability of CSR programs. CSR spending through investment in social venture funds could have been useful in promoting innovation and new business solutions as well as providing seed funding and incubation of breakthrough ideas and social enterprises. The credit crunch faced by social businesses could have been comfortably addressed given that the estimated aggregate amount of CSR funding for one financial year is expected to be about $1 billion. Companies could have efficiently met their obligation to spend two percent of their revenue on CSR activities had the Rules permitted them to devote those resources to social venture funds which have already demonstrated success with market driven policies for the benefit of all stakeholders satisfying the social performance norms.

However, the removal of “social business” projects from Schedule VII casts doubt on policy-makers’ understanding of, or possibly commitment to, the goal of CSR. Government policy makers, for reasons that are not obvious, seem to have been trapped by a conventional and outdated understanding of CSR as philanthropy. Schedule VII of the recently enacted CSR Rules reveals that government policy makers failed to appreciate that permitting CSR funds to be directed to

GOVERNMENT’S AMBIVALENCE REFLECTED – THE LAW ON CORPORATE SOCIAL RESPONSIBILITY DOES NOT ADDRESS SOCIAL BUSINESS POLICY

By Ankita Srivastava
social business purposes would have realized in the most efficient way the legislative purpose of the CSR. That purpose is implementation of effective social policy by innovative and efficient use of capital. By excluding social business from CSR activities, the government lost a rare opportunity to address India’s widespread social problems and improve the lives of its citizens in an efficient, effective, stakeholder-driven and financially sustainable way.

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FOCUS ON RURAL INDIA: LAW ON CORPORATE SOCIAL RESPONSIBILITY BOOSTS ACTION TO ADDRESS SOCIAL INEQUITY

By Jane Schukoske

Rural communities with unmet fundamental needs are clearly high priority among the key intended beneficiaries of the two percent provision for CSR in the Companies Act 2013. Schedule VII of the Act specifically includes rural development projects, and many other listed activities address the deprivation of basic human rights experienced by many rural villagers: eradicating hunger, poverty and malnutrition; promotion of preventive health care and sanitation and making available safe drinking water; promotion of education and employment, enhancing vocational skills; promotion of gender equality and empowerment of women; ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro-forestry, conservation of natural resources and maintaining quality of soil, air and water.

For rural development interventions to be sustainable, the community must lead and “own” the efforts. When the community helps design solutions and takes responsibility for behavior change within the village, the community will maintain infrastructure and the social commitment to the behavior over time. Many companies will rely on NGOs that have built rapport with communities to engage the communities for a sustainable CSR effort. Success of many of the listed CSR activities requires some community behavior change; this should be factored into the projects, programs and timelines proposed in CSR plans.

By drawing attention to neglected rural communities, the “2% CSR” provision will stimulate greater communication and collaboration between companies, NGOs and such communities. This joint effort will serve as a powerful tool for leveraging the funds and systems of the Government of India, which has capacity to scale rural development. The collaboration will cause more citizens to be attentive to policy gaps, such as in the Right to Education Act, 2009, which largely addresses school infrastructure rather than student learning. Corporate employees who engage in CSR activities will have the opportunity to traditional knowledge and meet talented and inspiring people, who, given a fair chance, could be contributing to greater wellbeing and prosperity in India.

Lawyers, themselves responsive to the professional ethical requirement of provision of pro bono services, have important roles to play in supporting rural CSR activities. In addition to advising clients on compliance with the Companies Act, lawyers should advise clients about government systems, such as the legal services authority system and its paralegals, who could work in rural areas to bring about women’s empowerment and to implement existing government programs designed to provide dignity and meet basic human needs.

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The Companies Act, 2013 ushered in a host of sweeping changes that will set the tone for modern legislation that facilitates growth and greater regulation of the corporate sector in India. The government designed the 2013 Act to enhance self-regulation, encourage corporate democracy, and reduce the number of required government approvals for transactions. As a result, the 2013 Act is expected to improve corporate governance norms, and better protect the interests of various stakeholders such as lenders and investors (particularly small investors).

The new law, which received presidential assent on August 29, 2013 and appeared in the Official Gazette on August 30, 2013, represents a transition from an approval regime to a disclosure regime and provides relief from obtaining cumbersome approvals from regulatory authorities. As of April 26, 2014, 283 sections have been notified (brought into effect), and the corresponding sections of the Companies Act, 1956 have ceased to have effect.

This article highlights important changes for related party transactions (RPTs) under the 2013 Act and examines several provisions that require further clarification before parties can confidently engage in these transactions.

Broad Definition of “Related Party”

The RPT provisions of the 2013 Act are materially different in scope and applicability than their predecessors in the 1956 Act. For example, the 2013 Act comprehensively defines the term “related party” for the first time and broadly interprets the term to include the following relationships:

- directors and key managerial personnel (KMP) and their relatives;
- firms or companies in which a director, manager, or their relative is a partner, member, or director;
- public companies in which a director or manager is a director and holds, along with their relatives, more than 2 percent of its paid-up share capital;
- corporations whose board of directors, managing director, or manager is accustomed to act in accordance with the advice, directions, or instructions of a director or manager; and
- any person on whose advice, directions, or instructions a director or manager is accustomed to act.

The law further defines related parties to a company to include its holding, subsidiary, associate, and fellow subsidiary companies. The Act authorizes the government to amend this list of related parties.

Expanded List of Covered Transactions

Under the new law, a transaction with any related party requires approval from the board of directors if the transaction does not occur in the ordinary course of business or at an arm’s length basis. The 2013 Act expands the types of transactions subject to examination. The 1956 Act included only sales, purchases, or supply-related contracts involving any goods, materials, or services and underwriting the subscription of shares in or debentures of a company. The 2013 Act extends coverage to several additional types of transactions:
• buying, selling, or disposing of any kind of property;
• leasing of property;
• appointing an agent to buy or sell goods, materials, services, or property; and
• appointing a related party to the company, its subsidiaries, or its associate companies.

Here are a few examples illustrating RPTs covered by the 2013 Act:

• Under the 1956 Act, a company must prepare its financial statements according to certain accounting standards. Under Accounting Standard 18, which governs RPT disclosures, an Indian company must disclose in notes to audited financial statements any transaction with its foreign parent company or its fellow subsidiaries. Under the 1956 Act, these RPTs did not require any approval from board members, shareholders, or the government. However, the 2013 Act defines the term “related party” as including a holding company—that is, a foreign parent company. Therefore, these transactions require approval if either of two conditions is true: (1) the transaction does not take place in the ordinary course of business or (2) the transaction takes place in the ordinary course of business but the negotiation does not take place at an arm’s length price.

• A sale of immovable property by a director to the company or vice versa would not require government approval under the 1956 Act. However, under the 2013 Act, buying, selling, or disposing of property of any kind requires necessary compliance and approvals in case the transaction exceeds prescribed limits and disclosures.

• A sale of a vehicle to a director of a company may require government approval. Assume an Indian subsidiary of a U.S. company having paid-up capital of more than the prescribed limit (e.g., ₹100 million) and engaged in the business of providing information technology services is to sell a company vehicle to any of its directors (who may be based in the United States or in India) at the prevailing market price. Even though the transaction will be at an arm’s length price, it will require approval under the 2013 Act as it may not be regarded as “in the ordinary course of business of the Indian subsidiary” because the subsidiary’s business is information technology, not automobile sales.

**Additional Duties Imposed on Organizations**

Under the 2013 Act, RPTs that fall outside the ordinary course of business or that occur on a basis other than at arm’s length trigger a number of compliance duties, including the following critical responsibilities:

1. Audit committee approval: The company’s audit committee must approve RPTs and subsequent modifications, if applicable.

2. Board approval: The prior consent of the board of directors is required before entering into RPTs. Further, independent directors are required to pay sufficient attention and ensure that they hold adequate deliberations before approving RPTs and assure themselves that the transactions are in the company’s best interests.

3. Shareholder approval: Prior approval of the shareholders by way of special resolution at a general meeting is required in case the paid-up capital of the company or the transaction amount exceeds the prescribed limit. Rules have prescribed that a company would need
shareholders’ approval if any of the following conditions is true:

a. its paid-up share capital is ₹ 100 million or more;

b. the specified transaction individually or taken together during a “financial year” (April to March) exceeds 25 percent of the company’s annual turnover or 10 percent of the company’s net worth according to its most recent audited financial statements;

c. the transaction relates to the appointment to any office or place of profit in the company, its subsidiary company, or an associate company that exceeds payment of monthly remuneration of ₹ 250,000; or

d. the transaction is for remuneration for underwriting the subscription of any securities or derivatives thereof of the company that exceed 1 percent of the company’s net worth according to its most recent audited financial statements.

4. Disclosures: The board must disclose all RPTs regardless of whether they take place at arm’s length or in the ordinary course of business, along with a justification for each in the Board’s report.

5. Interested directors: Any director who has an interest in any contract or arrangement with a related party cannot be present at the meeting where the board is considering that contract or arrangement.

6. Notice: The notice calling the board meeting and general meeting shall contain disclosures as may be prescribed.

Noteworthy among the changes introduced under the new Act is the law’s mandate that a related party who is a member of the company cannot vote on a required special resolution in relation to matters requiring shareholder approval (as listed above). In other words, for RPTs that require approval, only shareholders who are not related parties can vote.

Penalties for Noncompliance

The 2013 Act has introduced stringent penalties for noncompliance. Any directors or employees of a company who entered into or authorized the nonconforming contract or arrangement may be subject to a fine and imprisonment. For listed companies, the penalties range from a minimum of ₹ 25,000 to a maximum of ₹ 500,000 along with imprisonment for a term that may extend to 1 year. Non-listed companies are subject only to the fine.

Gaps in the RPT Provisions of the 2013 Act

Although most of the suggested changes are welcome from the point of view of protecting the interests of shareholders, lenders, and other stakeholders, the new law comes with new challenges, most of which relate to the definitions of certain important terms. One challenge is presented by the term “ordinary course of business.” Because the 2013 Act does not define this term, its meaning will have to be subjectively determined based on the facts of each case.

So, too, is the case with “arm’s length transaction.” The 2013 Act defines this term as a transaction between two related parties who conduct the transaction as if they were unrelated, so that there is no conflict of interest. The basis for determining whether a particular transaction is at arm’s length has not been set forth in the Act. Instead, it appears that the burden of proof with respect to the arm’s length condition rests with the company itself as well as its directors, audit committee, KMP, and other officers in charge of the affairs of the company. Under the tax laws, there are methods for
determining arm’s length pricing; the question is whether companies can use these methods for purposes of the 2013 Act and what would happen if the revenue authority were to hold subsequently that the method the company adopted is not correct.

**Impact of the RPT Provisions**

As the 2013 Act evolves, its RPT provisions should bring about a more transparent system by increasing reporting requirements, enhancing accountability, and focusing on self-regulation. This law requires taking a fresh look at existing structures and arrangements and changing them appropriately to ensure compliance from a tax and regulatory perspective. During this transitory period, many companies will experience a strain on their resources as they struggle to comply with the new requirements.

In the meantime, the best option for many companies will be to avoid RPTs until the government clarifies the terms “in the ordinary course of business” and “arm’s-length transaction” under the 2013 Act.

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**Disclaimer:** The views expressed in this article are those of the authors only and not Deloitte Touche Tohmatsu India.
An important feature of the new Companies Act, 2013 is that it provides, for the first time, a single forum for litigating most disputes governed by company law. Strange as it may sound, until now Indian companies were required to approach multiple forums for resolving their disputes. For instance, to contest insolvency proceedings a Company had to approach the Board of Industrial and Financial Reconstruction (BIFR), whereas for obtaining approval of a scheme of merger with another company, the company had to approach the relevant High Court or the District Court. Similarly, to contest claims of mismanagement of company affairs by a shareholder, the Company had to approach the Company Law Board.

The new Companies Act of 2013 consolidates the jurisdiction of the Company Law Board, the High Court & District Court (for company matters), and the BIFR along with its appellate forum, into one Tribunal with exclusive jurisdiction, the National Company Law Tribunal (NCLT). Prominent exclusions from NCLT jurisdiction include disputes arising out of arbitration proceedings, civil suits filed by or against the company for, say, recovery of money or other civil or criminal disputes that the company may be involved in but which are not essentially commercial in nature. For instance, if a Company were to challenge compulsory acquisition of its land by the government then the challenge would lie before a District court and not the NCLT since this is not a typical commercial dispute covered by the Act.

The creation of the NCLT was much anticipated and something that the government had attempted earlier but without success. In 2002 the Parliament passed by the Companies (Amendment) Act, 2002, which amended the old Companies Act of 1956, and provided for establishment of a tribunal, much similar to the NCLT contemplated under the 2013 Act. However, the tribunal under 2002 amendment never saw light of the day due to a legal challenge to its composition.

The Supreme Court in 2010, in an important judgment, upheld Parliament’s power to create a specialized company tribunal but held certain provisions of the Companies (Amendment) Act, 2002 as unconstitutional on the ground that they provided for under-qualified experts to sit as judges on the tribunal. The tribunal contemplated under the 2002 amendments and the 2013 provision for a NCLT both provide for the appointment of ‘judicial’ and ‘technical’ members as judges.

In its 2010 decision, the Supreme Court held that as the tribunal was intended to replace the High Court’s jurisdiction over certain company law disputes, the “technical” members of the tribunal should be comparable in experience to a High Court judge. Since the clause relating to the qualifications of appointment of a technical member on the tribunal was vaguely worded, the Supreme Court struck it down as unconstitutional. The Parliament never amended the law again and thus the tribunal under the Companies (Amendment) Act, 2002 never saw light of the day.

Perhaps the biggest criticism of the 2013 Act is that it does not fully comply with the 2010 judgment of the Supreme Court in that, as with the Companies (Amendment) Act, 2002, technical members need not be as qualified as High Court judges. Thus the creation of NCLT under the Act has again been challenged in the Indian Supreme Court, where the case remains pending. See Madras Bar Association v. Union of India [Writ Petition No. 1072 of 2013]. The Supreme Court,

**DISPUTE RESOLUTION UNDER THE NEW COMPANIES ACT**

*By Ajit Sharma*
by its order of January 13, 2014, agreed to consider the question of the constitutional validity of the NCLT proposed to be created under the 2013 Act on the ground that its composition (i.e. appointment of judicial and technical members) compromises the independence of judiciary and that such appointments also do not comply with an earlier judgment of the Supreme Court announced in *Union of India v. R. Gandhi* [Civil Appeal No. 3067 of 2004]). The defects, if any, in the 2013 Act with respect to appointment of members/judges of the NCLT are curable by an amendment if Parliament wishes to have the NCLT established and running at the earliest opportunity. It would thereby avoid a time-consuming case in the Supreme Court.

**Jurisdiction of NCLT**

Disputes involving mergers and amalgamations, which were hitherto litigated at the Company Law Board, the BIFR and the High Court/ District Court will now be adjudicated by the NCLT. The 2103 Act provides for class actions law suits and a provision for resolving commercial disputes by mediation and conciliation, both of which are much needed initiatives.

The NCLT, under the 2013 Act, is intended to adjudicate or regulate the following kinds of disputes and/or activities:

1. Conversion of a public company into a private company is to be carried out only after obtaining the approval of the NCLT;

2. Variation in the rights of a class of shareholders is not to take effect without the NCLT’s approval where an application opposing such variation is made by at least ten percent shareholders holding such class of shares;

3. Approval of the NCLT is necessary where a company proposes to issue fresh redeemable preference shares in lieu of payment of a dividend to be paid on existing preference shares;

4. A transferee can approach the NCLT against the decision of a company refusing to register a transfer of the company’s securities;

5. NCLT’s prior approval is imperative for reduction in share capital by a company;

6. Debenture holders or depositors can approach the NCLT in the event the company refuses to redeem the debentures or pay its depositors;

7. A shareholder can approach the NCLT seeking a direction by it to the company to call an annual general body meeting where no such meeting has been convened in time;

8. Any person may approach the NCLT seeking a change of the company’s auditors where such auditor has been involved with any fraudulent activities – the NCLT can also *suo moto* order such a change in the company’s auditor;

9. Shareholders of a company may approach the NCLT seeking an investigation into the affairs of the Company if there is a reason to believe that the company is being mismanaged or its activities are prejudicial to the interests of its shareholders. Shareholders can also seek a direction from the NCLT prohibiting disposal or transfer or sale of the company’s assets where the affairs of the company are not being managed properly;

10. Creditors or the shareholders or the company itself may approach the NCLT with a proposal for a scheme of amalgamation or arrangement or merger with another company. Such a scheme, if approved by the NCLT, would then be binding on all shareholders or creditors of the company.

11. Shareholders or depositors of a company may file class action applications before the NCLT.
on behalf of all shareholders or depositors where affairs of the company are being mismanaged;

12. Creditors of a company may approach the NCLT seeking appointment of an administrator to manage the affairs of the company on the ground that the company is unable to pay its debts and merits declaration as a “sick company.” The NCLT may on an application filed by any shareholder or the company itself approve a scheme for revival and rehabilitation of the company; and

13. A creditor or shareholder or any other person may approach the NCLT for winding up and dissolution of a company on the ground that the company is unable to pay its debts, or that its activities are against the sovereign interests of the country or that it is conducting its affairs in a fraudulent manner.

It is clear from above that almost all kinds of commercial disputes are required to be resolved by the NCLT when it is formally created by the government. Moreover, a party in any litigation before the NCLT may request the tribunal that the litigation be referred to an expert mediator for resolution. This is an encouraging sign. Often commercial disputes among shareholders or creditors or investors are resolved with the assistance of an expert mediator saving time and costs while keeping the settlement confidential, if the parties so chose. The success of mediation is evident from the fact that in many other courts across India a large number of cases have been resolved using mediation.

**Will the NCLT Change the Way Commercial Disputes are Resolved in India?**

The advantage of the NCLT is that from the day of its creation all commercial disputes will now be resolved in one forum instead of several. While it will be convenient for parties to be able to approach one tribunal for resolution of all company related disputes, the biggest gain will be consistency in the growth and development of company law jurisprudence in India. A single forum will avoid the current situation where different forums interpret similar cases differently. All of this will change with the creation of NCLT as a single forum which would decide all disputes arising out of the Act. Growth of company law jurisprudence at the level of a court of first instance is important since it not only encourages compliance with the provisions of the Act but makes compliance simpler since company officials will need to update themselves on the latest orders of just one tribunal instead of several.

The growth in India’s economy over the past decade has outpaced much needed change in its corporate laws. Existing infrastructure, practices, laws and thinking continue to impede further growth. The creation of the NCLT may also have symbolic significance since it signals the end of an era where the company law board, courts and other existing forums were only too keen to interfere with the company affairs.

The 2013 Act also provides that the NCLT shall endeavor to resolve all disputes within a period of three months. While it is uncertain whether most disputes before the NCLT could be resolved within this time frame, it would be sufficient if this provision, once implemented, inspires judges and parties to work together to resolve disputes as expeditiously as possible.

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THE COMPANIES ACT 2013 – DESPITE THE ACCOLADES, IT DESERVES SOME FLAK TOO!

By Lalit Kumar

There is little doubt that the new Companies Act, 2013, which came into effect on April 1, 2014, has deserved the accolades bestowed upon it, particularly those that predict it is going to change the corporate landscape in India for the better. Conversely, however, there is equally little doubt that the Act suffers from many defects including careless drafting errors which pose significant challenges in its implementation.

Section 2(46) of the Act defines a “holding company” to be “a company” of which other companies are subsidiaries. “A company,” is defined under this section as a company incorporated under the Act, that is to say, a company incorporated in India. So the question arises of whether a foreign holding company that is not incorporated in India, but has Indian subsidiaries, is a holding company under the Act. Moreover, under the Act “related parties,” include subsidiaries of a common holding company. If the definition of “holding company” does not include a foreign holding company then transactions between two Indian fellow-subsidiary companies of a foreign holding company will not constitute transactions between related parties. In the view of most practitioners this cannot have been the intent of the Act. Thus, poorly drafted or not, the better view of Section 2(46) is that foreign companies, which by definition are not incorporated in India, should be included within the meaning of the term “holding company” even though the section uses the words “a company” which under the section means only companies incorporated in India.

Another issue is the definition of “listed company.” Section 2(52) of the Act defines “listed company” as a company whose securities are listed on a recognized stock exchange. Unlike the old Companies Act 1956, Section 2(52) of the new Act makes no distinction between a “listed public company” and a private company whose securities (e.g., non-convertible debentures) are permitted to be listed on a special window/segment of a recognized stock exchange. There is no evidence of a legislative intent to regulate private companies as if they were public ones. Yet this would be a reasonable conclusion in light of the glaring omission of the word “public” in the definition of a “listed company”.

Next, Section 2(71) provides that a private company which is a subsidiary of a public company shall be deemed to be public company. This provision appears to adopt similar language from a judgment of Bombay High Court in Jer Rutton Kavasmanek & Anr. v. Gharda Chemicals Ltd. The Act, however, is silent on whether such private company must convert itself into a public company or whether it can continue to function under its original articles of incorporation as a private company. Interestingly, the Jer Rutton Kavasmanek case was also silent on this issue.

Then there are the much discussed problems with Sections 185 and 186. Section 185 prohibits a company from giving loans to its directors and providing guarantees or securities on their behalf, including to any other person in whom the director is interested. Many practitioners believe that this language can be construed to prohibit a holding company from giving loans, securities and guarantees to its non-wholly owned subsidiary where both have common directors. Section 186, on the other hand, allows a holding company to give loans of a specified amount with a special resolution if the amount to be lent exceeds the thresholds prescribed. Section 185 seems to resolve the conflict between itself and Section 186 with the prefatory clause, “save as otherwise provided in this
This, in effect, cedes the issue to Section 186, which does “otherwise provide.” This, in turn, makes section 185 redundant or even void, which begs the question of why Section 185 was adopted in the first place. Moreover, the Act does not define “in the ordinary course of its business” within the context of Section 185. Many transactions especially project and asset financing are structured in the ordinary course of business in a way that loans taken out by subsidiaries are secured by their parent holding companies. It can be difficult for subsidiaries to secure loans without such guarantees. The omission of a definition of “ordinary course of business” has left subsidiaries wondering whether they need to amend their articles of incorporation to include as a business purpose having their parent holding companies guarantee their loans (or even if they amend will it stand the test of law), lest regulators invalidate such guarantees as not being the ordinary course of the subsidiaries’ business.

The language of Section 465 which provides for repeals and savings is most ambiguous and provides no clarity regarding the survival of resolutions already passed and actions already concluded and approved under the Companies Act, 1956. The ambiguous language of Section 465 is making it difficult to correctly interpret the new law.

The omissions, ambiguity and lack of clarity of the Act have also carried over to the final Rules issued by the Ministry of Corporate Affairs. For example, Rule 24 of Companies (Incorporation) Rules, 2014 requires that when registering and making a declaration at the time of commencing business, a company must also provide separate and specific approvals from sectoral regulators such as the Reserve Bank of India and the Securities and Exchange Board of India. A copy of the registration from these regulators where such registration is required should have been sufficient.

Rule 8 of Companies (Issue of Global Depository Receipts) Rules, 2014 states that a company which has issued depository receipts prior to the commencement of these Rules shall comply with the requirements under this Rule within 6 months of such commencement. Yet the Rules fail to recognize that a company that has already issued a depository receipt can hardly remit those previously received and remitted funds into a bank account in India.

Rule 4 of Companies (Share Capital and Debentures) Rules, 2014 prohibits a company from converting its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice-versa.

The Rule leaves unclear, however, whether the prohibition applies to convertible securities such as compulsory convertible debentures issued prior to the effective date of the Act being converted into shares carrying differential voting rights after the effective date of the Act. Further, an “Explanation” at the end of Rule 4 states: “For the purposes of this rule, it is hereby...
clarified that differential rights attached to such shares issued by any company under the provisions of Companies Act, 1956, shall continue till such rights are converted with the differential rights in accordance with the provisions of the Companies Act, 2013.” The explanation fails to clarify how that conversion is to take place, for example, in the case of private limited companies, which were unregulated by the 1956 Act as far as the issuance of shares with differential voting rights was concerned.

Rule 13 of Companies (Share Capital and Debentures) Rules, 2014 states that a preferential issue (an issue of shares or other securities, by a Company to any select person or group of persons on a preferential basis) under Section 62 has to comply with the conditions of a private placement under Section 42. It is unclear why such provision is made and making fund raising extremely challenging for companies.

Rule 13(1)(ii) of Companies (Share Capital and Debentures) Rules, 2014 defines “shares or other securities” to mean equity shares, fully convertible debentures, partly convertible debentures or any other securities, that can be convertible into or exchanged with equity shares at a later date. It is unclear whether this rule covers loans for which no securities are issued, but which, under the financing agreement, may be converted equity after a period of time.

Rule 13(2)(h) of the Companies (Share Capital and Debentures) Rules, 2014, states that with respect to convertible securities offered on a preferential basis with an option to convert to equity shares. The rule also unreasonably requires compliance with Section 42 of the Act under which securities must be allotted within 60 days of receipt of the application money. Here again, the FEMA and FDI rules provide guidance in that they permit allocation within 180 days.

Rule 18(1)(b) of Companies (Share Capital and Debentures) Rules, 2014 states that secured debentures shall be secured by creation of a charge on the properties or assets of the company. It is unclear whether this prohibits a parent company of the borrower company from providing security on the parent company’s properties and assets. Such a prohibition will adversely affect the financing transactions by subsidiary companies.

“The way the Companies Act, 2013 was drafted has led, whether intentionally or not, to provisions that are ambiguous and even contradictory. This is a very sorry state of affairs, particularly when so much has hinged on this new law. The new Act is an exemplary example of great intentions being badly translated into words and awfully implemented by the Ministry of Corporate Affairs (MCA). The devil of excessive delegation through rule making power is evident from many rules where the MCA has overstepped its power and made provisions contrary to the Companies Act, 2013. It is quite an unfortunate situation. Another very odd element of the new Act is its phased implementation resulting in huge confusion and uncertainty. With all this, one cannot say with certainty today – what is the corporate law of India?

It will require some time not only on the part of the MCA but the judiciary as well to sort through the drafting omissions, errors and ambiguities to finally give a clear and cogent voice to Parliament’s intention to enact the most significant statute in the field of company law in India in over half-a-century.”
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In 2009, Penguin Group published a scholarly work written by Professor Wendy Doniger entitled *The Hindus: An Alternative History*. A professor at the University of Chicago since 1978, Doniger is generally recognized as a leading scholar on Hinduism and mythology, and her book chronicles the development of contemporary Hinduism. Her central argument is that the modern conceptualization of a unified Hinduism can be traced to the British colonial attempt to forge an understanding of the seemingly chaotic and ostensibly contradictory collection of religious practices and traditions across the Indian subcontinent. However, this understanding was flawed, Doniger argues, because it was rooted in Protestant biases that elevated Sanskrit scripture over local languages and traditions and it ignored the foundational role of women, people of lower castes other traditionally disempowered groups, and pre-Vedic religious traditions in shaping the extremely diverse collections of religious practice and theologies in South Asia.

The following year, Dinanath Batra, a retired school headmaster and Hindu nationalist activist, sent a legal notice to Wendy Doniger and Penguin Group’s Indian subsidiary. In his notice, Batra claimed that the book was “a shallow, distorted and non-serious presentation of Hinduism” that was “written with a Christian missionary zeal and hidden agenda to denigrate Hindus and show their religion in poor light.” (Legal Notice Reference No. 254/LN/0310, Mar. 3, 2010 paras. 5-6). The notice asserted that Doniger and her publisher were criminally liable for “intentionally, deliberately and maliciously hurt[ing] the religious sentiments of the Hindu Community” and demanded that they “immediately tender an unconditional apology to the people of India and to the millions of Hindus all around the world; [] withdraw the said objectionable parts from your book and [] undertake not to offend the religious sentiments of the Hindus in future.” Id. at paras. 41, 47. After mounting pressure and settlement talks, but prior to any governmental action or threats of public disorder, Penguin Group agreed to withdraw and destroy copies of the book and refrain from future distribution in India.

The landscape of Indian free expression jurisprudence and the concomitant controversy it invariably generates highlights a significant legal and governmental paradox. On the one hand, the Indian governmental system is structured as a democratic republic that is naturally couched in an Enlightenment emphasis on individual liberty and personal autonomy. Simultaneously, however, this system of government is applied to societies that tend to define themselves communally and which traditionally do not see the individual as the basic unit of social analysis. Although this civic tension finds multiple expressions in India, the Indian approach to expressive freedom provides a particularly salient example of a state’s attempt to reconcile a mode of governance grounded in Classical Liberal principles with traditional, communal social values.

These social tensions often generate unrest that can range from vociferous protests to deadly violence. India’s legal institutions have attempted to resolve this tension by constructing a framework that liberally permits the government to restrict speech that is socially offensive and emotionally harmful in an attempt to reconcile the competing rights of individual liberty, manifested as expressive freedom, with protecting communal sensibilities, manifested...
as social harmony and collective, emotional wellbeing and dignity. The first part of this essay will explore this tension and the Indian legal system’s attempt to manage it. Woven throughout is a comparison to the American approach to restricting hate speech to illustrate the stark contrast between the two approaches and to demonstrate the idiosyncratic journey that Indian free expression jurisprudence has undertaken since independence. The second part will argue that historical and sociopolitical factors also, if not predominantly, control India’s approach to regulating this type of speech, and that India’s current approach hampers its ability to develop the type of healthy national discourse democratic republics require and undermines the goal of securing the emotional wellbeing and dignity that this approach ostensibly seeks.

India’s government is a democratic republic framed by a constitution that defines the various governmental institutions and affirmatively details their scope of authority by enumerating the grounds upon which they may act. Naturally, this system of government assumes a particular relationship between state sovereignty and the citizen. This relationship follows the traditional post-Enlightenment approach to governance developed in the West during the eighteenth and nineteenth centuries: that governmental authority arises entirely from the exclusive sovereignty of citizens and is constructed in order to secure the natural rights all individuals possess and those civil rights upon which citizens agree to allow reasonable restraints for the benefit of society. Grounded in an Enlightenment emphasis on the role of the individual as the basic unit of social analysis, this approach to governance required new definitions of rationalism, freedom, equality, and democracy that elevated individual autonomy to vastly greater importance. While post-colonial India largely avoided the type of social, bourgeois revolutions that rocked much of Europe during the eighteenth and nineteenth centuries, the tension between Western forms of governance and indigenous patterns of social organization elicited alternative manifestations.

The framers of India’s constitution recognized the challenges in establishing a modern democratic republic in a society that was characterized by B.R. Ambedkar, an early Indian statesman, jurist, and chairman of the Constitutional Drafting Committee, as basically communal and “essentially undemocratic.” Constitutional Assembly Debates: Official Reports Vol. VII: Nov. 4, 1948, at 38. Thus, the framers of India’s constitution recognized the need to strike a practical balance that would allow the state to form a functioning government around Enlightenment ideals within Indian cultural contexts.

Like the First Amendment to the American Constitution, Article 19 of the Indian Constitution protects the freedom of expression. Section One of Article 19 provides that “[a]ll citizens shall have the right (a) to freedom of speech and expression” and other expressive rights such as freedoms of assembly and to practice any profession. INDIA CONST. Art. 19 § 1. Interestingly, while the state extends this right to the people in Section One of Article 19, Section Two of Article 19 provides a broad foundation for legitimate governmental restrictions on expressive freedom by allowing the state to impose “reasonable restrictions . . . in the interests of” a myriad number of enumerated, but purposively vague, bases such as “public order,” “decency,” or “morality” among others. Id. at Art 19 § 2.

There are three key differences between the Indian and American constitutional provisions that protect expressive freedom. Each of these differences demonstrates how the Indian approach privileges the state’s ability to regulate speech to preserve social harmony and emotional wellbeing over the type of individual autonomy and personal freedom associated the American approach.

The first difference lies in the linguistic scope of the provisions themselves. While it guarantees the right to expressive freedom, the Indian constitutional text also lays out valid bases for the state to impose restrictions. This textual difference exists in stark contrast to the first amendment contained in the American constitution, which prohibits restrictions on speech categorically. Although American jurisprudence does not follow the First Amendment’s categorical approach, American courts extend the most rigorous protection to socially offensive and emotionally harmful speech to the extent it does not
fall into an unprotected category. See Snyder v. Phelps, 131 S. Ct. 1207, 1218-19 (2011) (holding that emotionally damaging or offensive speech “cannot be restricted simply because it is upsetting or arouses contempt” or “because society finds the idea itself offensive or disagreeable”). In contrast, India’s deliberate enumeration of free expression limitations demonstrates that India’s framers attempted to strike a different balance between individual freedoms and the potential, negative externalities that could result from speech that is emotionally harmful or exacerbates enmity between different social groups.

A second key difference from the American approach emerges from a close reading of Section Two of Article 19 of India’s constitution. India’s constitutional text describes the right to free expression as “the right conferred by” the state, which is affirmatively granted to the people in Section One. This language implies that the Indian framers viewed, or at least treated, the right to expressive freedom as a legal right and not a natural right. In contrast, the American constitution, following in the Classical Liberal tradition, views free speech as a natural or inalienable right that does not flow from the graces of the state, but rather one whose source is located within the innate humanity of each citizen. Although natural rights are certainly not absolute in the American approach, the fact that the American constitution identifies the source of the right to free speech as residing in the people makes it more difficult for the state to restrict it because that source is not the state. Although it can enforce modest restrictions, the American government cannot restrict this right easily because, under its approach, the people and not the government are the source of the right. In contrast, the Indian constitution frames expressive freedom as a legal right rather than as a natural right, and thus state restrictions of speech become easier to justify.

The final difference in the Indian approach to restricting speech is also codified in the provision that allows the Indian government to impose “reasonable restrictions” on its citizens’ right to expressive freedom. INDIA CONST. Art. 19 § 2. Naturally, this reasonable standard has different statutory expressions depending on the type of restriction. Nevertheless, as the Indian statutory framework regulating speech and the application and judicial exploration thereof demonstrate, the Indian definition of reasonable is far more flexible than the standards governing restriction of speech in American jurisprudence. When viewed in tandem with the comparatively weak restrictions governing the type of process the Indian government must provide someone to deprive him or her of life or liberty, all that the Indian constitution requires for a restriction on expression to be lawful is that the restriction on speech be “reasonable” and that it was imposed pursuant to some form of legitimate government action. See id.; id. at Art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

Building upon this constitutional foundation, the Indian government has developed a statutory regime permitting the suppression and criminalization of speech that is emotionally harmful or socially offensive. The two pillars of this regulatory framework are Sections 153A and 295A of the Indian Penal Code, statutes enacted by the British Colonial Government and retained by India at independence. Section 153A criminalizes speech that “is prejudicial to the maintenance of harmony between different” religious or social groups. India Pen. Code (1972), § 153A(1)(a)-(b). Similarly, Section 295A imposes criminal liability on anyone who “with deliberate and malicious intention of outraging the religious feelings of any class . . . insults the religion or religious beliefs of that class.” Id. at § 295A.

Notwithstanding the criminal sanctions provided by Sections 153A and 295A, in recent years, there has been less of an emphasis on prosecuting individuals directly for these offenses and more on banning and seizing offensive materials though Sections 95 and 96 of the Code of Criminal Procedure. These provisions collectively allow the government to ban the publication of any materials that violate, or would violate, Section 153A or Section 295A and to confiscate the materials indefinitely or until an injured party files a petition to set aside the forfeiture or ban order. The Indian Supreme Court has affirmed the constitutionality of this regulatory regime, striking a balance competing interests such as protecting individual freedom and maintaining social harmony in a manner that allows the state to
privilege the latter. See, e.g., \textit{Ramji Lal Modi v. State of Uttar Pradesh}, 1957 S.C.R. 860 (India 1957) (while affirming a conviction under Section 295A, holding that Section Two of Article 19 of the Indian Constitution permits the government to impose criminal liability so long as the restriction falls within the broad test of being “in the interests of public order,” even if a nexus between speech that may result in public disorder and an actual disturbance of or proximate threat to public order is lacking); \textit{Sri Baragur Ramachandrappa v. State of Karnataka}, 5 S.C.C. 11 (India 2007) (affirming the ban and forfeiture of a novel with a controversial plot involving a twelfth century Vedic saint and philosopher pursuant to alleged violations of Sections 153A and 295A even when there was no breach of or even a remote threat to public order and the ban and forfeiture order was consistent with the government’s authority to prevent general outrage in “ordinary times”).

In addition to the expansive framework for restricting socially offensive and emotionally harmful speech provided by India’s constitutional framework and developed by the Indian framers and Supreme Court, other social and historical factors contribute to India’s comparative willingness to restrict this type of speech. These other factors include the historical legacy of colonialism and the sociopolitical function of quelling social conflict and conspicuously demonstrating governmental accountability.

Colonialism in South Asia acted as a powerful resynthesizing force, reconstituting through a foreign lens many fundamental aspects of society ranging from religious practice and theology to political governance. Due to misunderstanding, ignorance, and convenience, the British colonial project created an ethnocentric, simplified understanding of South Asian social structures, religious traditions and relations, and political dynamics as a hermeneutic framework to allow it to implement rational policies in pursuit colonial of goals, such as mercantile capitalist wealth extraction and spreading peace and harmony based on “good” Christian morals. Aside from conquest, the key mechanism for implementing this understanding consisted of establishing English-derived common law rule buttressed by statutory enactments that protected British colonial interests.

Introduced in 1898 and amended in 1927, Section 153A initially sought to maintain harmony between the local population and Europeans during colonial rule. Similarly, the British introduced Section 295A in 1927 to quell the appearance of favoritism thereby preventing social instability and resentment toward British suzerainty, a particularly pronounced British fear after the turbulence of the Rebellion of 1857. These statutory enactments, along with the press censorship regime established in the early nineteenth century and dramatically strengthened after 1857, constituted the British attempt to secure the colonial state by suppressing ideas injurious to British rule either in the form of direct hostility toward Europeans or resentment flowing from the perceived favoritism of one social or religious group over another.

Upon independence, the India inherited this control regime, and the constitutional framers and judiciary allowed it to remain intact. In spite of, or perhaps because of, the framers’ experiences with British censorship and speech criminalization, all the colonial hate speech laws remained in force. The framers knew first-hand the threat ideas could pose to the security of the state, and the general consensus was that the state’s primary goals of developing India, mitigating poverty, and diminishing the role of caste and communalism took priority over ensuring robust expressive freedom.

While these concerns remain a challenge for contemporary India, it is not clear that maintaining a state with a remarkably expansive power to restrict speech, a power itself formulated in a colonial context to meet colonial objectives, is a viable way for a modern democratic republic to put rest the imprisoning effects of its colonial past. The force of violent or imminently combustible outrage remains a central driver of Indian politics and governance. As a result, instead of a reasoned, informed national discourse defining the appropriate the scope of citizens’ rights to “[l]iberty of thought, expression, [and] belief,” (INDIA CONST. Preamble) the contours of expressive freedom in India are too often defined by reactive government responses to social vitriol, outrage, and violence. Ironically, this familiar pattern echoes the British colonial government’s relationship with its Indian subjects.
To be sure, expressive freedom enjoys more protection in post-Independence India than it did under British rule. However, this difference is more quantitative than qualitative. The fundamental drivers of Indian free speech discourse have remained substantively unchanged, thus begging the question of whether continued implementation of a regulatory regime crafted for colonial purposes is capable of moving a post-colonial democratic republic beyond the sociopolitical limitations established by that regulatory regime during its colonial experience. Instead of encouraging tolerance and open discourse among India’s diverse citizenry, regulations the Union Government inherited from its colonial predecessor continue to encourage sectarianism, intolerance of dissent, and a stunted national discourse wherein groups seek redress from offense primarily through pressuring the state to sanction their adversaries.

Yet another motivating force that shapes India’s expressive freedom jurisprudence is the need to demonstrate competent governmental responsiveness to social pressure. As an outgrowth of India’s national discourse that often consists of offense and outrage, a discourse shaped by India’s colonial experience, keeping a permissive regulatory regime in place allows the state to exercise a conspicuous public peacekeeping function. As social tensions wax in the aftermath of an initial controversy, the state typically attempts to tamp down social animosities to preserve public order. Furthermore, the state’s swift and often overreaching response also allows the state to avoid appearing weak and ineffectual in the face of fervent demands for action by offended groups. These efforts usually entail intervening, upon complaints from purportedly offended groups, through arrests and criminal prosecution under Sections 153A or 295A or ban and forfeiture orders pursuant to Section 95. As a result, the administrative branch provides an immediate political solution to an immediate social problem by appeasing temporary outrage and censuring the provocative speech. Meanwhile, the courts, after passions have cooled, provide the legal solution, which recognizes more ample protection for speech by reversing or dismissing the overreaching executive action. India’s legal system clearly recognizes stronger protections for expressive freedom than does India’s political branches and frequently overturns the law enforcement’s application of speech restrictions by recognizing that the value of free speech outweighs preventing offense, finding technical fault with the restriction’s application, or even through superficial and pretextual reasoning. However, it is important to note that the courts are afforded this latitude to overturn the restrictive action because India’s notoriously clogged judiciary ensures that they almost always operate years after the social conflagration wanes. Therefore, the pattern results in a sort of governing dance: the political branches bend to social pressure to appear strong and responsive to outraged citizens while years later the judiciary quietly acknowledges the unconstitutionality of the political branches’ actions and lifts the unlawfully imposed sanction.

While India’s expressive freedom jurisprudence provides the state a unique methodology for quelling escalating social tensions, it also is easily susceptible to inconsistent application and abuse. Naturally, inconsistent application of India’s speech restrictions is problematic because its citizens will not be able to distinguish lawful from unlawful speech. As a result, uncertainty reigns, speech is chilled, and the public discourse suffers.

In addition to the general uncertainty of surrounding the scope of one’s constitutional rights, India’s speech regulation jurisprudence is vulnerable to abuse by the powerful at the expense of the vulnerable. Since the rapid growth of the Hindutva Movement starting in the early 1980s, India’s expression regulatory regime has been successfully mobilized by conservative, mainstream Hindus to attack religious minorities and suppress dissenting Hindu voices. See Sri Baragur, 5 S.C.C. 11 (“It is significant, and it is clear from the very large number of judgments that have been cited before us, that most of the [Section 153A and Section 295A] matters pertain to attacks on minorities or religious and social groups or individuals who are perceived as being prodigals or heretics and therefore unacceptable to the conservatives amongst the mainstream.”). Ironically, and despite the Court’s apparent self-awareness, Sri Baragur is itself a prime
example of conservative, mainstream Hindu groups successfully utilizing India’s speech regulations to attack what they view as unorthodox constructions of their religious liturgy. As this example demonstrates, among many others, India’s restrictions on socially offensive and emotionally harmful speech are much more often used by powerful majorities as weapons for suppressing political adversaries and dissent than they are as shields to protect the vulnerable or to promote personal dignity or cultural, religious, and political pluralism.

Furthermore, as the controversy surrounding Doniger’s book demonstrates, India’s hate speech regulatory regime is vulnerable to exploitation by even extra-governmental actors who desire to suppress dissenting speech. In this instance, conservative Hindu activists were able to silence a scholar articulating views of history and theology that conflicted with the Hindu right’s sociopolitical ideology. Significantly, Batra was able to silence his opposition merely by invoking potential state sanction pursuant to Section 153A and 295A, among other statutes. This threat was especially potent considering India’s permissive approach to regulating socially offensive or emotionally harmful speech and the manner in which sanctions are applied disproportionately to dissenting and minority speech by India’s judicial and executive branches. Instead of critiquing Doniger’s view through informed, persuasive discourse, Batra and his supporters were able to achieve a more total victory: they exerted political power to prevent those with different views from even participating in the discourse. Such an outcome provides palpable evidence of a system struggling, if not failing, to balance the competing values of individual freedom with social harmony and to further its own goals of protecting the vulnerable, enhancing social pluralism, and safeguarding personal dignity.

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In a case that made headlines, the Supreme Court of India in December 2013, handed down a decision in *Suresh Kumar Ooushal & Another v. NAZ Foundation & Others* ([2014] 1 SCC 1), which alarmed many in the gay rights community worldwide. The Court reversed the Delhi High Court and held that Section 377 of the Indian Penal Code which criminalizes private, consensual gay sex does not suffer from any constitutional infirmity and that it was within the legislative, not judicial, sphere to amend or repeal the section. The Delhi High Court had held that Section 377 violated Articles 21 (right of privacy and dignity), 14 (right to life) and 15 (right of non-discrimination) of the Constitution.

The appellants, a non-profit group, had argued that Section 377 has been enacted to penalize sexual acts which are “against the order of nature” based on traditional Judeo-Christian moral and ethical standards and was being used to legalize discrimination against sexual minorities. They argued that the section had no justification in contemporary Indian society based on the historic and moral values concerning sexual relations. They cited a Law Commission report that had recommended repeal of Section 377 and on policy grounds including the detrimental effect it has on lives of people and the health effects on the lives of gay persons who cannot openly obtain health services including HIV/AIDS prevention and treatment.

The two-judge Supreme Court bench held that the law’s distinction between natural (procreative) and unnatural (non-procreative) sex, whether between members of the opposite sex or not, was not arbitrary and irrational. In reasoning that has been criticized in several quarters, the Supreme Court bench justified upholding the law on the ground that only a fraction of the population is gay and, in any case, few people have actually been prosecuted under Section 377 in the last 150 years. In upholding Section 377, the Court appears to have been heavily influenced by that aspect of the law that criminalizes non-consensual acts and acts with minors. Yet, the Delhi High Court had only held unconstitutional that part of the law that criminalized private consensual behavior. The Supreme Court bench focused on the non consensual aspects of the statute, and while appreciating that consensual acts could get caught in Section 377’s wide net, still upheld its constitutional validity.

The court observed that case law revealed “no uniform test [that] can be culled out to classify acts as ‘carnal intercourse against the order of nature.’ In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed. All the … cases refer to non consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent. It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation.” In one of the more puzzling aspects of the decision the court noted that Section 377 “merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity or orientation.” The Court held, in effect, that under Section 377 IPC it is not a crime for persons to be gay so long as they do not do the one thing that makes them gay. Also, it bears mentioning that Section 377 touches upon heterosexual behavior, too, because it makes no distinction between homosexuals and heterosexuals.

**CASE NOTES**

**THE SUPREME COURT AGREES TO CONSIDER WHETHER TO GRANT REARGUMENT ON ITS DECISION UPHOLDING THE CONSTITUTIONALITY OF SECTION 377 OF THE INDIAN PENAL CODE CRIMINALIZING GAY SEX**

*By Debopama Roy*
The *Koushal* case stands out in stark contrast, however, to the April 2104 decision of another two-judge bench of the Supreme Court, which included the Chief Justice (*National Legal Services Authority v. Union of India and Ors.*), that recognized transgendered persons as a third gender with equal rights as all other persons. The two cases intersected briefly when the bench in the transgender case referred to the gay rights case noting that Section 377 IPC “though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. A Division Bench of this Court in *Suresh Kumar Koushal and another v. Naz Foundation and others [(2014) 1 SCC 1]* [the gay rights case] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.” The court in the transgender case made no effort to reconcile the inherent contradiction between its decision to recognize equal rights for transgender persons regardless of their sexual orientation and the previous decision by a different bench of the same court that held that the criminalization of gay sex was not unconstitutional. Ironing out that inconsistency was implicitly left to another day. (Hijras are classified as neither male nor female. Generally, they are born male, they adopt women’s names, behavior and clothing and may, or may not, be eunuchs or they may adopt a gender role that is neither male nor female.)

While an initial application in January 2014 to reargue *Koushal* was denied, in late April 2014, a four-judge bench of the Supreme Court granted petitioners leave to hear arguments on admitting a “curative petition” challenging the decision. Curative petitions are rarely granted and only where the court can be shown to have had the appearance of bias or violated principles of natural justice. The hearing was to have been held in early May 2014 to hear whether there is merit to petitioners’ argument that reargument should be permitted. If leave to reargue is granted, reargument is expected to be heard in late June 2014.

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The landmark decision on the law of adoption by the Supreme Court in *Shabnam Hashmi v. Union of India* [(2014) 4 SCC 1] demonstrates changing attitudes in India in the area of personal law. The effect of the decision is that the personal religious laws of individual litigants will no longer have primacy over the country’s uniform civil code as contained in legislative acts which flow from Article 25 of the Indian Constitution. The uniform civil code as contain in statutory law shall have equal footing with personal religious laws of litigants. In this case, the petitioner, Shabnam Hashmi, had adopted a daughter and wanted her recognized under the law as her natural daughter.

Prior to 2000, India did not have a law on adoption for non Hindus. The only enactment on the issue was the Hindu Adoption and Maintenance Act, 1956. With the enactment of the Juvenile Justice (Care and Protection of Children) Act 2000, as amended, the right to adopt children is recognized across the board irrespective of personal laws. This, in essence, enables Muslims to evade their orthodox personal laws which do not permit adoption. The Muslim personal law permits only guardianship and disallows inheritance of property for an adopted child. Intervenor the All India Muslim Personal Law Board had argued that Sharia law on guardianship is consistent with United Nations conventions and, therefore, not in conflict with the meaning and intent of the Juvenile Justice Act and that Sharia law should, therefore, prevail.

The court, however, declared that under the Juvenile Justice Act a Muslim may adopt a child regardless of his personal law. In order to avoid an apparent clash between personal laws and the Juvenile Justice Act the court calls the Act an optional legislation that does not impose any compulsory right over any community. The judgment falls shy of declaring the right to adopt a child the status of a Fundamental Right and leaves it for the legislature to do so as and when it deems appropriate. The court did not rule that the right of adoption is a fundamental right under the constitution.

Significantly, under the decision, the Juvenile Justice Act does not preempt personal Islamic law, which is still valid and enforceable. The decision holds only that the courts must recognize an adoption under the statute should a litigant, regardless of his or her personal religious law, choose to seek enforcement of his or her rights in a civil court under that statute. In that sense, the decision is a step closer toward achieving a Uniform Civil Code as envisaged in Article 44 (also a directive principle of state policy) of the constitution (“The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India”).

*Chritarth Palli is a fourth year student at Government Law College, Mumbai. Upon graduating in 2015, he plans to attend a Masters in Law program at a law school in the United States. He can be reached at chritarth04palli@gmail.com.*
From February 13 – 15, 2014, the India Committee of the American Bar Association Section of International Law participated in the holding of a historic Conference in New Delhi, India, entitled "Threading the Needle in U.S. India Deals: Safe Passage through Formidable Legal Risk." The Society of Indian Law Firms and the Services Export Counsel played leading roles in the presentation of this most important Conference. Dr. Lalit Bhasin, Erik Wulff, and James P. Duffy, III, where the Convenors of the Conference. This was the Section of International Law's second conference in India, the first being in Mumbai in January 2012. These two conferences grew out of a historic ABA ILEX delegation to India in 2009 and reflect the ABA's continuing growing interest in India.

While it is not possible in this brief article to name all of the people from the United States and from India, who worked tirelessly to make the Conference a great success, Richa Naujoks, Sajai Singh, Kaviraj Singh, and Shikhil Suri deserve special mention as does Judge Sanjay Tailor. Similarly, it is not possible to name all of the many important Indian legal personalities who spoke at the Conference, but notable participants included Gopal Subramanium, Fali Nariman, and Ram Jethmalani among others. Notable participants from the United States included Laurel Bellows, Immediate past President of the American Bar Association and William T. Robertson, III, another recent past President of the American Bar Association as well as Section of International Law Chair Elect Marcelo Bombau.

The Conference began on Thursday evening, February 13, 2014, at the Lalit Hotel in New Delhi with opening remarks from a number of personalities, including, Mr. P.H. Parekh, the President of the Supreme Court Bar Association in India, Mr. Manan Mishra, the Chairman of the Bar Council of India (the regulatory body for lawyers in India), and Mr. Kapil Sibal, the then Minister for Law and Justice. Cocktails were served during the opening session and remarks and an extensive dinner followed. This was the first of many important networking opportunities that were available throughout the Conference.

The following two days, namely, Friday and Saturday, February 14 and 15, 2014, respectively, took place at the Hyatt Regency Hotel in New Delhi and 17 substantive legal programs were presented on a wide variety of legal topics that were germane to the theme of the Conference. While space does not permit the listing of the titles of each of the 17 programs, there were several programs on various aspects of the new Company's Act, as well as programs on cyber security, listing of Indian companies on US exchanges, taxation, intellectual property, bilateral trade, arbitration, commercial aviation and wealth transfer, to mention but a few of the topics covered. The final plenary session dealt with increasing opportunities for young lawyers in India.

The program schedule included numerous networking breaks on Friday and Saturday as well as formal lunch sessions that were designed to foster networking and interchange among the US and Indian participants. There was also a formal reception and dinner on Friday evening for the same purpose. The Conference ended with "High Tea" late in the afternoon on Saturday, which was a further networking opportunity for Conference participants. These networking opportunities proved to be invaluable in enabling lawyers from the US and India to network and exchange their views as well as develop friendships and relationships.
The participants numbered about 150, and consensus of all involved was that the Conference was a huge success and more than accomplished the purposes for which the Conference was convened.

In view of the obvious success of the Conference, the India Committee would like to make this a biannual event and build upon these activities going forward with a view towards increasing understanding and awareness of important trade, business, and other issues that will confront US and Indian lawyers as the two countries expand their relationships and do more business and commerce together.

Now that the India Committee has participated in the running of two very successful meetings in India, it has acquired a considerable amount of expertise related to running a successful meeting in India. The India committee intends to build upon this expertise as it works more closely with its Indian colleagues on future meetings.

*James P. Duffy, III, was a Co-Convenor of the February 2014 conference in New Delhi entitled "Threading the Needle in US India Deals: Safe Passage through Formidable Legal Risk." Mr. Duffy is a founder and senior partner of the firm Berg & Duffy, LLP in New York City. He specializes in international banking and finance, international commercial law, taxation, finance and securities, international estate planning, intellectual property and issues involving the First Amendment of the United States Constitution. He is a member of the India Committee of the Section for International Law of the American Bar Association and a founding member, past Chair, and permanent member of the Executive Committee of the International Law and Practice Section of the New York State Bar Association. He currently serves as one of the Section's representatives to the House of Delegates of the New York State Bar Association. He can be reached at jpduffy@bergduffy.com*
The India Committee Thanks the Following Entities for their Support in Making the February 2014 Delhi Conference a Success
Laurel Bellow, Immediate Past President, American Bar Association with Kapil Sibal, then Minister of Law and Justice

Conference Co-Convenors, Lalit Bhasin, President, Society of Indian Law Firms (SILF) and Eric B. Wulff with William Richardson, III, Past President, American Bar Association and Laurel Bellows, Immediate Past President, American Bar Association

Co-Convenors James P. Duffy, III, Eric B. Wulff (at far left) and Lalit Bhasin, President of the Society of Indian Law Firms (at far right) with Laurel Bellows, Ashok Chawla, Chairman of the Competition Commission of India and India Committee Co-Chair, Judge Sanjay Tailor (next to Mr. Bhasin)
Justice A.P. Shah, Chair of Law Commission of India and former Chief Justice of Delhi High Court with Laurel Bellows

Co-Convenor, Lalit Bhasin, President of the Society of Indian Law Firms

Co-Convenor, James P. Duffy III with Kapil Sibal, then Minister of Law and Justice
Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee’s jurisdiction. These submissions are then compiled as respective committee’s Year-in-Review articles and typically published in the Spring Issue of the Section’s award-winning quarterly scholarly journal, The International Lawyer. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee’s Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

India Law News is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Summer 2014 issue of India Law News will carry a special focus on venture capital. Please read the Author Guidelines available on the India Committee website. Note that, India Law News does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the Editorial Board.
The India Committee is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

BECOME A MEMBER!

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the ABA website. We encourage active participation in the Committee’s activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee’s projects, including guest editing a future issue of the India Law News.

Membership in the India Committee will enable you to participate in an online “members only” listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

UPCOMING SECTION EVENTS

Conference

Section of International Law 2014 Fall Meeting
Buenos Aires, Argentina
Date: October 21-25, 2014
Format: Live/In-Person

The Future of Bulk Data Collection
Date: July 24, 2014
Time: 1:00 PM - 2:30 PM ET
Format: Webinar