

LAWYERED

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Legal Vision

Interview with Mr. K.K. Venugopal

Mr. K.K. Venugopal is a legal luminary who enrolled as an Advocate in January, 1954. In 1972, he was designated as a Senior Advocate of India by the Supreme Court. He is a lawyer par excellence and has been recipient of many prestigious awards such as the Global Award 2003 from the Chief Minister of Kerala, and the Eswara Iyer “Distinguished Lawyer” from the Kerala Bar Federation. He has also been conferred the most Prestigious Award of the country “Padma Bhushan” in 2002, by the President of India.



(Source: ICADR)

1. According to you what judicial reforms should be made so that justice is timely delivered?

There has to be an increase in the number of courts, at least to half the extent recommended by the Supreme Court in the All India Judges case etc. The judiciary across the board will have to have far better compensation than what they receive now and the retirement benefits should practically be the same as the compensation that they draw during their lifetime. The question of any comparison with the public services, both state and centre, should not arise if you really want a first class system of delivery of justice.

The selection of Judges with the enhanced conditions of service should be transparent and merit, along with equality, should prevail at all levels of the judiciary. The Judges at the sub-ordinate level should undergo training for a full year before they actually start discharging the functions and duties, if this is not already in vogue in some states. Judges of the High Court on being appointed should also attend the National Judicial Academy and other Judicial Academy for at least 8 to 10 weeks during the first year and succeeding years so that they may be exposed to different branches of law.

Similarly, lawyers will compulsorily have to undergo legal education on the lines prescribed by the American Bar Association in the United States. The existing system of lawyers being disciplined by Committees consisting of their peers should be given up and the system prevailing earlier or one where special tribunals consisting of retired Sub-ordinate Courts' Judges with appeals to tribunals consisting of retired High Court Judges should be established on the lines of the ombudsman in England.

Unless holistic reforms are introduced covering each one of these areas, I am afraid, we will continue to have a back log of 30 million cases in the Sub-ordinate Courts, about 3 million in the High Courts and about 55000 in the Supreme Court of India with cases pending at each one of these levels for 5 to 10 years and resulting in the litigant population losing confidence in the justice delivery system in the country.

2. What changes should be made in the law school curriculum in order to make it a dynamic one?

We have to start from a clean slate with the law schools in the first instance by eliminating all those which are sub-standard and thereafter, we have to add new ones which are as good as the ones abroad.

The curriculum has to be revised so that one set of law schools will be designated for those desiring to practice in the Supreme Court of India and the High Courts' with stress on Intellectual Property Rights, International Sale of Goods, WTO, Sports Law, Cyber Law etc. Then there must be another set of law schools which cater to those desiring to practice in the Sub-Ordinate Courts, where about 70% of the lawyers of the country would be practicing

law. Here, the stress would be more on Procedure Codes, drafting of pleadings, evidence, arbitration – domestic and international, criminal law in all its aspects, land laws and so on.

3. What qualities should litigating aspirants should possess in order to be a successful litigation lawyer?

The litigant lawyer should have:

- a. an analytical mind so that in every case he analyses, he goes to the heart of the matter and then makes it the main plank for the thrust of his arguments.
- b. Thereafter, he should restrict his arguments to the proposition of law and fact and support each one of the propositions with case laws, if relevant.
- c. He should be able to project his voice without being over-loud so that the points that he makes sinks home.
- d. He should never keep standing while the opposite party is arguing his case and never interrupt unless any misstatement is made.
- e. He should not sneer or laugh at a point made by the opposite party just to impress the Judge with ineptitude or the hollowness of the opponent's arguments.
- f. Finally, whether he wins the case or not, he should bow the Judge with a pleasant face when leaving the court hall.

But there is one thing that he has to avoid and that is misstating facts or quoting a decision by reading only the portions which favor him though there are parts of the judgments which are against his contentions. He should also not indulge in suppressing of facts or not making full disclosure of the facts.

4. Corporate practice rather than litigation has always been touted as “instant success and money mantra”. How do you debunk such a myth?

It is a difficult decision for a lawyer to make as his financial means may not be such that he could hold on for a long time without earning a sufficient income especially since in some cases, the lawyer may have borrowed monies for completing his law studies. However, in the long run, a leading litigating lawyer would, if he is competent and also lucky, be able to earn a far greater income than if he continues as an associate in a law firm. Additionally, he also has an opportunity to make a name for himself and be well-known in the association which

an associate in the law firm may not be able to achieve. The litigating lawyer, however, has no fixed hours and no holidays. He works 12 hours a day and practically every day of the week. There are considerations which are for and against both in regard to corporate practice and being a counsel.

Contributor: **Oommen Mammen (IV year)**



Legal Newswire

TRAI'S DIRECTIVE – APPROACH TOWARDS GREENER TOMORROW

There has been a global crusade against high levels of carbon emissions in the environment. Various countries are adopting green and clean technologies in order to reduce carbon emissions. In India, the Telecom Regulatory Authority of India (hereinafter referred to as “TRAI”) has issued recommendations and directions to telecom service providers to adequate measures in order to reduce carbon emissions in telecommunication sector.

The Government has accepted these recommendations provided by TRAI and have issued the same to the service providers. In a nutshell, the recommendations and directions put forth are as follows:-

1. TRAI has set a deadline for service providers to provide hybrid power in rural and urban areas i.e., 50% of all rural towers and 20% of the urban towers are to be powered by hybrid power (Renewable Energy Technologies (RET) + Grid power) by 2015.
2. The Telecommunication Engineering Centre should provide a “Green Passport” certification to all telecom products and services by 2015.
3. The telecom service providers have to give an account of total carbon dioxide and methane emissions of their network operations (also known as carbon footprint) to TRAI on bi-annual basis.
4. The telecom providers have to strive towards reducing carbon emissions and such targets should be achieved for mobile network at five percent by the year 2013 and 17 per cent by 2019. Moreover, the service providers have to promulgate Carbon credit policy in order to attain the defined targets as set by TRAI for rural and urban areas.

These recommendations have received a mixed response from various interest groups i.e. service providers, academicians and industrialists. One of the major concerns relating to these regulations is lack of any penalties or fines against telecom operators who evade from these targets which have a stipulated time limit. Concomitantly, these regulations will help in enhancing investment in the dormant renewable energy sector. Various telecom companies like Airtel, Idea and BSNL have adopted business strategies which aim at reducing carbon

emissions such as setting up of solar plants, use of biodiesel, green shelters, etc. Hence, a joint concerted effort is required on the part of the government as well as the telecom service providers so that the latter strictly conforms to the said recommendations and resulting in sharp decline of carbon emissions in the country.

Contributor: **Shinjni Kharbanda (IV year)**

Source: The Telecom Regulatory Authority of India

INTERNET CENSORSHIP: GOOGLE, FACEBOOK, YAHOO FACING THE HEAT

A complaint was registered by editor of Akbari, Vinay Rai, , who claimed that web content companies should face prosecution for alleged offenses such as criminal conspiracy, defamation, promoting enmity between different groups on grounds of religion and race and obscene content, among others on the internet. This case bring to highlight the question of internet censorship in India, with multinational companies such as Google, Facebook, Microsoft etc made parties to the case. While at the centre of the storm is the fundamental right to free speech which is bearing importance. Though the Delhi High Court has granted relief to Yahoo from the criminal case as there is no evidence that it hosted such objectionable content. The Delhi High Court in January had asked Facebook and Google India to develop a mechanism to keep a check and remove offensive and objectionable material from their web pages or like China, India would also block all such websites.

Under the Information Amendment Act, 2008 and the Information Technology Rules 2011 internet companies are obliged to screen material that was objectionable, harmful, defamatory or blasphemous within 36 hours of notification. The affected companies claim protection under India's IT laws from liability for user generated content however, they acknowledge they had a responsibility to remove content, in some cases, but only if notified about it. If found guilty the top management could face penalties and even imprisonment.

While in New York, USA, Facebook founder has a case against two of his classmates who were trying to get more money from the social networking website chief by claiming he had stolen the idea of the project from them. The Judge ruled that the 2008 settlement gave them stock and cash which ended the dispute and signed a release of all claims all claims to Facebook.

Contributor: **Shweta Nambiar (III year)**

Source: Hindu, Economic Times, BBC News.

HOW NEW IS THE QUESTION OF RIGHT TO SLEEP AS FUNDAMENTAL RIGHT?

Justice BS Chauhan mentioned that a sleeping person is "half dead" with his mental faculties are in an inactive state and terming sleeping as a basic human right. The question about sleeping as a basic right approached the Supreme Court because Delhi Police attacked yoga guru Ramdev's supporter at midnight depriving a person from sleeping. Justice BS Chauhan said in his judgment said that deprivation of sleep has tumultuous adverse effects. He further elaborated that it causes a stir and disturbs the quiet and peace of an individual's physical state. Lastly, a natural process which is inherent in a human being, if disturbed, obviously affects basic life. It is for this reason that he propounded that if a person is deprived of sleep, the effect thereof, is treated to be torturous. He amounted to take away the right of natural rest as violation of human rights. Clarifying that it becomes a violation of a fundamental right when it is disturbed intentionally, unlawfully and for no justification. Justice Kumar and Justice Chauhan unanimously agreed on sleep as a fundamental right and they believed that it is as essential as right to privacy and right to sleep which completes Right to life under Article 21.

Right to sleep as a fundamental right is not a very new case that has approached the court of law. In 1963 the case of Kharak Singh v. State of U.P. approached the Supreme Court. The petitioner Kharak Singh was charged in case of dacoity in 1941 but he was eventually released as there was no evidence against him. After his release the U.P police in accordance with regulation 228 under chapter XX of the U.P police regulations opened a history sheet with regard to Kharak Singh. The village chaukidar and police constables for the purpose of surveillance used to enter his house, wake him up, knock and shout at his door during night hours and thereby disturb him. He has to report to the village chaukidar or police station before leaving for another village and also mention his destination and period within which he would return. His village police station on receipt of such information immediately informs the police station of his destination where he was kept under similar close watch. Sometimes Kharak Singh was compelled to wake up from sleep and accompany the visiting police constables to the police station. The Supreme Court held that regulation 236(b), which authorizes domiciliary visits, is void and unconstitutional. The majority Judges in the decision of this case said that our constitution does not in terms confer like constitutional guarantee. However the dissenting opinion of Justice Subba Rao was in favor of deriving a right to privacy from the fundamental right guaranteed under Article 21.

Therefore Right to life includes right to privacy and this includes right to sleep as a whole. Sleep as a fundamental right is crucial to life which is at par with right to privacy and right to life. The question of Right to Sleep as a fundamental right is not a new question that the country needed answer for. The question had arrived in case of Kharak Singh v. State of U.P. but the decision of both the case is parallel to each other.

Contributor: **Shreya Mazumdar (II year)**

Source: Times of India, IBN Live, <http://www.detectiveupdate.com/advocate/right-to-privacy-in-india/>.

SOUTH AFRICAN COURTS SET TO PROSECUTE ZIMBABWEAN RIGHTS ABUSERS

A case which will catch the eye of international community has been filed by South African and Zimbabwean non-governmental organizations (NGOs), namely, The Southern Africa Litigation Centre (SALC) and the Zimbabwean Exiles Forum (ZEF) in the North Gauteng High Court to compel South Africa to investigate and prosecute high level Zimbabwean officials accused of crimes against humanity.

The event occurred on 28 March 2007, when Zimbabwean police conducted a raid on Harvest House, the headquarters of the then opposition party, the Movement for Democratic Change (MDC). Initially over 100 people were taken into custody, including those who happened only to work in nearby shops or offices. Individuals affiliated with the MDC were detained in police custody for several days where they were allegedly continuously tortured which included mock execution, water boarding and the use of electric shock.

SALC said it had submitted a comprehensive dossier to South Africa's National Prosecuting Authority (NPA) in March 2008 detailing the alleged crimes. But a year later they were told no investigations into the alleged human rights violations would take place.

SALC and ZEF are therefore asking the High Court to review and set aside the decision of the National Prosecuting Authority and the South African Police Services not to investigate Zimbabwean officials linked to acts of state-sanctioned torture following a police raid on the headquarters of the Movement for Democratic Change in 2007.

Nicole Fritz, Executive Director of SALC said that the decision not to pursue credible evidence of crimes against humanity was taken for political reasons; it ignored South Africa's clear obligations under both international and domestic law. She further elaborated that by ratifying the Rome Statute of the International Criminal Court, South Africa committed itself

to prosecute perpetrators of serious international crimes, regardless of where they are committed. Lastly, she concluded that it's in South Africa's own national interest to enforce this law so that South Africa is not a safe haven for the worst types of international criminals. The Rome Statute of the International Criminal Court (Rome Statute) came into force in 2002 and allows the International Criminal Court (ICC) jurisdiction over crimes committed after 1 July 2002. The Rome Statute has been ratified by 120 countries and represents collective agreement to prosecute serious crimes under international law. However, this case represents the first time that a South African court will have the opportunity to provide guidance on the scope and nature of the obligations placed on South African authorities by signing up to the ICC.

Section 4(1) of the ICC Act creates jurisdiction of South African court over ICC crimes by providing that despite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment. Section 4(3) of the Act provides for extra-territorial jurisdiction. In terms of this section, a South African court has jurisdiction over any person who commits an ICC crime outside the territory of the Republic and that person, after the commission of the crime, is present in the territory of the Republic. Section 4(3) deems such an offender's crime to have been committed in the territory of the Republic.

The ICC Act therefore empowers the NPA and the South African Police Services (SAPS) to initiate investigations and prosecutions against the persons responsible for international crimes, including torture and other crimes against humanity committed in Zimbabwe.

The case will be heard between 26 March and 30 March 2012.

Contributor: **Himanshu Bagaria (II year)**

Sources: Voice of America News, Daily Nation and African Global Village.

THE 2G VERDICT

Undercharging cellular service providers in India for 2-G spectrum licenses is one of the biggest abuses of power in recent history. On 2 February, the Supreme Court reached a decision in which it cancelled all the 122 licenses that A. Raja, the then Telecom Minister, had issued on the grounds that such allotment was unconstitutional and arbitrary. The licenses granted to companies on or after Jan 10, 2008 and subsequent allocation of spectrum to the licensees was declared illegal and such action was quashed. The Court struck down the first

come first serve policy and directed the TRAI to allot spectrum through auction. Though allotments before 2008 were made on the basis of first-come-first serve and such licenses subsisted, they were not cancelled when the policy of first-come first serve was struck down, for parties holding such prior allotments were not arrayed as Respondents.

The Supreme Court ruling said that the current licenses will remain in place for four months, in which time the government should decide fresh norms for issuing licenses. The court asked telecom regulatory authority TRAI to make these fresh recommendations. The bench said the allocation of spectrum should be done through auction within four months.

The Court also refused to order an investigation into the role of Home Minister P Chidambaram in the telecom scam, asking a CBI trial court to decide on this instead. P. Chidambaram was not made a co-accused for his alleged involvement. A. Raja and Kanimozhi were yet to be tried by a Special CBI Court when this judgment was passed. Though A. Raja alleges that the decision is against the principles of natural justice since his case is pending before the CBI Court and he will be unfavourably looked at. The Centre has also criticized the judgment stating that the Supreme Court has gone against the separation of powers and deliberated on a policy matter. Though the judgment rejected the stance that public policy is outside the purview of judicial review, giving the judiciary wider powers to do justice when public policy is arbitrary.

Contributor: **Mukta Batra (II year)**

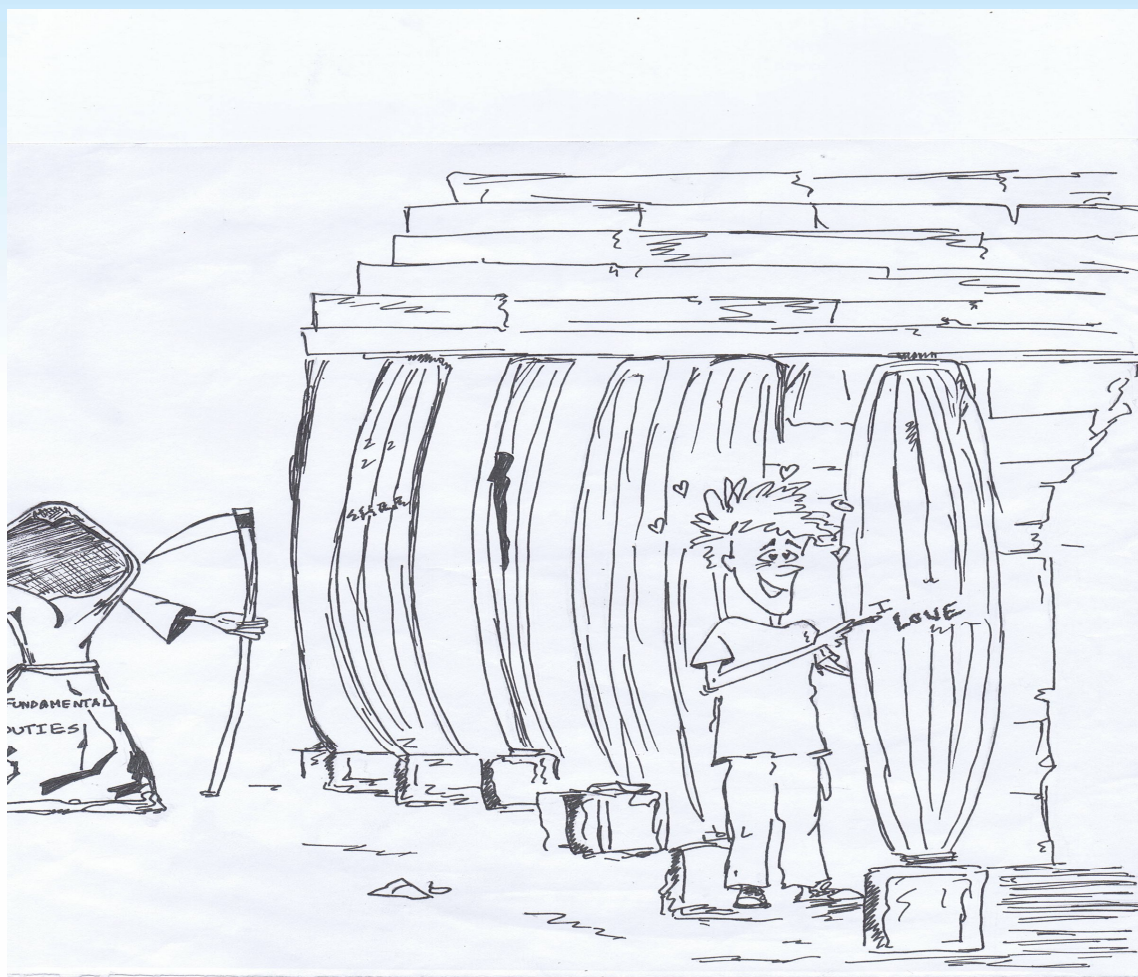
Sources: India Today, Economic Times, <http://www.2gscam.in/>

ARMY CHIEF AGE ROW

Army Chief General V. K. Singh before withdrawing his petition had submitted additional documents in the Supreme Court which was in support of his writ petition that clearly gave proofs for his date of birth being 10th may 1951. The documents consisted of domain of Adjutant General branch, which was the official record keeper of the Indian army headquarters; it showed General V. K. Singh's date of birth as May 10, 1951 as printed in his matriculation certificate. But a contradiction came when in the military secretary section, which is responsible for promotions and postings in the army, in his UPSC form he had his date of birth as May 10, 1950. The Court enquired as to why he never took any action against entry of wrong date of birth in the UPSC form. Further, the Supreme Court has refused to entertain General V. K. Singh's plea because it was pointed by the bench of Justices R.M.

Lodha and H.L. Gokhale that the Army Chief, had in three occasions accepted the government's decision in determining his date of birth as May 10, 1950 therefore was not allowed to go back on his commitment. The bench made it also clear that question raised by General V. K. Singh was not about the determining his actual date of birth but it was concentrated on recognition of his date of birth as 10th may 1951 by the Defense Ministry in the official service record.. During the years of 2006, 2008 or 2009 when the issue of General V. K. Singh's date of birth had been discussed he had accepted a wrong date i.e. 10th may 1950. After the case was withdrawn Mr. Puneet Bali said that General V. K. Singh's date of birth will remain as 10th may 1950 for the purpose of maintaining his service record in army, also the counsel for the government Mr. Vahanvati told that government had good faith in the Army Chief and had no intentions bringing any kind of dishonor to his integrity. So, towards the end, the Supreme Court had upheld the government's contention to keep General V. K. Singh's date of birth as 10th May 1950. The army chief will be retiring on 31st May 2012. Lt. General Bikram Singh will be the next Chief of Army Staff and will take over on 31st May 2012.

Contributor: **Priyanka Kumar (II year)**



Legal Jargon

TAKE PRIDE, MAKE US PROUD

We all are, or soon will be, litigators. I want to begin this article with some (oversimplified) historical perspective on our profession. In one sense, we are glorified goondas. Don't be offended; I will distinguish us from them below.

But we play a vital role in today's dispute resolution. In pre-historic times, disputes were won by whomever had the most muscles or biggest club. Between two men who each wanted a certain cave to himself, the bigger man won. Later, in the era of fiefdoms and kingdoms and rajas, the winner was the person with the most effective political power – he who directed those most able to injure, destroy and kill. This is still the way of resolving disputes in less civilized corners of our world, be it through Chicago's mafia thugs or Mumbai's goondas.

But largely, our civilization has matured such that we have a much better system – better because it is less violent and more just.

That civilized system includes you and me. The last resort for disputes –for those arguments yet unsolved after negotiation and compromise – is litigation. An objective, impartial judge with no stake in the matter decides the case, based on rules set out for all. But the judge does not have time to research all the details of each case. That's where we come in.

We are experts and professionals in this civilized system. A party to a dispute hires us to present its case in the way most favorable to it. We are able to separate the relevant facts from the irrelevant and to apply the law to those facts in a way that very few non-lawyers can. For this, we receive prestige, the trust of our clients, and money, sometimes a great deal of money.

Why does this system work? Because the State stands behind the judgment. We have at our disposal the police and military might of the nation when we win a judgment in court. All the people, theoretically, have that power at their disposal if they win a court judgment. This is why our skill is valued and why we wield the power we do.

Now, with that in mind, let me give you a charge that my mentor gave me long ago, a charge, when heeded that will justify the power and prestige given us as litigators. I hope it guides your professional life as it has mine:

In any given case, you cannot change the facts. Facts are stubborn things, as is rightly said. And we cannot even change the law as it stands. These two vital aspects to the dispute – the law and facts – are determined before the client even approaches you. But one thing (a thing that is sometimes decisive) is always in your control: your level of dedication. The other side may have better facts, and they may have better law. But never ever let the other side be more prepared than you are. For that there is no excuse.

If you're always more prepared, your peers and clients and even judges will respect you; your adversaries will fear you; and you will win more cases than otherwise. Is this a fool-proof way to win every case? Of course not. The facts and law (and public policy arguments) are the most determining factors. But the dedication and the hard work of the advocate can tip the scales of justice. Don't believe me? Just ask the Tatas or the Ambani brothers why they pay crores for the best legal representation when the facts and law of their disputes are pre-determined.

So, take pride in your budding membership in the finest dispute resolution mechanism history has ever designed. Work hard and play by the rules and you might someday be an honored name within this honored profession.

May it be so.

Contributor: **Glen Thomas Parks, Guest Faculty**

School of Law, Christ University.

**VODAFONE INTERNATIONAL HOLDINGS, B.V. v. UNION OF INDIA:
AN ANALYSIS OF THE DECISION DURING AND AFTER THE INCOME TAX ACT
REGIME**

The Supreme Court of India, on January 20, 2012 adjudicated the dispute between Vodafone International Holdings, B.V. and the Union of India. The brief facts of the dispute are that Vodafone International Holdings registered in British Virgin Islands (Vodafone) entered into a joint venture with Hutchison Telecommunications International Limited (Hutchison) registered in Cayman Islands by which Hutchison would transfer CGP shares in Cayman Islands to Vodafone. CGP in turn held shares in various Mauritian companies which in turn

held shares in the Indian company, Hutchison Essar Ltd. [which subsequently was renamed Vodafone Essar Ltd. (VEL)]. Hence, the Revenue alleged that there was an indirect transfer of shares between two non-residents and hence this transfer should be Vodafone should be liable for withholding tax under Section 195 of the Income Tax Act, 1961 (ITA).

The Court adjudicated upon the issue as to whether a transfer of Indian shares between two non-residents outside India was liable to be taxed in India.

The Revenue argued that income was deemed to accrue in India by virtue of section 9(1) (d) of the ITA, as there was a transfer of Indian shares outside India between two non-residents. On the other hand, Vodafone argued that there was no income which was deemed to accrue in India under the section. Only if income accrues or arises or is deemed to accrue or arise in India, can tax deduction at source be made. If no income arises in India, the question of deducting tax at source or withholding tax does not arise.

The Court took into account the following arguments while holding that such a transaction could not be taxed in India:

- 1) The source of income lies where the transaction is effected and not where the underlying assets lie. In the present case, the underlying assets were the shares of the Indian company which was transferred from Hutchison to Vodafone indirectly through the transfer of CGP shares. Hence, the source of income would lie outside Indian as the transaction was effected as per Mauritian laws.

Further, the Court recognized the fact that such transactions could not be taxed by judicial creativity. There must be an express legislation or provisions must be contained in a taxing statute (look through provisions) to tax off-shore transactions of such kind.

- 2) Thirdly, the words 'any person' used under S.195 (tax deduction at source) of the ITA must be interpreted to mean an Indian person so as to give it a contextual interpretation in accordance with its object and purpose, which is to recover tax from an Indian person who pays consideration to a non-resident.

- 3) Furthermore, 'a share sale' is not an 'asset sale'. The Revenue could not determine separate tax liability for acquiring shares of a company and for acquiring controlling interest thereby. The Court ruled that 'controlling interest' is a consequence of the number of shares held by a person and hence is merely incidental to the number of shares. But, an asset sale is different. Even though a shareholder has a larger controlling interest, he does not become the owner of the assets of the company. The assets would still be owned by the company itself. In the facts of this case, Vodafone did not acquire the assets of VEL but merely bought the shares.

4) The Court also recognized the fact that such a transaction would be saved by Article 13(4) of the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA) which provides that capital gains derived by a resident of a contracting State shall be taxable in Mauritius. But, as Mauritius is a tax haven, taxation on the capital gains could be escaped. Further, as the DTAA does not contain a Limitation of Benefit (LOB) clause, hence, treaty benefits cannot be denied by the tax department to third parties who incorporate themselves in Mauritius solely to take benefits of the treaty (treaty shopping).

Hence, the Court arrived at the decision after a substantive analysis of the abovementioned arguments.

Had the issue been adjudicated upon by the Court under the regime of the Direct Taxes Code, 2010 (DTC), the result would have been different. Vodafone would have been held liable to pay the tax deduction at source under s.195 of the DTC on the consideration amount. Section 5(4)(g) read with S.5(6) of the DTC are in the form of 'look through provisions' which provides that if a share or interest in an Indian company is transferred outside India between two non-residents, and if the fair market value of the assets in India is at least fifty percent of the total assets held by the company, then such offshore transactions could be taxed. Therefore, the ITA and DTC have substantial differences with regard to taxation of off-shore transactions.

Contributor: **Roshil Nichani (IV year)**

DOES RAPE LAW NEED ANOTHER AMENDMENT?

The advent of twenty-first century has seen many positive socio-economic developments for the country but there is one thing which hasn't changed, and in fact has worsened, i.e. the women's plight. The rape case of a medical student in Delhi, a 16-year old girl by a police constable in Mumbai, and the German Lady at Jodhpur gives us enough evidence that the present penal laws as regards to rape are ineffective (Dipa Dube, Rape Laws in India, 2008 Edition). This is despite the fact that many of the cases go unreported because of the plausible after-effects which are forecasted by the victim and her family as a backlog to their 'social-status'.

Presently, Section 375 and 376 of Indian Penal Code, 1860, defines the offence of 'Rape' and prescribes punishment for the same respectively. The two sections have remained dynamic ever since they were drafted by Lord Macaulay. The definition and the quantum of

punishment has always remained an issue of discussion, and such debates have ensured that the law making bodies are kept on their toes. Both the sections have undergone numerous amendments and have also seen some stunning interpretations, especially after independence. The Indian judiciary has shown a mixed trend over the years. While the period immediately after independence, up to the seventies witnessed a conservative and narrow-minded judicial system, the late eighties and nineties have seen emergence of judicial activism which reached its heights in *Sakshi v. Union of India* (AIR 2004 SC 3566). Nevertheless, instances of injustice being heaped on the victim have continued to persist.

Mention may be made of the infamous Mathura rape case or the Nandan Kanan rape case of Orissa or Raju's case of the nineties. The first would find an elaborate discussion in the thesis; the second speaks of the turmoil of a pregnant woman who was raped by three NCC cadets while her husband was held hostage. The Supreme Court interpreted it as a case of consensual sexual intercourse where the consent purportedly was given by the husband of the victim since she was not his 'legally wedded first wife' (Aparna Bhat, Supreme Court on Rape Trials, 2003 Edition). The court also stressed the point that she was a midwife and therefore experienced and no one on earth, even the strongest man, could ever dare to rape her. Ridiculous it may seem, but the truth stands out harsh and naked. *Raju v. State of Karnataka* (AIR 1994 SC 222), was another instance of glaring disregard for human right of the victim. Here the lady was a nurse who, while travelling, was befriended by two youth who agreed to take her safely to the place destined. Since it was evening and they had to take another bus, she was taken to a lodge where in the same room they put up the night. She was thereafter raped by these two men, despite her protests and resistance, which medical evidence and oral evidence of the police constable, staying in the next room confirmed. Yet the Sessions Court as well as Supreme Court took a light note of the facts, stating that the prosecutrix had voluntarily allowed the accused persons to have a merry time and to have sexual intercourse with her. Further they stated that the prosecutrix herself caused inducement to the accused who was a young man and only on such inducement and under a grave provocation he had lost the mental frame and in a fit of passion which was very natural in that age committed the offence of rape. Surprisingly, the court invented the theory of provocation because of young age and uncontrolled youthful passion and imposed a sentence of three years on accused.

Since 90's the courts started to realize the pitiful condition of women and the gender-backwardness which they face in their social-life. But still, as stated earlier, the amount of

rapes, especially on adolescents, are a real cause of concern and the Judiciary has been far from creating any deterrence to discourage the rapists and pedophiles.

Seeing such a situation, Chemical Castration seems to be one of the possible solutions which the law-makers can resort to. Obviously, the 'human right' activists don't seem to be ecstatic about this idea, but it's necessary for them to realize the repercussion of Castration on the victim, convict and the society at large and that it can be, many a times, a victim-friendly also, as it would help them to rehabilitate back into the society better than otherwise.

In simple words, Chemical Castration is popping a hormone-suppressing drug that would block production of the male hormone in the testes that generates sex drive (Several nations have chemical castration as punishment, Times of India dated 2 May, 2011). Interestingly, it is a reversible process and can be discontinued after the treatment and also has very rare side-effects. After all such possible cost benefit analysis only, as many as nine states including Florida and California in U.S.A have resorted to this solution for punishing pedophiles and serial-rapists (Castration of sex offenders, Sandra Norman-Eady dated February 21, 2006). In the recent years also, few countries have added themselves in this list including Poland and South-Korea.

Coming back to India, it's not that we are too far. Honorable Additional Sessions Judge (Rohini) Kumari Kamini Lau, while expressing serious concerns over the spurt in rape and sexual abuse cases in Delhi, said that the lawmakers should explore the possibility of awarding the punishment in form of surgical and chemical castration in rape cases (Castration may be punishment for rape, court tells lawmakers, Indian Express dated May 2, 2011).

Hence, not in a hurry, but post to a prudent analysis, if law-makers realize that Chemical Castration is not barbaric but at the same time a deterrent law, they can use it to discourage the potential rapists.

Contributor: **Rahul Raman (II year)**

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Cartoons: Mahit T. Anand

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