

Jaipat's

India

Briefing

*An Occasional Newsletter on
Law and Happenings in India*

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Some might find words naturally in times of grief. This lawyer obviously does not. Early last month, Kashmir – constituting parts of India and her twin,² Pakistan – was devastated by an earthquake that has taken nearly 80,000 lives. As if that loss was not enough, later in the month terrorists rumored to belong to those same parts of India or Pakistan blew up nearly 60 people in the heart of New Delhi. Neither man nor his maker seems to be at peace with that part of the world.

Earthquakes in the Himalayas

Earthquakes in the Himalayas, informs Dr. Neptune Srimal, a professor of geology at the Florida International University who spent over 25 years studying them as a field geologist, are a natural result of the changes taking place in that region. The plates underlying that part of the earth (“like rafts in an ocean”) are constantly moving northwards (“nearly two inches a year”) and colliding with stationary plates of Eurasia. That resulted in the creation of the Himalayas

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² Pakistan (“the land of the pure”) was born simultaneously with India’s independence in August 1947.

(Sanskrit: “him” means snow and “alaya” means abode) in the first place. According to him, the Himalayan region is known to be among the most earthquake prone parts of the world.³

Legal Framework

Each year, about 4,500 lives are lost in India as a result of natural disasters, including earthquakes.⁴ The country awakened to the need for better disaster management in 2001 when another earthquake, in the State of Gujarat, took about 14,000 lives. A National Disaster Management Division was constituted under the federal Department (“Ministry” in India) of Home Affairs in 2002. Several studies⁵ and revisions to building⁶ and other codes were initiated. It is ironical therefore that India’s most comprehensive revision of the National Building Code (the “Code”) was published days before the earthquake.⁷

Adoption and enforcement of the Code has traditionally been left – as is primary responsibility for disaster management – in the hands of the various States and their respective district and village municipalities.⁸ Apparently,

³ More earthquakes of magnitude 7.5 or more on the Richter’s Scale can be expected. See, for instance, <http://cires.colorado.edu/~bilham/Kashmir%202005.htm> for the work of Dr Roger Bilham of the University of Colorado.

⁴ See “Disaster Management in India, a Status Report, August 2004,” and “Building a New Techno-Legal Regime for a Safer India, *recent but undated*, Ministry of Home Affairs. www.ndm.nic.in.

⁵ See, for example, 4 above.

⁶ It is said that earthquakes by themselves do not kill people, but buildings that collapse do. See “National Housing and Habitat Policy, 1998.” Nearly 1% of all housing is damaged each year by natural disasters in India. See <http://ciionline.org/sectors/61/Images/nhhp1998.pdf>

⁷ See <http://www.bis.org.in/sf/nbc.htm>.

⁸ The Constitution of India lists subject-matters for law-making for the States and the Union. See Constitution of India, Article 246 and the Seventh Schedule. Housing, as such, is not an enumerated subject, nor is disaster management. Unlike the Congress, the Indian Parliament has plenary powers on matters not covered in the “State List.” See Article 248.

the last version of the Code, made two decades ago, remains largely unimplemented and no governmental or non-governmental body in India tracks adoption of the Code by the various States.⁹

Right to Information

Even if there were a governmental body that tracked such information, it may not be possible for a citizen to have access to that information unless that body chose to disclose it. That is, until now. Last month, India's first freedom of information law became effective.¹⁰ The federal law¹¹ is a milestone for a country whose governments continue to be guided by a 1923 act of the British Parliament, the Indian Officials Secrets Act,¹² which proscribes disclosure of information available with the government. However, the Act continues a pernicious tendency to establish more governmental machinery to keep courts out.¹³ In this instance, a huge governmental machinery has been created to handle appeals against refusal of information by the government. In many ways, India continues to be just as free as its bureaucracy wants it to be.¹⁴

However, the Union has shied from assuming responsibility for making or enforcing laws relating to housing, except with respect to its lands and possessions. In times of disaster, it steps in with resources on a case-by-case basis.

⁹ See <http://timesofindia.indiatimes.com/articleshow/1259118.cms>

¹⁰ The Right to Information Act, 2005, Act 22 of 2005. The Act was enacted in June 2005 but became effective on October 12, 2005.

¹¹ Five States have also enacted laws in recent years.

¹² Act 19 of 1923.

¹³ Section 23 of the Act provides: "No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act."

¹⁴ Unless compelled otherwise. India first enacted a "Freedom of Information Act," in 2002, but that law did not become effective because the government did not notify procedural rules. It was also opposed by civil rights activists who found it seriously flawed and moved the Supreme Court. The new law was enacted

Nun Advocates

Last month, I wrote about nuns being denied admission to the bar by a State bar council because they were deemed already in employment and therefore not eligible to enroll as "advocates." A single judge of the State High Court has now ruled that "being a priest or nun by itself cannot be a disqualification" and that "no one joins priesthood or nun-hood as an employment for the purpose of earning a livelihood."¹⁵ The State Bar Council may appeal.¹⁶

20th Chief Justice of India

Sixty-three year-old Justice Yogesh Sabharwal was sworn-in as the 20th Chief Justice of India. He will retire in January 2007.¹⁷ Prior to his elevation, Chief Justice Sabharwal was a Judge ("Judge," not "Justice") of the Supreme Court and is most noted for his Constitutional law expertise and opposition to the death penalty.

Bird Flu

Cipla, an Indian pharmaceutical giant, claimed it had reverse engineered the active ingredient of Tamiflu, the popular drug against bird flu, following its manufacturer Roche's refusal to license, and will make it available at "considerably lower" prices starting January 2006.¹⁸

after India's activist Supreme Court in July last year nudged the government to act.

¹⁵ Citation awaited.

¹⁶ More on the appeal process in India later.

¹⁷ A Judge of the Supreme Court retires upon reaching the age of 65 years. The Supreme Court Judges (Conditions of Service Act), 1958, Section 13(b).

¹⁸

<http://www.newscientist.com/article.ns?id=mg18825224.100>. Roche later announced that it was open to licensing deals. For Roche's view on patent protection, see http://www.roche.com/sus_med_pat