



INDIA – LEGAL FRAMEWORK AND PRACTICE POINTERS

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India's Printing Press Moment

Economic liberalization and socio-political resurgence during the past two decades, aided by the rapid spread of digital technologies, has unleashed in India a stampede of aspirations and challenges. It is India's printing press moment and the country is going through profound changes, often chaotically. It is imperative that the lawyer representing clients doing or seeking to do business there not only understands the laws, but the big picture behind them. This outline and my presentation will seek to provide that picture.

According to McKinsey & Co., by the year 2025, India will have a middle class of 583 million people.¹ The OECD Development Centre, in a 2011 working paper, noted that India's middle class could be one billion strong by the year 2039 – larger than any other country.² McKinsey & Co. estimates India's middle class – the consuming society – to be about 250 million people. Further, according to it, India is already the world's third largest economy in terms of purchasing power parity (\$5,032 billion) after the United States (\$16,238 billion) and China (\$13,623 billion).³ Recent press reports indicate that profit margins earned by most publicly listed multinational corporations in India exceed global rates.⁴ Separately, a multitude of studies show that there exists in India a wide gap between the demand for and the supply of goods and services. In short, all of the foregoing point to India emerging as one of the world's largest untapped markets, and that opportunity beckons businesses there.

- Those in India who aspire for better life will outnumber those who see themselves as victims of circumstances
 - o 59% of Indian households have a mobile phone (2011 Census)
 - 40% do not have a bank account
 - o In 2020, average Indian will be 29 years old (China 37 years, Japan 48 years)
 - 70% of Indians are below 36 years age
- Examples of economic growth:
 - o In March 2013, India had 120 million Internet users; in June 2013, 190 million; in October 2013, 205 million; and in December 2013, 204 million. The number is expected to be around 320 million in 2015, second only to China.⁵
 - o Pharmaceutical sector is expected to grow from \$18b in 2012 to \$45b in 2020.⁶
 - o A vaccine made in India immunizes a third of the world's children. One in three generic drugs in the world today is of Indian origin.

Legal Framework

India's legal framework, however, is not seen as ready to take on the challenges of a chaotically changing country. In the economic sphere, the World Bank, for instance, rates India among the world's worst performers on parameters such as ease of starting a business, dealing with construction permits, paying taxes and enforcing contracts.⁷ The Wall Street Journal-Heritage Foundation Index of Economic Freedom, an annual ranking of nations in terms of property rights, entrepreneurship and other economic rights and liberties, recently ranked India at 120 among 178 countries.⁸

Below is an outline of India's legal framework.

- World's longest constitution (about 125,000 words)
 - o Inherits, in material parts, the British-made Government of India Act 1935
- Guarantees certain fundamental rights akin to the Bill of Rights
 - o Constitutional rights, however, may be curtailed by acts of federal legislature (the Parliament). See, for instance, Article 21: "No person shall be deprived of his life or personal liberty *except according to procedure established by law.*"
 - o But procedure must be "reasonable, fair and just." See *Maneka Gandhi v Union of India*, AIR 1978 SC 597. *Cf.* the Armed Forces (Special Powers) Act, 1958, as amended. See also Article 19 regarding freedom of speech, assembly, etc., where judicial doctrine continues to evolve
- Parliament has power to amend the Constitution
 - o But under well-settled judicial doctrine, the "basic structure" of the Constitution cannot be abrogated. See *Golaknath v. State Of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762; *Kesavanand Bharthi v. State of Kerala*, AIR 1973 SC 1461. See also *Minerva Mills v. Union of India*, (1980) 3 SCC 625
- Some parts of the Constitution are beyond judicial review
 - o Ninth Schedule. But see *Waman Rao v Union of India*, (1981) 2 SCC 362, 1981 2 SCR 1, AIR 1981 SC 299

Form of Government

- India is a union of 29 states and seven federally administered territories
 - o Asymmetric federal structure, in that all states and federally administered territories do not have uniform powers
 - Some States do not enjoy all fundamental rights
 - o Unitary and federal features
 - Legislative powers of the federal government (the "Centre") and the States are enumerated in the Constitution. The Parliament exercises all residual powers.
 - Most laws affecting commerce, such as corporation, contracts, property, civil procedure, antitrust, securities, evidence, torts, criminal, etc., are made by the Parliament. But States make laws regarding land use, utilities, maintenance of property records and law and order.

- More Unitary than Federal
 - State of Andhra Pradesh was divided in 2014 without its consent
 - Congress in power via executive fiat in Delhi after being booted out in elections
 - Judiciary is unitary
 - The organization of the civil services exemplifies India's federal structure: it is selected by the federal government and when not performing federal services, returns to serve a previously identified State

One Election to Executive and Legislative Branches

- One election fills both the Executive and the lower house of the Legislative branch
 - The upper house of legislature is comprised of indirectly elected or nominated members
- 815 million voters in 2014 (*cf.* U.S.: 215 million in 2012)
 - Right to vote (like cricket) has struck deep roots and a general election in India is the world's grandest exercise of democratic rights
 - Lowest/ highest turnout ever: 55.42% in 1962/ 63.56% in 1984
 - More than 350 registered political parties; 1,000 unregistered
 - Average of 15 candidates for each constituency in 2009
 - First-past-the-post system: winner obtained 26% of votes cast on an average in the 2009 general elections to the lower house of Parliament
 - Most political parties are privately-held and undemocratic (e.g. Congress), communal (e.g. BJP) or communists. But in the last two decades, new stakeholders have emerged
 - Most Parliamentarians belong to a dynasty of politicians
 - Coalition of parties runs the federal government. Disparate parties run the States

Executive Branch Dominates Over the Legislature

- The 3 branches are not separate and equal in the U.S. sense ("different functions")
- Executive is the dominant branch; Legislature is designed to best work under its control
 - The Executive is formed out of the majority group in the Legislature
 - Voting is along party lines
 - Most treaties and bilateral agreements do not need Legislative consent
 - Only bills proposed by Executive become law (only 14 private bills have ever become law; none since 1970)
 - More than 300 of the 1,140 federal laws are British-made
- Laws are designed to promote Executive control of government
 - Ouster provisions are placed in statutes ("[this law]...shall not be called into question in any court")
 - Executive decides when and if any part of an enactment is actually effective
 - Notification in Official Gazette

- Most laws create elaborate administrative machinery
 - The new Companies Act has 300 provisions that require rule-making by Executive
 - Businesses complain that there is a need to “privatize the private sector”
- Laws often serve as enablers of Executive control over statutory bodies
 - “Ganga Clauses” inserted to ward-off challenge (provisions that “wash off” deficiencies on how statutory bodies get constituted)
- Many tiers of administrative rule-making (e.g. rules, regulations, orders, guidelines, circulars, master circulars, notifications, draft notifications, Press Note, etc.) with virtually no public comments

Resolving Conflicts

- Era of separatist movements seems to have eclipsed
 - Example of M. Karunanidhi
- People often turn to courts to resolve disputes, including political disputes
 - But self-help, such as strikes, civil strife or lawlessness, is common and glorified
 - Aam Aadmi Party gets more funding when it stages street protests
 - According to India’s Planning Commission, 182 of India’s 640 districts are in control of those who believe in overthrowing the government by force
 - Pre-speech “ban” is usual
 - Better laws required to deal with emerging issues
 - Example of serving process (the case of “slapping a complaint”)
 - Parliamentary procedures
 - Property records
- Over-burdened Court System
 - Supreme Court: 66,349 cases pending (Jan 2014)
 - High Courts: approx. 4.2m (mid 2012)
 - District Courts: approx. 28m (mid 2012)
 - Tribunals: numbers not readily available
- Government is a party in 70% of the lawsuits
 - Decisions are routinely appealed
- Trend towards adjudication by specialized “tribunals,” increased use of arbitration, and choice of foreign laws and venues

Working With Lawyers and Getting Information

- Stylistic? Yes, but save yourself loads of billable time
 - Date format; letter size; page break; page numbers; margins; font; line spacing...
 - Closing agenda, checklist and time schedule
 - Counterparts; made “as of”; initialing all pages

- Negotiating Tips
 - o Watch out for the misleading “ready to finalize”
 - o Negotiating after the “full, final and exclusive” agreement has been executed
 - o “What taxes do you want to pay this year?” – Changing the facts
- Some Information Sources
 - o Online databases: indiacode.nic.in; indiancourts.nic.in; lexisnexis.co.in; indlaw.com; sconline.com; manupatra.com; indiankanoon.org
 - o Government departments and regulators: rbi.org.in; sebi.gov.in (do not miss the investor complaint video); aarulings.in; traigov.in; ccigov.in; india.gov.in (citizen-oriented)

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ENDNOTES

¹ Reimagining India, Unlocking the Power of Asia’s Next Superpower, edited by McKinsey & Company, 2013, annexure following page 228.

² OECD Development Centre, Working Paper No. 285, January 2010 available at <http://www.oecd.org/dev/44457738.pdf> <site last visited March 6, 2014>. See also Asian Influence: The Emerging 21st Century Middle Class, Morgan Stanley Smith Barney, June 2011, report available at <http://www.morganstanleyfa.com/public/projectfiles/35257b34-b160-45e4-980d-8bca327db92b.pdf> <site last visited March 6, 2014>.

³ See, for example, Reimagining India, annexure following page 164.

⁴ See, for instance, http://articles.economictimes.indiatimes.com/2014-02-07/news/47127329_1_india-infoline-coal-india-destimoney-securities <site last visited March 6, 2014>. See also <http://www.firstbiz.com/corporate/pharma-looks-red-hot-mncs-renew-their-india-love-story-21076.html> <site last visited March 6, 2014>.

⁵ See the Internet and Mobile Association of India website http://www.iamai.in/rsh_pay.aspx?rid=0xVjWOWUhSU= <site last visited March 6, 2014>. See also http://www.mckinsey.com/insights/high_tech_telecoms_internet/indias_internet_opportunity <site last visited March 6, 2014>.

⁶ See http://www.biospectrumasia.com/biospectrum/analysis/190822/mckinsey-india-pharma-touch-usd45-bn-2020#.Uxi_l4WLIvs <site last visited March 6, 2014>.

⁷ See Doing Business report on India, the World Bank, at <http://www.doingbusiness.org/data/exploreconomies/india/> <site last visited March 6, 2014>.

⁸ See <http://www.heritage.org/index/> <site last visited March 6, 2014>.

Dharma Chakra. *The picture at the beginning of this paper is of the “dharma chakra” (the wheel of law), a national symbol of the timeless rule of law. “...and what is the use of a book, thought Alice, without pictures or conversations?” Alice’s Adventures in Wonderland, Lewis Carroll, page 1.*