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Criminal Law Section News

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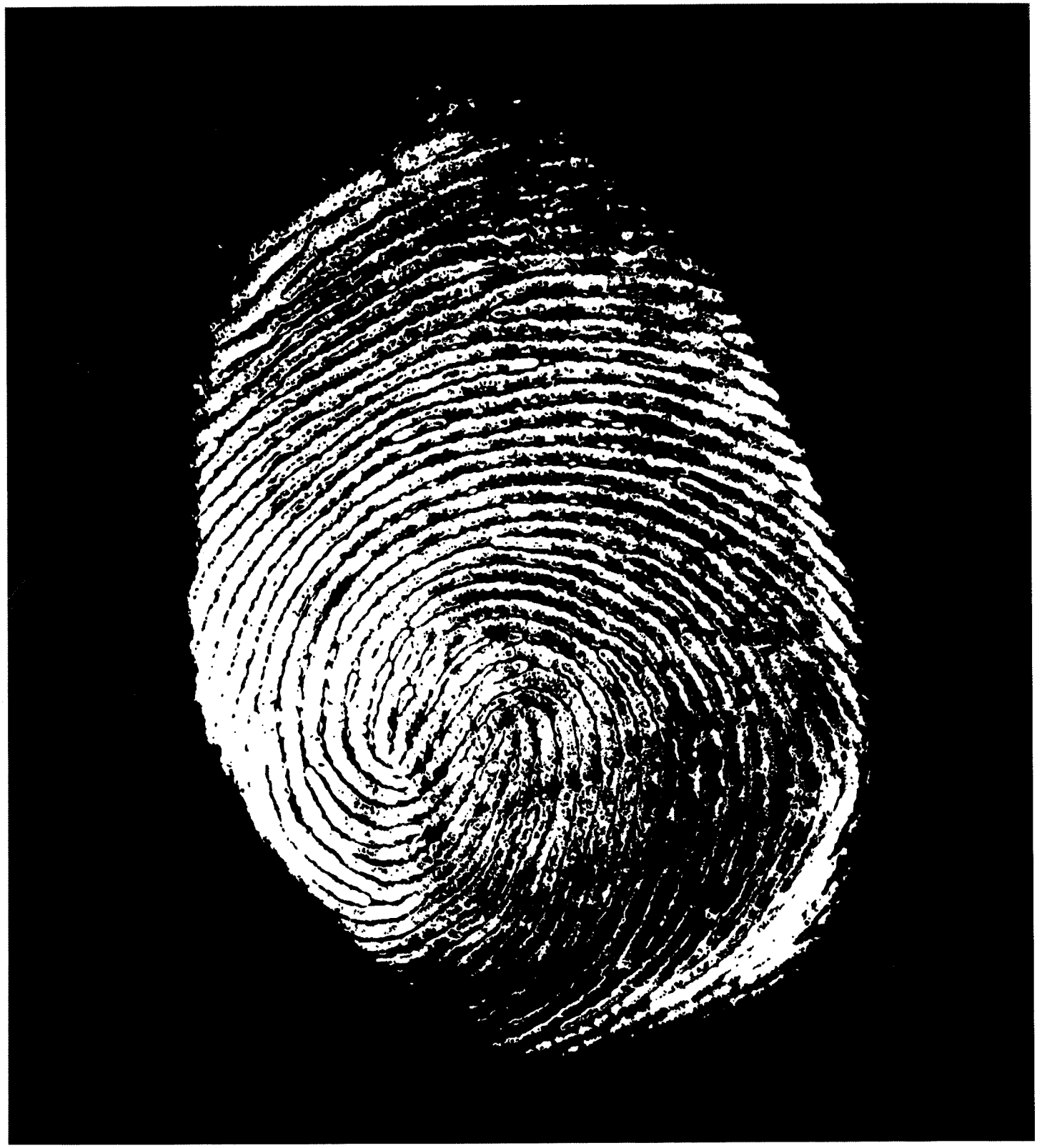

INTERNATIONAL BAR ASSOCIATION CONFERENCES


CPD/CLE HOURS AVAILABLE

16th Annual Transnational Crime Conference

15–17 May 2013 **Miami Beach, USA**

A conference presented by the IBA Criminal Law Section and supported by the IBA North American Regional Forum

Sessions include:

- The use of private investigators, experts and forensic accountants in criminal litigation
- Offshore tax havens and secrecy
- Money laundering and corruption in South America and the Caribbean
- Acting in high profile cases and the role of the media
- Multi-jurisdictional criminal investigations
- LIBOR and securities fraud

Who should attend?

Criminal defence and regulatory practitioners, prosecutors, in-house counsel, international business crime lawyers, compliance officers, law enforcement officials and auditors.

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In conclusion it seems that the Resolution 24, issued by COAF, comes in line with the claims of the associations representing legally regulated professionals, liberating persons and legal entities from its procedures, and postponing the debate about the inviolability of lawyers' professional privilege.

Notes

1 Process 49.0000.2012.06678-6.
2 Brazilian Bar Statute.
3 Article 133 – Lawyer is indispensable to Justice, being inviolable for its acts and doings in the professional exercise, in the limits of the law.

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Foreign corrupt practices: issues and developments in the Canadian context

Among OECD countries, Canada has historically been perceived to be 'soft' in combatting foreign corruption activity. In response Canada ratified the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions on 17 December 1998. Shortly thereafter, on 14 February 1999, Canada passed the Corruption of Foreign Public Officials Act (the 'Act'), thereby implementing Canada's treaty obligations with respect to foreign corruption. The centrepiece of the Act is section 3 which contains the prohibition against bribing foreign public officials.

There is a practical and very real difference between enacting law and its enforcement. Thus, although Canada has had a Foreign Corrupt Practices Act (FCPA) law on its books the reality is that for the decade following passage of the Act there were no real efforts made to enforce it. In response to further criticism in 2008 the Royal Canadian Mounted Police (RCMP) created a tactical unit dedicated to prosecutions under the Act.

The recent increase in enforcement activity in Canada has garnered significant media attention. In addition to the recent charges laid against former SNC Lavalin executives (including its former CEO), 2011 saw the first significant prosecution to that point in time in the case of *Niko Resources*. In this case, Niko Resources ultimately plea-bargained for a $9.5m fine for paying and delivering a Toyota Land Cruiser to the Minister for Energy and Mineral Resources of Bangladesh.

Moreover, the law in Canada on foreign corrupt practices is bound to be clarified (hopefully) in the first half of 2013 as an Ottawa court is hearing the matter of *Regina v Karigar*, an Indian-born Canadian citizen who has pleaded not-guilty to charges that he violated the Act. Closing arguments are expected to begin in March 2013 [at the time of writing]. The prosecution alleges that Mr Karigar funnelled a $250,000 bribe to Praful Patel, India's Minister of Heavy Industries and former Minister of Aviation. According to a *Globe and Mail* report, the charge relates to Mr Karigar's work on behalf of a high-tech security company that was pursuing a $100m contract with Air India for a facial recognition security system.

International foreign anti-corruption watchdog Transparency International has issued a report that Canada has improved its foreign anti-corruption enforcement and the *Vancouver Sun* published this headline: 'Canada among "most improved" in anti-bribery enforcement: Report' (5 September 2012). But the consensus still appears to be that Canada can, and should, do more to combat foreign corruption, as a *Globe and Mail* headline attests: 'Canada must do more to fight bribery' (12 September 2012).

In the result, the risk of an FCPA prosecution under the Act is more real than ever. According to reliable sources there are currently about 40 ongoing active FCPA investigations afoot in Canada. Accordingly, companies need to be aware of the Act and implement procedures to decrease the risk of investigation and prosecution both in Canada and abroad.

The design of the Canadian Act

There are a few particularly noteworthy elements to the Act:

- There is no maximum fine.
- There is no limitation period to a prosecution under section 3 (the *Niko*

Resources prosecution was preceded by a six-year investigation).

- Authorities can obtain wire-tap warrants to investigate.
- A bribe is defined broadly as obtaining or retaining an advantage in the course of business. This wording is intended to cover bribes to secure business or an improper advantage in the course of business.
- The Act applies to both corporations and individuals.
- When prosecuting a corporation, the general principles of corporate criminal liability including those in sections 22.1 and 22.2 of the Criminal Code will likely apply, which means the activities of the senior officers of a company will become crucial to the prosecution and defence of charges under the Act.
- The Act also refers to a situation where a person *directly or indirectly* gives, offers, or agrees to give or offer a loan, reward, advantage or benefit of any kind. This wording is of course critical and in particular the use of the word *indirectly*. Bribes can be deemed to be made through an agent.
- The Act also contains built-in defences: for example, *facilitation payments*, are permitted under the Act, which is not the case under UK Bribery Act. However, caution should be used when making such payments since it can be difficult to distinguish a bribe from a facilitation payment under the Act. Proportionate and bona fide hospitality or 'reasonable business expense' for promotion, demonstration, explanation of a product are not bribes under the Act, and neither are payments which are lawful in the foreign jurisdiction. Proof of legality should be demanded in these cases.
- The UK Bribery Act has a unique offence of a commercial organisation failing to prevent a bribe from occurring (ie, essentially an offence of negligence). It is, however, a defence if a commercial organisation can show that it had adequate procedures in place to prevent persons associated with it from bribing. Although the Canadian Act does not contain an explicit due diligence defence, bribery under the Act requires the prosecution to prove intent with the result that the due diligence of a company may constitute critical evidence to counter a prosecution contention that a company, through the actions of an agent or rogue employee, had the requisite intent to bribe a public official.

The centrality of a properly conducted internal investigation

In January 2013, Griffiths Energy International Inc, an oil and gas company based in Calgary, Alberta, entered into a plea agreement and accepted a fine of $10,350 in anticipation of charges being formally laid under the Act. As part of the Agreed Statement of Facts, Griffiths admitted to entering in a consultancy agreement to pay $2m to the wife of the Chadian Ambassador to Canada (located in Washington), which prosecutors alleged constituted a bribe to obtain rights to explore and develop oil and gas reserves in Chad. The fine was relatively low – due in large part to Griffiths' cooperation during the police investigation. Indeed, the bribe was discovered by a new management team conducting due diligence prior to an initial public offering. An internal investigation was initiated by a special committee of Griffiths' new board and conducted by independent counsel, which led to voluntary self-reporting to law enforcement authorities in *both* Canada and the United States (Agreed Statement of Facts, *The Queen v Griffiths Energy International Inc*, Alberta Court of Queen's Bench, 14 January 2013).

The Griffiths special committee (comprised entirely of the independent members of the board) instructed an independent law firm to conduct a: 'robust, credible and independent' investigation into not only the circumstances surrounding the subject consultancy agreement but also in respect to any other information relating to any other potentially improper payments. In the course of the investigation hundreds of thousands of pages of hardcopy and electronic records were collected and reviewed and 31 individuals were interviewed, including current and former employees, third-party consultants, external lawyers, and current and former government officials in Chad.

The *Griffiths* case demonstrates that the proper conduct of an internal investigation may be very beneficial in mitigating what would likely have been a harsher sentence and/or in discovering internal procedural/policy gaps that can be proactively addressed to avoid corruption (and corruption charges) in the future. However, certain steps should be taken and various issues carefully considered before initiating an internal investigation. A preliminary strategy will be needed that inevitably involves, but is of course not limited to, the following issues:

- Who should have independent representation? In most cases counsel will need to be appointed to represent the company, the primary shareholders, senior management and, if the business enterprise is a reporting issuer, then perhaps to advise the Board.
- Who will be retained to conduct the investigation so that a coherent, cost effective, hopefully joint investigation and response can be developed? Will there be a joint defence agreement? What will be the terms of that agreement? Who will be invited to become party to it?
- Who will lead the conduct of the internal investigation? Clear lines of authority and reporting must be established at the outset. Note that in-house counsel will almost always be ill suited to conduct the internal investigation because as in-house counsel often provides both business and legal advice it will be difficult for in-house counsel to preserve privilege particularly if in-house counsel's work product is shared with auditors and management. Furthermore, government agencies may not view in-house counsel as sufficiently independent or, worse, as compromised or complicit.
- All investigations should be driven by the circumstances giving rise to the need to investigate with the result that the commissioning counsel or client will need to set clear investigative goals, timelines and investigative standards at the very outset.
- It is important and entirely appropriate that employees be advised of their rights and obligations if contacted by government agents and that separate counsel be appointed by the company to provide this service. Questions will inevitably arise as to whether individual employees will be entitled to independent counsel and whether such employees will be indemnified by the company for such costs. Generally, there may be many advantages to key employees being represented by separate counsel, particularly by counsel with experience in the conduct of complex investigations who are prepared to work within the framework of a carefully designed joint defence agreement. While acting solely in the interest of the employee, independent employee counsel can prepare a key employee to be interviewed and gain a deeper understanding of the entire matrix of the facts and legal issues within the privileged confines of a collaborative joint defence agreement.
- Pre-indictment advocacy: the adverse consequences of indictment for foreign corruption (and the civil and/or administrative sanctions that may follow) can be devastating to the business enterprise and its personnel. Each case will be assessed individually but companies will inevitably consider whether or not a detailed factual and legal submission should be made to government to avoid sanctions taking into account that such a submission will necessarily provide the government with a guideline to the defence case. Consideration should be given to whether to seek a prior assurance that such a submission will not be treated as a waiver of work product or solicitor client privilege. The consideration of whether or not to make a pre-indictment submission will take into account whether an offence has been committed, whether the operating mind of the company or an employee possessed intent, whether there is a reasonable likelihood of conviction, whether alternative sanctions or remedial steps are available or appropriate and whether the prosecution is in the public or federal interest.
- Self-reporting combined with remedial proposals may minimise the risk of prosecution. Alternatively, cooperation may exculpate the company while leaving employees exposed. At minimum, if the enterprise is a closely held non-reporting issuer a competently conducted internal investigation will enable the enterprise and its principals to respond to any investigation with confidence and agility.

The critical questions of jurisdiction, concurrent jurisdiction and extra-territoriality

Whereas the UK Bribery Act and the FCPA have been characterised as having comparably broad scope, the Canadian Act has been criticised for having a narrow jurisdictional reach.

Generally speaking, Canada operates under the territoriality principle. An offence must have a 'real and substantial' connection to Canada before Canada will take jurisdiction. Note that in *R v Karigar*, the accused brought a motion to dismiss the charge for lack of jurisdiction on the basis that the 'real and substantial connection with Canada' test had not been met. The motion was dismissed by the court on 4 May 2012, while preserving the

right of the accused to bring this matter up again at a later date.

In addition to the territoriality principle, American and British legislation permits courts to take jurisdiction under the nationality principle. This means that regardless of where the offence was committed, if the accused is American or British (or, in the case of a corporation, incorporated in America or Britain; or is a reporting issuer or carries on part of its business in these countries), then American or British courts have jurisdiction. Under the FCPA, non-US companies may find themselves subject to the FCPA because some business activity that relates to the misconduct has a US connection, even though this connection is not otherwise substantial, for example, by using US mail.

Similarly, the UK Bribery Act also has broad extra-territorial reach. British citizens, citizens of British overseas territories and bodies incorporated under the law of any part of the UK, are deemed to have a 'close connection' with the UK and they may be prosecuted whether the offence takes place outside of the UK. The UK Bribery Act also applies to foreign nationals who commit bribery offences abroad while domiciled or habitually resident in the UK.

The most novel part of the UK Bribery Act is its criminalisation of a commercial organisation's *failure to prevent bribery*. Once it is established that a commercial organisation carries on a business or part of a business in the UK, regardless of where it is incorporated, if an employee, an agent or a subsidiary bribes another person or foreign public official for its benefit, the organisation may be guilty of the offence unless it can demonstrate that it had adequate procedures in place to prevent such conduct. This means if an 'associated person' of a Canadian organisation that carries on only a part of its business in the UK pays a bribe to a third party, the parent Canadian company can be guilty of failing to prevent the bribe under the UK Bribery Act, *unless* it can show that it had adequate procedures (due diligence) in place to prevent the bribe.

The various anti-corruption laws around the world and various approaches to jurisdiction make concurrent jurisdiction a reality to be mindful of. For example, a French citizen working for a Canadian company incorporated in Delaware, listed on the London Stock Exchange who bribes a government official in Nigeria can potentially be prosecuted in France, Canada, the US, Great Britain and Nigeria. In fact, the phenomenon of what is termed 'carbon copy' prosecutions has recently been extensively commented on in the American context (see publications by Andrew Boutros and T Markus Funk, '"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World', [2012] The University of Chicago Legal Forum.

Strategies for the avoidance of international double jeopardy

The jurisdictional issue is particularly important in relation to the different approaches countries take to international double jeopardy. In Canada and the UK, the rule against double jeopardy also applies internationally so that if an individual is tried and convicted (or acquitted) of foreign corruption in one country, there is a general bar against re-prosecution in Canada or the UK.

However, this is not the case in other countries, most notably in the US and Germany. In the case of the *US v Jeong*, 624 F 3d 706 (2010), a South Korean national was tried in South Korea for paying bribes to American public officials. He was convicted and served 58 days in jail in addition to having to pay a fine of approximately $21,000. Pursuant to a mutual legal assistance treaty between the two countries, the US sought evidence from South Korean officials in relation to Mr Jeong. The Americans specifically noted in their request for information from the South Korean government that 'the Government [US] understands that Jeong was convicted earlier this year of the offence of interference with foreign trade in the...Republic of Korea, and therefore, it is not seeking to further prosecute Jeong'. Despite this 'assurance', Mr Jeong then travelled to the US, was arrested, indicted for bribery and conspiracy, and sentenced to five years' imprisonment and to a $50,000 fine for the exact same conduct.

Therefore, any FCPA settlement must take into account all countries that enjoy potential concurrent jurisdiction over the same conduct. In global settlements for corruption and bribery charges, it is important that primary negotiations be conducted with the nation(s) that do not recognise international double jeopardy such as the US and Germany (for a more detailed analysis on this subject

matter see: Tyler Hodgson, 'The gift that keeps on giving: Does the protection against double jeopardy have any application to international crime?' Vol 19 Iss 4 'Journal of Financial Crime', pp 326–331.

Conclusion

Investigations and prosecutions for bribing foreign public officials are on the rise in Canada. Canadian companies more than ever have to be mindful of this and tailor their internal policies and procedures accordingly to prevent bribes from being paid in the first place and to prepare their response when they suspect that bribery conduct may have taken place. Since there are many Canadian subsidiaries of US and foreign companies operating in Canada and overseas these companies (and their counsel) will be increasingly forced to deal with Canadian initiated investigations and prosecutions which will often be coordinated with US and foreign authorities. In such circumstances, lead defending counsel will be required to have extensive experience with and a deep understanding of the art and science of transnational criminal defence.

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Anti-corruption, business crime and criminal law

In no other country are these three topics of greater relevance nor have come under such recent public scrutiny, than perhaps the world's most populous democracy, India.

Recent views about the present situation and mood on these three issues, in the 'educated' media in India, appear to reflect great pessimism.

Anti-corruption

The existing Indian anti-corruption statutory framework and the enforcement mechanisms set up thereunder are, to date, the most comprehensive anywhere in the world.

The Indian Penal Code (1860), the Prevention of Corruption Act (1988), the Benami Transactions (Prohibition) Act (1988) and the Prevention of Money Laundering Act (2002), the Right to Information Act (2005) and certain provisions of the Income Tax Act (1960) provide a wide enough net of stringent provisions, which can ensnare the most ingenious and creative corrupting influences.

While none of these laws define the term 'corruption' they do set out numerous situations/circumstances which cover activities that are expressly prohibited as undesirable – to the interests of society and/or to the nation at large.

However, despite the existence of said statutes and enforcement machinery, it is the worst-kept secret that some of the dramatic paradoxes shown by the Indian economy, may be attributable to its thriving 'parallel' economy (estimated at about US$1tn).

The inefficacy of these statutes (to bring high-profile evaders to book) and, more importantly, the perceived political control of the said enforcement machinery by the establishment of the day, has helped engender popular support for non-political persons whose stated objective is to create a pressure group for establishing yet another legislation which would create yet another 'super-cop' or cops, in the form of a *'Lokpal'* (loosely translated as 'peoples' caretaker'). Why or how that may be better than existing agencies, remains to be seen.

The Indian judiciary, headed by the Supreme Court of India, is yet seen to be relatively non-corruptible and has been, for many who wish to see good traditional values prevail in today's society, the last port of redressal.

Recent judgments of the Indian courts in matters ranging from allocation of natural resources (airwaves, mineral resources, land) and expenditure of public funds (the 2010 Commonwealth Games) give the indication that the courts may be the last bastion to uphold the letter and spirit of the Constitution of India.

Business Crime

It may be said that Indian business houses have 'come of age' in the last decade or so (from about the year 2000 onwards). The true

meaning and implications of the first wave of broad economic and fiscal reforms (carried out in the first half of the 1900s, headed by the present Prime Minister, Mr Manmohan Singh) were assimilated by Indian business houses over a period of six to seven years, which has led to the present global footprint of many business houses.

Much as Indian business houses have embraced global money, manufacturing and services best-practices and customers, they may also have (wittingly or unwittingly) brought home some of the sharp business practices that western nations evolved over decades of 'free market' functioning.

India does not have any statute to cover or govern 'political lobbying' by corporate houses as an organised activity. The Indian Companies Act (1956) contains a specific provision which enables companies to contribute up to five per cent of their net profits for the particular year, to be offered as 'contribution' or donation to any political party or any political purpose to any persons.

Most large corporate houses in India today are known to be close to the top leadership across the political spectrum; the head of a large business house is known to have remarked (when the present government was elected) that the government is 'my own shop'.

A recent scandal involved the leaking of telephone conversations between a wheeling-dealing intermediary and the top-most leader of India's oldest and most respected corporate house – although this only made public what was already well-known in certain circles.

Currying favour with politicos is an integral part of doing business in India. No corporate house has made any significant impact or registered impressive growth in India without directly or indirectly seeking and/or offering gratification to political parties.

Once again the Supreme Court of India has pronounced certain judgments highlighting the growing instances of criminal conduct by business houses and incorporated entities.

The matter of collection of about US$5bn (from the general public or from 'small depositors') by a large company in total disregard of the norms issued by the Securities and Exchanges Board of India (SEBI – the sole capital markets regulator), the striking abuse of the 'consent terms' provisions of the SEBI by large incorporated entities (where, taking advantage of the US$1m ceiling to pay penalty fines, they seem to have got away with multi-fold gains made unscrupulously), the attempt made by two brothers to hijack the process of allocation/use of natural resources, are striking examples of the activist role that the Supreme Court of India has had to play in the recent past to curb business crime.

Criminal law

A plain reading of the general law and order situation in India would make any discerning reader ask a lot of questions:

- Why does India have one of the most skewed sex ratios in the world?
- Why is the criminal conviction rate low in India?
- Why does India have the largest number of under-trial detainees in prisons?
- Why are crimes against women in India amongst the least reported and yet the largest (in number terms)?
- What explains delays in the conduct and completion of criminal trials?

In a petition published January 2013, a division bench of the Supreme Court of India has heard a matter pertaining to the special privileges granted by the two Houses of Indian Parliament, to their own members facing criminal charges.

The said petition seeks amendments to, or striking down (as being unconstitutional) of, sections 8, 9 and 11-A of the Representation of the People Act (1950), on the grounds that the same violate Articles 84, 173 and 326 of the Constitution of India. The said constitutional provisions contain safeguards against the criminalisation of politics and, inter alia, bar criminals from getting registered as voters or becoming members of parliament or members of legislative assembly.

A few weeks ago, two college-going girls were picked up from their residences (late at night) and thrown in a prison cell for voicing their ire at an obviously state-supported *bandh* (strike) in 'memory' of a right-wing hate-mongering octogenarian politician. This, in a city which stakes claim to being one of the world's most important financial hubs.

Recent not-so-thinly-veiled attempts by elected politicians to censor exchange of free thought over electronic media has met with significant 'success' (at least so far.. or maybe the 'voices' have just found another vent which I am unaware of!) Most social media and networking websites in India now have a 'moderation' filter which is used by

the owners of the websites to ensure that only the mildest and the most 'moderate' views are published.

A heinous crime on a moving bus in New Delhi resulted in spontaneous protest marches and agitations against the state by ordinary citizens in January 2013; this was met with unprecedented force and brutality by uniformed personnel under the direct command of the Government of India. As in another comparable incident in the recent past, the Chief of the uniformed forces rendered an 'unconditional apology' in court, but it is largely felt that very little has yet been done to ensure that such force would not be repeated.

Conclusion

The dynamic and attractive customer base and the diverse geo-social environment explain, to some degree, the global interest to do business in and have commercial dealings with India.

The Indian psyche, Indian society and importantly the Indian legal system, hold significant surprises (not all pleasant ones) for persons (natural as well as juridical) having establishments in or dealings with India – especially in the current volatile context.

One may see little or no impact of the present populist churn on India's political class, so long as: those with criminal antecedents continue to dominate the political firmament and a large percentage of voting population continues to stay illiterate or 'below the poverty line'; business houses believe that they can manipulate the criminal justice machinery to delay and deny justice, while they adopt unethical (if not downright illegal) practices to achieve their bottom-line-driven objectives; and Indian courts continue to get bogged down by the weight of outstanding litigations.

While this vicious cycle has the potential to push India towards a 'cliff' of abysmal proportions, I am glad to see many members of the learned professions – like law and medicine – willing to contribute towards a better environment by offering pro bono help and staying true to universal values and principles in the conduct of their professional practice and personal lives. While this number can certainly grow (we are 1.3 billion people, remember) it is evident that one lit candle is better than a roomful of darkness!

If initiatives of the Supreme Court of India (such as the National Courts Management System which is an ambition action plan launched by the then Chief Justice of India in mid-2012 to speed up the disposal rates of litigations in Indian courts – as on date there are about 31.3 million pending cases across courts in India) and its Orders (on issues related to corruption, business crime and criminal law in general) are implemented in the true spirit, it may ensure that: public resources and funds are expended in the most equitable manner to achieve the larger objective of nation-building and human welfare; large corporate houses do not convert India into a 'corpocracy' and; the ordinary citizen feels that they have a fair opportunity of receiving timely justice, never mind the 'stature' of the accused person.

That would be a step towards meeting the fundamental rights, directive principles and other valuable prescriptions enshrined in the Constitution of India.

With regard to where India's constitutional structures are headed, I remain a hopeless optimist: I still think that the time may be right for bold steps to be taken by the Indian polity as well as the Indian voters, as well as all right-minded people, to signal that '*We shall Overcome*'!

Maybe I dream, but the meek may yet inherit the world...