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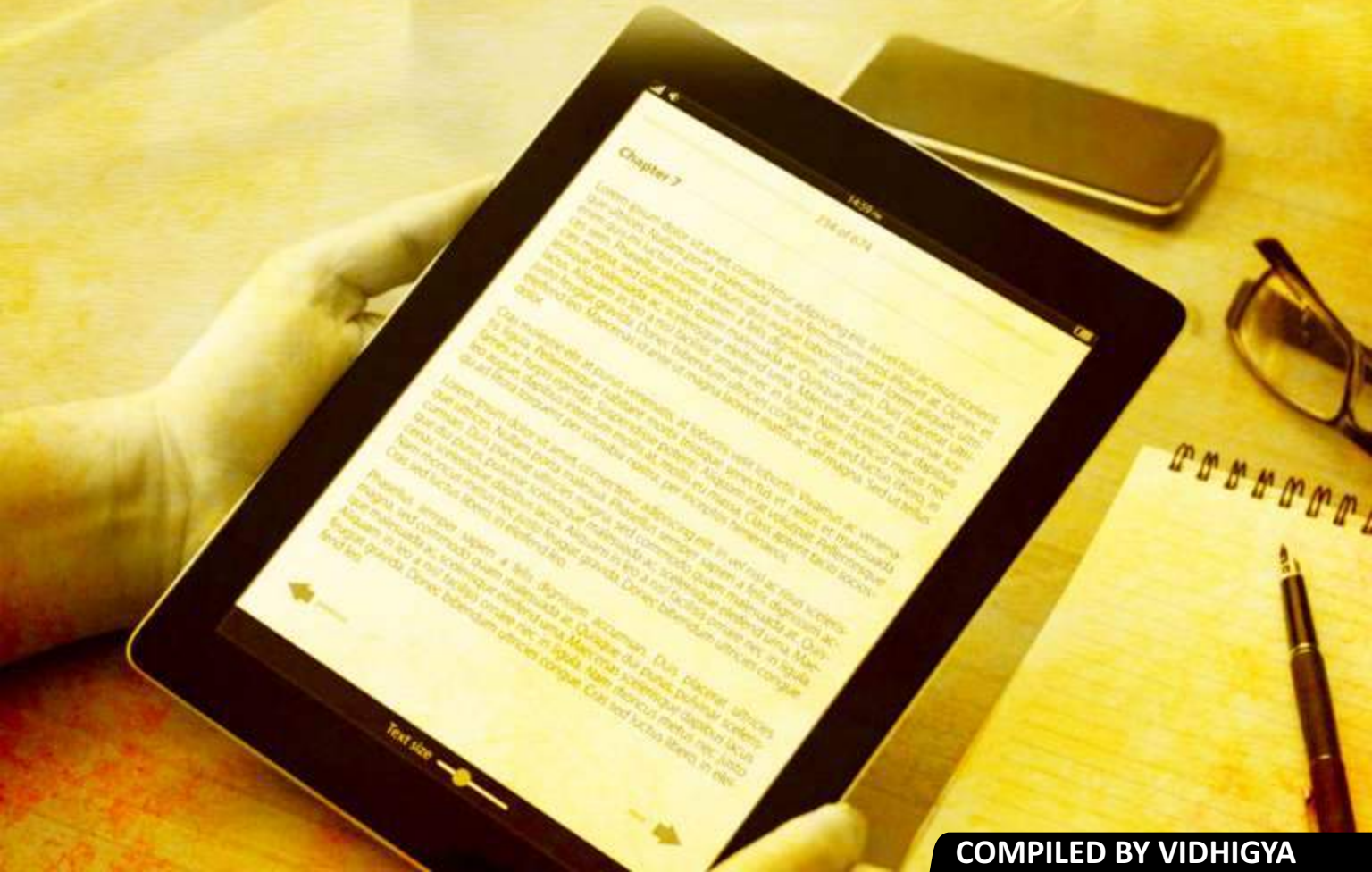

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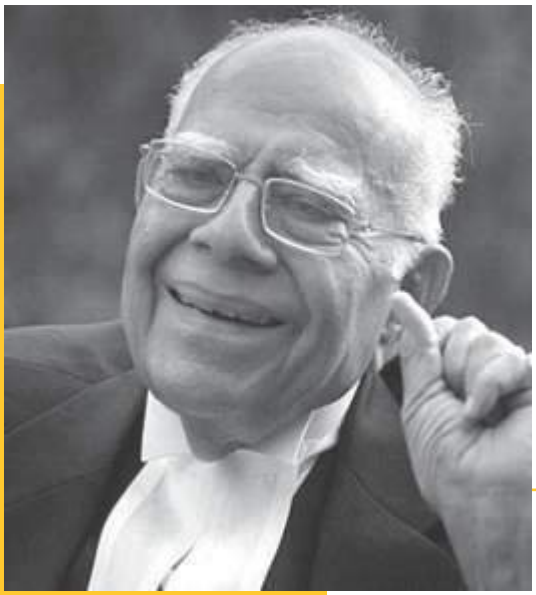

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I am thankful to my mentors at Vidhigya for filling me with confidence and capability. I will be indebted forever to them. To all the champions out there have faith and patience, keep working for your ultimate goal. As Bahul Sir says "Only Work Works".

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Sneak Peek:

No. of words: 1063 words

Note: In this article the author is highlighting the need of increased women representation in the Higher Judiciary. Author is highlighting the said issue in the light of the recent retirement of Justice R Banumati and Justice Indu Malhotra.

Article: 1

Much needed and long overdue: a woman Chief Justice

Women need greater representation across the judiciary, including the Supreme Court. But the appointment of the first woman CJI must not overlook seniority and merit.

With the retirement of Justice R Banumathi and the recent retirement of another women judge, Justice Indu Malhotra, one can hear voices from the corridors of the Supreme Court (SC) advocating for the appointment of more women judges to the apex court.

This debate is not new, but it has resurfaced again after a judge of the Madhya Pradesh High Court imposed a condition while granting bail to a man accused of sexual assault — that he should go to the residence of the victim and get a Rakhi tied to his wrist. Nine women lawyers approached the SC to challenge the order and while hearing this petition, the SC had issued a notice to the Attorney General to seek his views and suggestions on the issue. Among the written submissions filed by the AG, one was that improving the representation of women in the judiciary could go a long way towards attaining a more balanced and empathetic approach in cases involving sexual violence. The AG also brought up the fact that there has never been a woman Chief Justice of India (CJI).

This set the ball rolling on a discussion about Indian having its first woman Chief Justice, a milestone that should have been achieved long ago. The then CJI S A Bobde, while hearing a petition of a women lawyers' body seeking consideration for the appointment of meritorious women lawyers practising in SC and high courts, remarked that the time has come for the first woman CJI. Another SC judge and member of the collegium, Rohinton Fali Nariman, while delivering his speech during the 26th Justice Sunanda Bhandare Memorial Lecture, also voiced the opinion that the time for our first woman CJI is not very far off. Justice D Y Chandrachud also raised his voice while delivering a farewell speech on the retirement of Justice Indu Malhotra, saying that it is a deeply worrying fact that with Justice Malhotra's retirement the Supreme Court has only one female judge on the bench. He added that "Instrumentally, having a more diverse judiciary ensures [that] diversity of perspectives is fairly considered, instils a high degree of public confidence."

I concur with the views of my esteemed brother judges. It is now a reality that presently, the Supreme Court is left with only one woman judge, Justice Indira Banerjee, who is also going to retire next year, after which, the SC will be left without a woman judge. The collegium failed to take timely steps to elevate more women judges in the SC. In the 71 years of history of the SC, there have been only eight women judges — the first was Justice Fathima Beevi, who was elevated to the bench after a long gap of 39 years from the date of establishment of the SC.

The situation is not any different in developed countries such as the US, UK, Ireland, France and China. Expressing concern over the gender imbalance, the United Kingdom Supreme Court President J Lord Robert John in his speech at the International Judicial Conference said: "The low proportion of women judges on our

highest courts is a problem in my country and it is one which we share with many others." According to the data collected by Smashboard, a New Delhi and Paris-based NGO, not only has no woman ever been appointed as the CJI, the representation of women across different courts and judicial bodies is also abysmally low.

All these facts paint a grim picture of the representation of women in the judiciary. There is no doubt that CJI Bobde has left a legacy of not having recommended any judge for elevation to the Supreme Court. Although his tenure was overshadowed by the pandemic, he had many an opportunity to have fruitful interactions with the members of the collegium to arrive at a consensus to recommend appointments. By passing the laudable order of setting timelines for appointment of judges on April 20, just before demitting office, his was a last-ditch effort with good intentions.

In the last few meetings of the collegium, there has been some talk of promoting women to the apex court and the prominent name that surfaced was that of Justice B V Nagaratha of the Karnataka High Court, who was appointed as a judge of Karnataka High Court on February 2, 2008, and will retire on October 29, 2024. If she is elevated to the Supreme Court, she could become the first woman CJI in February 2027. She is presently the senior-most judge in the Karnataka High Court and is at Serial No. 33 in the all-India seniority list of high court judges. Currently, she is the only woman judge who can reach the position of CJI. Another fact, which is no less important, is that her elevation will lead to the supersession of 32 senior judges, amongst them, 19 are chief justices and some of the seniormost are already in consideration to enter the Supreme Court. There is also a senior woman judge, presently the Chief Justice of Telangana High Court, who is in line to enter the Supreme Court.

This supersession in a bid to see a woman in the highest judicial office cannot be overlooked. Supersession itself is perceived as a threat to an independent judiciary. Seniority combined with merit is the sacrosanct criteria for promotion in the judiciary. History is replete with instances when meritorious judges were superseded. How demoralising and frustrating this is, only the judge superseded knows. Let it not happen again. Justice Nagaratha can become the first woman CJI even without superseding so many senior judges, though her tenure will be shorter.

How CJI N V Ramana will give leadership to the SC and secure the trust of members of his collegium to fill the backlog of 411 vacancies across high courts and six vacancies in the SC remains to be seen. Hopefully, under his leadership, justice will be done to Justice Akil Kureshi over whose name there has been a deadlock. And a greater number of women in the Supreme Court eventually leading to a woman CJI. This would be a gratifying change, which may mark the beginning of a new era of judicial appointments.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/supreme-court-gender-diversity-woman-cji-7291772/

Sneak Peek:

No. of words: 988 words

Note: In this article the author is analyzing the recent judgment of Kerala High Court, where It was held that right to pronounce Khula is an absolute right conferred on the married Muslim woman and no specific reasons are required to invoke it, once there is a declaration from the wife for repudiation or termination of a marriage. Further Court elaborately discusses the various modes of dissolution of marriage. It is a must read article.

Article: 2

Landmark Kerala HC judgement clarifies Muslim women's right to initiate divorce

It states that the right to pronounce Khula, wife-initiated divorce, is absolute and no specific reasons are required to invoke it

In the past, the Kerala High Court has delivered many landmark judgements in relation to Muslims' divorce. This month, a Division Bench of the High Court was dealing with the issue of conditions in "Khula", divorce initiated by the wife. The legal issue before the Court was whether a Muslim wife, once she has decided to leave the marriage for reasons that she feels are appropriate, has the right to pronounce unilateral extra-judicial divorce through Khula against her husband.

Undoubtedly, without the intervention of courts, a Muslim woman can unilaterally divorce her husband if, by contract, the husband has delegated the right to divorce to his wife. The second method is divorce by mutual consent, through the process called Mubaarat. Another right of a Muslim woman to divorce is by way of Khula, wherein she decides to terminate the marriage. This process may be called wife-initiated Talaq. Till now, Ulemas, particularly of the Hanafi School, have interpreted that Khula can be exercised only when the husband accedes to the wife's request. If he refuses, the woman has no option but to approach courts of law under the provisions set out in the Dissolution of Muslim Marriage Act of 1939.

The Kerala High Court feels that compelling the wife to go to court for Khula frustrates the right guaranteed to her in the personal law, which is largely based on two primary sources — the Quran and Hadith (words or actions of the Prophet). The court draws an analogy from the right of the husband to pronounce unilateral Talaq, to say that both are of similar nature, adding that the husband's approval as a condition in Khula is not correct. The judgment proceeds to clarify that the right to pronounce Khula is an "absolute right" conferred on the married Muslim woman and no specific reasons are required to invoke it, once there is a declaration from the wife for repudiation or termination of a marriage. It also says that the right to pronounce Khula cannot be invalid in case the wife does not offer to return the dower or any other material gain received by her during the subsistence of the marriage at the time of the said pronouncement. The only thing the wife must do before the pronouncement of Khula is to undertake efforts of reconciliation — just like a man is obliged to, before pronouncing husband-initiated Talaq, as declared in the Shamim Ara Judgment of the Supreme Court (2002).

However, a reading of the judgment suggests that despite clear suggestions regarding the absoluteness of the wife's right to invoke Khula, she is still required to approach the court. Earlier, she could approach the court under the 1939 Act which, according to this judgment, is only for Faskh-e-Nikah, loosely translated as annulment or dissolution of marriage by a judicial or quasi-judicial authority.

According to the judgment, after pronouncing Khula, the wife takes recourse under the Family Courts Act, 1984 instead of the Act of 1939. The court process shall be a summary proceeding to declare the right of the

wife. If the husband wants to contest the validity of such an invocation, he shall be free to do so as per law, through a separate proceeding. But if we read the grounds for the dissolution of marriage in the 1939 Act, they are of mixed nature and not exclusively for the annulment of marriage, especially when it declares that it can be used for any other ground which is recognised as valid for dissolution of marriage under Muslim law. This is important because, in legal parlance, the terms "annulment" and "dissolution" attract different legal consequences. Here, the High Court is unclear when it says that the 1939 Act will be used only for Faskh-e-Nikah.

The All India Muslim Personal Law Board agreed with the judgment to the extent it recognises Khula as an extra-judicial remedy but has objected to the portrayal of Khula as a unilaterally-exercisable prerogative without the husband acceding to it. According to the board, the husband's acceptance is a prerequisite in the process of Khula. On the question of returning the gifts and the mehr (dower), the court says that Khula would not depend on fulfilling such obligations by the wife because they are only "procedural aspects". The court further clarifies that the Quran confers on a Muslim wife the right of Khula to annul her marriage without prescribing a procedure, adding that "fairness is a matter relative consideration in a context to be followed when such a course is opted by a wife".

Interpreting applicable verses of the Quran, the court said that the right of Khula is an unconditional right of the woman. It cited a well-known hadith where a wife approached the Prophet desiring to get out of the marriage. The Prophet inquired of the wife as to whether she will return the mehr to the husband. The wife said, "yes". The Prophet then told the husband to accept the garden given to her as mehr, and asked him to divorce her. This appears to have become the guiding factor for the ulemas to interpret the very same verses of the Quran as requiring the husband to accede to the request and to make the return of gifts and the mehr a mandatory part of the process of Khula. However, rigidity on this stand by ulemas will place the woman-initiated divorce in almost the same category of mutual consent divorce, Mubaraat. Both these concepts are recognised as distinct forms of divorce under the Shariat Application Act of 1937. Against this background, the High Court's interpretation of Khula appears to be more of an effort towards a "harmonious" construction of the terms set out in the 1937 Act, than being a perfect view.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/landmark-kerala-hc-judgement-clarifies-muslim-womens-right-to-initiate-divorce-7290233/

Sneak Peek:

No. of words: 2240 words

Note: In this article the author is critically analyzing the recent Supreme Court order rejecting an application to stay the deportation of Rohingya refugees to Myanmar. Author analyzes the said order of Supreme Court in the light of the ICJ ruling and various International Treaties to which India is a signatory. It is very informative text to understand the legal position about the subject.

Article: 3

Supreme Court must rethink its order on deportation of Rohingya refugees

The April 8 order is disappointing not just for the callous disregard of grave human rights issues by a Court which was a beacon for other constitutional courts; it is startling for its refusal to examine the questions raised by the petitioners, and to probe even superficially the facile defences of the government.

Supreme Court judgments are sometimes hailed for their sagacious blend of head and heart; other times, a judge with a towering intellect gets away with perceived heartlessness by the irrefutable strength of reason; or another who is all heart, makes up in compassion what may be lacking in cold logic.

But what is inexcusable, and especially in a human rights case involving the lives and personal liberty of hundreds of unlawfully detained refugees threatened with deportation into the hands of a genocidal regime, is a conscious refusal by the Court to consider the facts, to examine uncontested materials placed before it, and to hold the central and state governments to their duties under Part III of the Constitution of India, as well as their obligations under binding international law. If the government of the day exposes the nation to the danger of being complicit in genocide, the least that is expected of the Supreme Court is to hear, consider, examine, evaluate and decide. Burying one's head in the sand, and turning a stony heart away from searing issues, does credit neither to head nor heart.

In its April 8 order in Mohammad Salimullah v. Union of India, the Supreme Court rejected an application to stay the deportation of Rohingya refugees to Myanmar. The Court noted the petitioners' contention that more than 6,500 Rohingya refugees were illegally detained in Jammu, and that 150-170 of them were under imminent threat of forcible deportation at a time when the civilian government of Myanmar stood unseated by a military coup. It also noted the petitioners' reliance on a judgment of the International Court of Justice (ICJ) dated January 23, 2020, which recorded the genocidal conditions that resulted in 7.75 lakh Rohingyas being forced to take refuge in Bangladesh and India. Ultimately however, relying on the bald and unsubstantiated word of the government that the principle of non-refoulement, or forcible repatriation to a place where the refugee's life is in danger, applies only to signatories to the UN's Refugee Convention of 1951 or its 1967 Protocol, and that a previous application for seven Rohingya refugees in Assam had been dismissed on October 4, 2018, the Court rejected the present application. In the interest of full disclosure, it must be stated that a UN Special Rapporteur represented by the present author was not heard, as the Court felt that serious objections had been raised to her intervention.

The April 8 order is disappointing not just for the callous disregard of grave human rights issues by a Court which was a beacon for other constitutional courts; it is startling for its refusal to examine the questions raised by the petitioners, and to probe even superficially the facile defences of the government.

A glance at the ICJ judgment reveals that the United Nations, by General Assembly resolution 73/264 adopted on December 22, 2018, had accepted two reports of the independent international fact-finding mission on Myanmar, which clearly established that the Rohingyas had been systematically disenfranchised, rendered stateless, subjected to widespread atrocities, uprooted from hundreds of villages which were burnt to the ground, and subjected to mass killings, disappearances, rape and plunder. Para 71 of the ICJ judgment noted the detailed findings of another independent international fact-finding mission on Myanmar dated September 16, 2019. And in the passages that follow, the ICJ records another United Nations General Assembly resolution (74/246), adopted on December 27, 2019:

"71. The Court notes that…… since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life. As indicated in resolution 74/246 adopted by the General Assembly on 27 December, 2019, this has caused almost 744,000 Rohingya to flee their homes and take refuge in neighbouring Bangladesh."

"72. The Court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable. In this respect, the Court notes that in its resolution 74/246 of 27 December 2019, the General Assembly reiterated 'its grave concern that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process'.

"73. …..Moreover, the Court cannot ignore that the General Assembly has, as recently as on 27 December 2019, expressed its regret that 'the situation has not improved in Rakhine State to create conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity'. …At the same time the General Assembly reiterated 'its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces, including extrajudicial, summary or arbitrary killings, systematic rape and other forms of sexual and gender-based violence, arbitrary detention, enforced disappearance and government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed'.

"74. Finally, the Court observes that, irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention. The Court recalls that, in accordance with the terms of Article I of the Convention, States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context 'of peace' or 'of war' in which it takes place…"

Based on these preliminary findings, the ICJ on 23.01.2020 issued a slew of provisional measures to prevent continued genocide of the Rohingyas. Importantly, in the context of the Petitioner's submission that forced repatriation or deportation is particularly fraught after the recent military coup, the ICJ directed that:

"80. Myanmar must also, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organization and persons which may be subject to its control, direction or influence, do not commit acts of genocide, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide."

"81. The Court is also of the view that Myanmar must take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of Article II of the Genocide Convention."

The Supreme Court accepted the central government's glib assertion that non-refoulement applies only to contracting states under the refugee convention, and that the right not to be deported flows not from the right to life and liberty under Article 21, which applies to all human beings, but from the right to reside and settle in India under Article 19(1)(g), which applies to citizens alone. Had the Court opened its eyes to the materials staring it in the face, these specious arguments would have been laid bare.

India is a signatory to the Convention for the Prevention and Punishment of the Crime of Genocide (the Genocide Convention, 1948), and on March 2, 2016, Kiren Rijiju, Minister of State for Home Affairs, informed the Rajya Sabha that by acceding to the Convention in 1959, India has recognised genocide as an international crime, and that the principles of the Convention are "therefore already part of common law of India". India has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and a number of other UN conventions which also have a bearing on non-refoulement, particularly those dealing with the rights of women (CEDAW) and children (CRC), both of which have been declared by the Supreme Court to be part of our domestic legal framework.

Without labouring the issue, Article 6(1) of the ICCPR, which mirrors Article 21 of our Constitution, declares that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Article 6(3) of this Convention mandates that "When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide".

The leitmotif of the Genocide Convention is "prevention", and that word is not only prominent in its title, but central to Article I, under which the contracting parties confirm that genocide is a crime under international law, "which they undertake to prevent and to punish". One of the acts punishable as an international crime in Article III(e), is "complicity in genocide".

Any remaining doubts about the status of non-refoulement under international law, are dispelled by the general recommendations of the United Nations' Human Rights Council (UNHRC) adopted by the Committee on the Elimination of Racial Discrimination, under the ICERD, which India is a party to. Section VI of general recommendation XXX adopted at the 65th session (2005), titled "Expulsion and Deportation of Non-Citizens", contains clauses 25 to 28, the first three of which are relevant to the proposed expulsion or deportation of Rohingyas. Suffice, however, to set out clause 27, which requires that state parties "ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment".

Equally, it is increasingly accepted in public international law, that non-refoulement and other protections emanating from the Genocide Convention, are peremptory norms that apply to state parties as well as non-parties, or in other words, that non-refoulement is jus cogens, a norm from which there can be no derogation whatsoever. Indeed, at least three high courts (Gujarat in 1998, Delhi in 2015, and Calcutta in 2019) have held that non-refoulement is part of the right to life and liberty protected by Article 21 of our Constitution.

Sadly, the Supreme Court accepted the unsubstantiated word of the government, which flew in the face of all the clinching materials that were on record. Worse, the Court relied on an earlier, one-paragraph, order dated October 4, 2018, dismissing an application to prevent deportation of seven Rohingyas from Assam.

Resultantly, the Court brushed aside major developments after October 4, 2018, including the UN General Assembly resolutions of December 2018 and December 2019, the UNHCR Special Rapporteur's application of July 2019, the ICJ judgment dated January 23, 2020, and the military coup of February 1, 2021, which unseated the elected civilian government and jailed the Prime Minister and President. This last event is met with the statement that the Supreme Court "cannot comment upon something happening in another country'; a statement that is bewildering, considering that deportation, genocide, treaty obligations, and non-refoulement are inextricably concerned with the state of affairs in Myanmar. This is a callous cop-out, in view of the General Assembly resolutions recording that Myanmar's military was involved in a text-book case of ethnic cleansing and genocide. In fact, the junta that now rules Myanmar is headed by the Commander-in-Chief of the Tatmadaw, Senior General Min Aung Hlaing, who, along with other generals under his command, was named as the principal perpetrator of the genocidal "clearance operations" against Rohingyas in 2016 and 2017. Indeed, directions 2 and 3 of the ICJ's provisional measures are mandates against the military, which makes the Supreme Court's comment even more incomprehensible.

So what should the Supreme Court do?

There are two possible solutions. The first is that in its interim order, the Court specifies that the Rohingya refugees may not be deported unless "the procedure prescribed for such deportation is followed". It is a long-held principle of Indian jurisprudence that the word "procedure" means "due process", or a procedure that is just, fair, and reasonable. The Supreme Court can, thus, suo motu clarify that its interim order means that the refugees may not be deported without due process, and due process requires that they not be deported as long as there exists a reasonable threat of persecution in Myanmar.

Alternately, since the order in question is an interim order that was passed without a detailed hearing, the damage is not irreversible. The Court could, therefore, swiftly hear the main petition on its merits, and clarify the law on non-refoulement and Article 21. By doing this, the Court will redeem its hard-earned reputation of being the "last refuge of the oppressed and the bewildered".

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/rohingya-refugees-crisis-india-supreme-court-7288913/

Sneak Peek:

No. of words: 1387 words

Note: This article has gained prominence since the author is evaluating the tenure of last 4 Chief Justices of India. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it. It is very informative text and a must read article.

Article: 4

The chequered legacy of a Chief Justice of India

As the Supreme Court turns the page on the tenure of the outgoing CJI, it needs to reclaim its role as a judicial beacon

The Supreme Court of India in the last five years during the tenure of the last four Chief Justices of India (CJIs), has seen an unprecedented fall — from being an independent custodian of justice, to becoming an instrumentality of the government. After the tenure of former CJI Ranjan Gogoi, who oversaw the Ayodhya and Rafale verdicts, before retiring to join the Rajya Sabha, we thought the worst was behind us. We hoped that his successor, CJI S.A. Bobde would lift the Court out of this abyss and at least restore its independence from the executive. But, the nearly 18 months of his tenure has exposed a deep malaise in every aspect of dispensation of justice; from the administration of the Court; in the allocation of cases and benches; to presiding over matters related to the protection of civil liberties, securing the rights and the livelihood of the poor and marginalised; or in ensuring that the unconstitutional actions and policies of the executive are kept in check.

Momentous months

His tenure began in November 2019 with many important cases before him. There were over 100 petitions challenging the dilution of Article 370 and the reorganisation of the State of Jammu and Kashmir (J&K) into Union Territories. Soon after he assumed office, the Citizenship (Amendment) Act was passed, which led to another spate of petitions challenging its constitutionality. The CAA sparked widespread protests. We witnessed police confrontation at the Jamia University campus and the entry of gangs into Jawaharlal Nehru University who beat up students and teachers under the full gaze of the police. Thereafter, the city of Delhi witnessed engineered riots and the subsequent hounding of young students and other activists in the guise of an investigation by the Delhi Police. There were also other important cases pending before the Supreme Court, including the validity of electoral bonds, and the protection of Rohingya refugees. Then, early in 2020, COVID-19 overtook the country, and with it began the lockdown of the Supreme Court and thereafter other courts, and then the entire country — which led to the largest exodus of migrant labour from the large cities in India.

A powerful constitutional court like the Supreme Court of India must rise to these challenges, and it is in such challenging times that its mettle and independence is tested. It is here that the role of the Chief Justice of India — he is the master of the roster deciding the priority accorded to the hearing of cases, their allocation to Benches and setting the tone for the Court by his leadership — becomes critical.

The cases challenging the cataclysmic changes to the status of J&K remained unheard during his entire tenure as did the cases challenging the CAA. The main challenge to the electoral bonds and other changes to electoral funding, which have a fundamental bearing on our democracy, remained unheard. Applications for

the stay of bonds being issued before every election, were never listed for hearing, and were eventually dismissed on the ground that the bonds had been around for several years; therefore, there was no need to stay them. Similarly, the main petition regarding the status of the Rohingya refugees and the protection to be accorded to them, remained unheard. An application to prevent their detention and deportation, was disposed of by Chief Justice Bobde, in complete disregard of constitutional and international law norms, on the basis that their fleeing genocide in Myanmar did not concern the Court.

The Supreme Court, under his stewardship, remained shut for physical hearing much of the time, resulting in fewer than 25% cases being heard in a Court, already reeling under a backlog and pendency of cases. Many habeas corpus petitions of people in detention were not heard for months, and thereafter summarily disposed of without deciding the main issue by relegating the petitioners to the High Courts.

Migrant labour exodus

During the nationwide lockdown last year, the country witnessed unprecedented suffering by migrant labour; there was a mass exodus of them from the big cities, and they suffered a huge loss of livelihood and income. Without any public transport, they were forced to walk hundreds of miles to reach their villages. Their case for relief in terms of food, wages and transport was initially heard by the CJI's Bench. Unfortunately, the pleas on behalf of the migrant workers did not result in any relief to them with the Court saying it could not "supplant" the government's wisdom on providing relief to the lakhs of migrant labourers across the country. The CJI remarked infamously during one of the hearings, "If they are being provided meals, then why do they need money?" It would be no exaggeration to say that the Court's inhumanity and apathy towards the distress of the poor and marginalised reached its nadir during this time.

Far from being a custodian of citizens' rights, CJI Bobde, while hearing the Kerala journalist Siddique Kappan's habeas corpus petition (arrested while covering the infamous Hathras rape and murder case in Uttar Pradesh), noted that the Court had been discouraging people from approaching it under Article 32. Mr. Kappan's petition remained pending with repeated adjournments.

In the farmers' protest case, the CJI appointed a committee of people, whose political neutrality was suspect, to examine the issues and commence negotiations with the farmers. These committee members had publicly supported the farm laws in the past.

Administrative role

Apart from his role as the master of the roster, the CJI also plays a pivotal role in judicial appointments. Unfortunately, here too, he failed to carry the collegium with him, leading to no appointments to the Supreme Court during his tenure, and very few appointments even to the High Courts. He did not even order the government to issue notifications for the appointment of judges where the collegium had unanimously reiterated its recommendations, despite the government procrastinating over them for long. The law laid down by the Court says that these are binding on the government.

The Chief Justice of India also plays a critical role in dealing with complaints against judges. During his tenure, the CJI received a serious complaint made by a Chief Minister of a State against one of the Court judges, with considerable documentary evidence of questionable land purchases. For over six months, the people in the country were not informed how the complaint had been dealt with, and whether any in-house committee (as per the law) has been appointed to, who the members of the committee were, and what their report was.

The same lack of transparency was visible in another case, where he was chairman of a committee examining allegations of harassment made by a woman staffer of the Court against his predecessor. His report, purporting to give a clean chit to his predecessor, was never allowed to see the light of day and not even provided to the complainant.

Green cause

I have tried to search for the redeeming features in the CJI's tenure. But to my dismay, the only positive intervention by CJI Bobde that I have been able to discover was his order in the West Bengal trees case, where he appointed an expert committee to examine the value of trees which are to be felled for any public project. In all other issues, the CJI has only caused disappointment with his silence, letting the executive have its way and even making strong remarks on sensitive issues and subjects. He has kept important matters pending, and has hardly intervened to provide any relief to the most marginalised or the weak in India.

As we bid farewell to Chief Justice of India Bobde, the Supreme Court must examine what has happened to what had once been called the most powerful court in the world and a beacon for many other courts across the world. As the Supreme Court turns the page on his tenure, let us hope that in the coming years, it can rebuild its legacy by asserting its judicial independence from the government and once again reclaiming its constitutional role as a citadel that establishes India's constitutional values, guards its democracy, and protects human rights and dignity.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/the-chequered-legacy-of-a-chief-justice-of-india/article34387891.ece

Sneak Peek:

No. of words: 1770 words

Note: In this article the author is analyzing the tenure of 47th Chief Justice of India, S.A. Bobde. As a CLAT Aspirant it is a must read article.

Article: 5

What Is Chief Justice Sharad Bobde's Legacy, As He Retires?

The 47th Chief Justice of India, Sharad Arvind Bobde, is set to zoom off into retirement after an eighteen-month reign, marked by two waves of the coronavirus. His leadership of the institution, during a time of national crisis, has not lead to any enhancement of its stature. The court has withdrawn into enforced isolation, looked away from people's misery, and has largely hunkered down waiting for the storm to blow over, and better days to return. Throughout the world, countries, and institutions with good leadership, have weathered the pandemic better than institutions and countries with weak or whimsical leaders. After the storms of the Gogoi era, the court had looked towards the more affable Justice Bobde, to steer the court into calmer waters. The question is, has CJI Bobde's hand on the tiller, left the institution becalmed by dead winds.

His tenure began with a focus on religious issues that bedevil constitutional interpretation of the fundamental rights. In December 2019, he headed a bench that put a quietus to the Ayodhya verdict, by dismissing 18 review petitions filed against various aspects of the judgment. In February 2020, while dealing with the review petitions filed against the Sabarimala judgment, Justice Bobde held that the Supreme Court can refer questions of law to a larger bench while exercising its review jurisdiction. The Court also framed seven questions that are related to Articles 25 and 26 of the Constitution which will now be heard by a Bench of nine judges. The bench was to be constituted shortly, but the pandemic put paid to those forays.

Dealing With The Pandemic

The advent of the nationwide lockdown towards the end of March saw the court adopting video conferencing for urgent matters. As time went by video conferencing became the norm and physical hearings were not resumed, except for the Maratha reservation case. The Supreme Court however chose to run hearings, on a little-known app called Vidyo, operated by external control rooms, over which participants including lawyers and judges, had no control. Thankfully the Supreme Court did not impose its choice on other courts and consequently, some of the High Courts chose to operate more well-known apps with a much smoother user interface. The Supreme Court however has doubled down on its choice of Vidyo despite continual criticism from users, including some judges. To persist in error, in the face of contrary evidence, is to indulge in institutional confirmation bias, in the technology sphere.

Chief Justice Bobde was repeatedly heard advocating artificial intelligence solutions in a judicial system that cried out for a little native intellect.

To his credit, Bobde headed a bench that directed the states and union territories to constitute high powered committees that could decide which prisoners may be released on interim bail or parole during the pandemic. The Court recommended considering prisoners for release who have been convicted or are undertrial for offences for which the prescribed punishment is up to 7 years or less. Thousands of prisoners were temporarily set free, to avoid an explosion of Covid-19 in prisons. On the Civil side, the court while exercising its powers under Article 142, passed an order extending the limitation period in all proceedings, whether condonable or not, with effect from March 15, 2020, until further orders. It also allowed summons

and notice to be served through email, fax, and instant messaging applications in view of the Covid-19 pandemic.

Unions Versus The Union

When farmers' protests and the resultant blockades of roads, came up for the Court's consideration, Bobde refused to interfere with the protest, holding that the "right to protest is part of a fundamental right and can as a matter of fact, be exercised subject to public order." The Court declared that the farmers' protest should be allowed to continue without any breach of peace either by the protesters or the police.

Later the Supreme Court granted a stay on the "implementation of all the three farm laws for the present", with a view to "assuage the hurt feelings of the farmers and encourage them to come to the negotiating table with confidence and good faith". Rejecting the Attorney General's argument concerning the presumption of constitutionality, the Court declared that it was not "completely powerless to grant stay of any executive action under a statutory enactment". It also formed a committee to resolve the disagreements between the farmers and the government. The Court concluded by saying that it hoped that this "extraordinary order of stay… will encourage the farmers bodies to convince their members to get back to their livelihood". However, these orders failed to convince the farmer unions, who even today are continuing with their protest.

A Costly Reversal

It is however Bobde's turnaround on the question of not allowing crowds to gather for religious festivities, which may yet mark the Supreme Courts' tacit encouragement of super-spreader exemptions. In June 2020, the country had barely emerged from a brutal nationwide lockdown, when the question of holding the *rath yatra* of Jagannath at Puri, was brought before the court. "Lord Jagannath Will Not Forgive Us If We Allow This" proclaimed CJI Bobde on June 18, while staying the gathering of crowds for the religious function. Barely had the ink dried on the order, that politicians of all hues began to remonstrate. Four days later, on June 22, 2020, Justice Bobde revised his order and allowed the yatra to proceed subject to some conditions. The court set its imprimatur upon religious exceptions to pandemic restrictions, which doctrine has thereafter plagued, all efforts to strictly enforce masking and social distancing in crowd situations.

The crowds at Holi and the Kumbh Mela, which fuelled the second wave, owe their origin to Lord Jagannath's power of judicial review.

CJI Bobde's final week in office, was marked by staying an order of the Allahabad High Court which excoriated the state government for its weak Covid response. The High Courts of Bombay, Uttarakhand, Telangana, and Delhi too are examining similar questions. Those state governments may now feel emboldened to resist High Courts that seem determined to hold their Covid response to strict constitutional scrutiny. After all, there is a precedential value attached even to interim orders of the Supreme Court. On April 22, the Chief Justice said there was confusion and diversion due to six separate High Courts exercising their jurisdiction, took suo moto cognizance on four issues (supply of oxygen, essential drugs, vaccination, and power to lockdown), and appointed Harish Salve as amicus in the matter.

As the deadly second wave of the pandemic rages and the virus goes into exponential growth, killing thousands of Indians, we must squarely ask, has the Supreme Court been complicit in the destruction of human life? Has Lord Jagannath not forgiven us?

An Empty Slate On Appointments

In the matter of judicial appointments, Chief Justice Bobde failed to leave any mark whatsoever on the Supreme Court. An eighteen-month tenure would normally produce four or five appointments, if not more. While the collegium did meet to consider recommendations for appointments to the Supreme Court, it failed

to recommend any names during his tenure. Appointments to the High Courts were recommended and processed, but not in substantial numbers to cover the attrition due to retirements and resignations.

The seeds of the logjam on Supreme Court appointments were possibly sown in Chief Justice Gogoi's tenure when the appointment of Justice Akil Qureshi as Chief Justice of Madhya Pradesh was substituted by an appointment to the High Court of Tripura. The case of Justice Qureshi who is now due for consideration for elevation to the Supreme Court, but is likely to not find favour for appointment by the government, is a challenge that the collegium has not squarely addressed so far. Some senior judges seem inclined to make the recommendation and some others may prefer a cautious approach. The ball is now in the court of Chief Justice designate Ramana and the new collegium.

There has also been considerable talk about a woman judge being elevated in time to be Chief Justice of India, but that too is still a question at large. It is however apparent, that Bobde has, in his tenure, failed to achieve consensus on recommendations for appointment to the Supreme Court.

A lack of a record on appointments is a serious gap while evaluating the legacy of any Chief Justice of India.

In The Face Of Adversity

A summation of Bobde's triumphs and disasters, brings to mind, the image of Pontius Pilate, the procurator of Judea, who presided over the trial of Jesus Christ. The New International Version of the Bible records the exchange:

Jesus answered with abandonment, "You say that I am a king. Instead, in fact, the reason I was born and came into the world is to testify to the truth. Everyone on the side of truth listens to me."

What is truth?" retorted Pilate. With this, he went out again to the Jews gathered there and said, "I find no basis for a charge against him. But it is your custom for me to release to you one prisoner at the time of the Passover. Do you want me to release 'the king of the Jews'?" They shouted back, "No, not him! Give us Barabbas!"

The gospel of John goes on to record, "…From then on, Pilate tried to set Jesus free, but the Jewish leaders kept shouting, "If you let this man go, you are no friend of Caesar. Anyone who claims to be a king opposes Caesar."

When Pilate heard this, he brought Jesus out and sat down on the judge's seat at a place known as the Stone Pavement. It was the day of Preparation of the Passover; it was about noon. "Here is your king," Pilate said to the Jews. But they shouted, "Take him away! Take him away! Crucify him!" "Shall I crucify your king?" Pilate asked. "We have no king but Caesar," the chief priests answered.

Finally, Pilate handed him over to them to be crucified.

Like Pontius Pilate, Chief Justice Sharad Bobde often had the right instinct, but not the persistence to follow it.

He was good when the going was good but was not a leader designed for adversity.

In the face of persistent clamour, he yielded his individual voice and added it to the multitude. As he demits office, one can only hope that he retires to a fruitful private life and chamber practice as a gifted man of law. A return to public office or employment may only further fray what remains of his legacy.

Courtesy: 'Bloomberg quint' as extracted from:

https://www.bloombergquint.com/law-and-policy/what-is-chief-justice-sharad-bobdes-legacy-as-he-retires

Sneak Peek:

No. of words: 2834 words

Note: In this article the author has critically analyzed the tenure of 47th Chief Justice of India and highlighted the issues which lead to the further decline of Apex Court as a custodian of Constitutional values. It is in Furtherance of your last article.

Article: 6

CJI Bobde Led Further Decline of Supreme Court as a Constitutional Court

As the Chief Justice of India, Sharad Arvind Bobde had to preside over the Supreme Court when the country was going through a turbulent and difficult phase. There was(and still is) the unprecedented humanitarian crisis caused by the COVID-19 pandemic and the nationwide lockdown. It was also the time when widespread protests were simmering across the country against the ruling regime over the changes made to laws related to citizenship and farming. Corresponding to the rise of civilian protests, the regime's use of draconian laws relating to anti-terror and sedition against dissenters and activists increased. It was a time when the executive grew in its might, and its powers became even more unfettered, when the coronavirus threw normal life out of gear.

It was a period when the judiciary was faced with novel constitutional problems and human rights issues. If you were one among those who had placed hopes on the Supreme Court to deal with these issues with all its powers as a constitutional body to protect the rights of citizens, then you would feel let down by many of the responses of CJI Bobde, which were evasive, shallow and callous at times.

CAA- the first challenge

Soon after assuming office in the last week of November 2019, CJI Bobde was faced with the challenge posed by the Citizenship Amendment Act. The Citizenship Amendment Act and the announcements about the National Register of Citizens triggered off mass civilian protest movements across the country, which were sought to be brutally suppressed by the State through the invocation of Section 144 orders, police crackdowns, internet shutdowns etc. The changes to the core concepts of Indian citizenship and the uncertainties about the National Register of Citizens and the anxieties about its apparent precursor the National Population Register sent the country into a state of turmoil. Over 140 writ petitions were filed in the Supreme Court by different parties across the nation challenging the CAA-NPR-NRC.

Meanwhile, few petitions came before the CJI complaining of police brutalities in the campuses of Jamia and AMU. The CJI first said that the petitions will be heard "only after violence stops", and later turned the petitioners away to alternate remedies.

While many were looking up to the Supreme Court for an expeditious and authoritative pronouncement on the issues relating to citizenship, CJI Bobde chose to give priority to certain academic questions of religious rights raised in a curious order passed in Sabarimala review.

When urgent listing of the CAA petitions was sought, the CJI said 'after Sabarimala reference'.

It was a moment characteristic of the present times, where abstract questions of religion often prevail over concrete rights of citizens.

Both the issues – CAA and Sabarimala- remain unresolved today.

Pandemic-Lockdown-Migrants Crisis

When a country wide lockdown was announced in the March 2020 to control the COVID19 pandemic, it led to the unfolding of another humanitarian crisis, which the authorities failed to foresee – the exodus of migrants from cities. In the absence of regular means of transport, they attempted to traverse hundreds of kilometers by foot.

Heart-rending images of hordes of migrants families walking along roads, some with kids and toddlers, flooded the media. The situation was alarming enough to warrant a suo-moto intervention by the Court, especially considering the fact that usual judicial remedies were beyond the access of the hapless victims.

The grave humanitarian crisis in the unfolding demanded a prompt and pro-active response from the Court. However, when a PIL espousing the cause of migrants came before a bench headed by the CJI, it made a demeaning finding that the massive exodus of migrants was caused by "fake news".

"The migration of large number of labourers working in the cities was triggered by panic created by fake news that the lock down would continue for more than three months.", observed the CJI-bench in an order passed on March 31(It is a different matter that the lockdown continued for over three months after that).

The CJI's bench also recorded, without any verification, the submission of the Solicitor General that no migrant workers were walking on the road(to record this submission in the order which was speaking of exodus of migrants was in itself contradictory!).

This conclusive and sweeping finding was solely based on the assertion made by the Centre in its affidavit that fake news was to be blamed for the exodus. The CJI did not think it fit to probe if there were other factors - such as unemployment, penury, lack of food and shelter - which drove the migrants to desperation. This finding, made without any evidence and discussion, had two problematic effects :

Absolving the executive of its liability by indirectly stating that the migrants brought their own predicament upon themselves .

Trivializing the genuine sufferings of migrants by characterizing them as a response to a so-called fake news.

After expressing concerns about fake news, the Court stressed on "importance of mental health and the need to calm down those who are in a state of panic". The Court said that trained counselors and community leaders of all faiths should be arranged in all shelter camps and urged the authorities to treat the workers with "kindness". The Court failed to understand that the "anxiety and fear" of the migrants were not just matters of perception which could be cured through counselling and spirituality, but were real sufferings caused by lack of basic human necessities.

The Court's lack of sensitivity came on display again on April 7. While hearing a PIL filed seeking to direct the Centre to transfer wages to the accounts of migrants in shelter homes, CJI Bobde asked "if they are being provided meals, then why do they need money for meals?".

The Court's response to the migrants crisis came under severe criticism from many legal luminaries. Ultimately, after mounting public criticism, the Supreme Court took suo moto cognizance of the case in the last week of May last 2020, nearly two months after the lockdown declaration.

Farmers Protests

The CJI's response to the farmers protests against the controversial laws on farming was dumbfounding. A bench led by him stayed the implementation of the laws, but not on any legal or constitutional ground. The stay was ordered to facilitate talks between the protesters and the Central Government through a committee formed by the Court. (This extra-legal course adopted with respect to farmers protests, was in stark contrast with the total neglect shown by the court to the issues raised in CAA-protests, which were comparable to the scale of farmers protests. It may also be recalled that during the CAA-protests, the CJI had taken suomoto cognizance of a letter petition against participation of children in protests, though nothing came out of the matter).

When the CJI announced the names of the Committee members, it left everyone astonished, as all of them had favoured the farm laws in varying degrees. With this exercise, CJI Bobde took the Court into the political thicket, ignoring the primary judicial function of examining the vires of a law. As expected, embarrassment was in store for the Courts. The protesters boycotted the committee expressing no-confidence in it. One of the committee members recused.

Red-faced at the public flak against the court order, the CJI launched a verbal attack on the press and the critics while hearing the case on a later date.

"How can you play with people's reputation like this? We have serious objections in they being called biased and in saying court was having an interest. You malign people according to majority opinion?"

"We are very sorry to see the kind of opinions expressed in newspapers", he said.

Few weeks ago the committee submitted a report in sealed cover in the court. The farmers are still protesting. Questions of constitutional law in the pleas challenging farmers law are pending consideration.

Impulsive remarks, lack of legal reasoning

With his tendency to make off-hand, impulsive oral remarks from the bench, CJI Bobde has landed himself in controversy on many occasions.

His remarks such as 'why do migrant workers need money when they get food'(during lockdown), "We don't understand either why old people and women are kept in the protests"(during the famers protests case hearing) came under severe public criticism for their apparent insensitivity.

CJI Bobde was also seen insisting on the use of colonial honorifics 'your lordship' or 'my lord' on two occasions. He refused to hear two petitioners for not using these terms to address the court. This was a surprising response, out-of-sync with the latest practice adopted by many judges to discourage the use of these archaic forms of address.

A month short of retirement, CJI Bobde kicked up another row with his 'will you marry her?' question to a man accused of raping a minor on a false promise of marriage. The man, who was accused of inducing a minor girl into sexual intercourse by promising to marry her while he was a teenager, had approached the Court seeking anticipatory bail . Upset with the huge backlash generated by the remarks, CJI Bobde, on a later date, claimed that his observations were misreported and said "we never gave a suggestion that you should marry. We had asked, are you going to marry!"

Orders lacking adequate legal reasoning

The bigger issue is that many orders passed by CJI Bobde also reflected the loose nature of his oral remarks. The striking example is the recent order passed to refuse stay on electoral bonds, which was astonishingly lacking in legal reasoning. The bench even made puerile remarks in the order that the anonymity of the bonds can be pierced by doing a "match the following" from the public records of political parties and companies. It was shocking that the bench did not take note of the basic fact that political parties are exempted from disclosing the donations received via electoral bonds. Clearly, the bench had not understood the impact of the amendments brought by Finance Act 2017. In another detailed article, this author has argued how the electoral bonds order is erroneous.

The order allowing the deportation of Rohingya refugees was an even more shocking example. The bench led by CJI Bobde did not address the arguments raised by the petitioner based on the principle of 'non-refoulement'. The Court said that right not to be deported was a facet of right to reside in India, a fundamental right under Article 19 which is available only for Indian citizens. The bench failed to note that the Rohingyas were apprehending threat to right to life under Article 21 – which is available to non-citizens as well – as their deportation to Myanmar will expose them to genocide. As legal scholar Gautam Bhatia pointed out, with this order, the Supreme Court travelled back in time to the AK Gopalan era where Article 14, 19 and 21 were seen as forming distinct silos.

Even during this case hearing, CJI Bobde made certain insensitive remarks such as "Possibly that is the fear that if they go back to Myanmar they will be slaughtered. But we cannot control all that".

Inconsistent approach on Article 32

CJI Bobde has said on many occasions that the Court was trying to cut down the jurisdiction under Article 32 of the Constitution.

These statements had raised many eyebrows, as Article 32 is said to be the heart and the soul of the Indian Constitution, in the words of Dr BR Ambedkar.

Perhaps,he might have meant the weeding out of frivolous petitions filed in SC misusing Article 32. But even such an intention was not consistently reflected in the responses of CJI Bobde to many other petitions. For example, the bench led by him has issued notice on a petition filed under Article 32 seeking a ban on the streaming of 'Mirzapur 2' series on the ground that it was tarnishing the image of Uttar Pradesh!

His bench also issued notice on petitions challenging the Places of Worship Act 1991, which was enacted to stop the repeat of Ayodhya-like disputes in other parts of the country. Since the constitutionality of this Act was upheld by the 5-judge bench in the Ayodhya verdict (of which CJI Bobde was a part of), the 3-judge bench led by CJI ought to have given at least a prima facie reason which warranted the issuance of notice, especially so as the matter was communally sensitive.

Not many judgments by CJI Bobde

Although CJI Bobde had a fairly long term of nearly one year and five months, during which a lot of constitutional issues arose, he has not delivered many judgments.

Tata Sons-Cyrus Mistry dispute is the major case resolved by him during his tenure as CJI. Major constitutional issues like Aadhaar-Money Bill, amendments to Article 370, EWS reservation are pending adjudication.

He also steps down with the rare distinction of not having made any judicial appointments to the Supreme Court.

He also followed the long-standing Supreme Court tradition of not displaying transparency in matters related to judicial administration. The complaint raised by Andhra Chief Minister Jagan Mohan Reddy against the CJI-designate Justice NV Ramana was dismissed after a "confidential" in-house enquiry, for reasons not disclosed to the public. Incidentally, Justice Bobde had led the in-house panel which rejected the sexual harassment allegations against his predecessor CJI Ranjan Gogoi, again after a secret enquiry.

CJI Bobde also did not take any action on the report submitted by ex-SC judge Justice AK Patnaik, who was asked to probe if the sexual harassment allegations against former CJI Ranjan Gogoi was part of a larger conspiracy against the judiciary. Another bench of the Supreme Court recently closed the case, observing that it will be difficulty to fetch electronic evidence after two years. It is also pertinent to note that CJI Bobde had reinstated the woman staffer who had raised the complaint against Gogoi, although a panel led by him had earlier dismissed her complaint as baseless.

His tenure also witnessed a trend of Supreme Court taking cognizance of criminal contempt cases against comedians, satirists etc., for their tweets/cartoons/comments about the Supreme Court. These contempt petitions were filed relying on the judgment against Advocate Prashant Bhushan, which held him guilty of contempt of court over his tweets about CJI-Bobde's picture on a Harley Davidson bike and about the Supreme Court's performance in general.

Unceremonious last day

The last working day of CJI Bobde ended on an unceremonious note, with the controversy over the suo moto cognizance taken by his bench on the previous day on COVID related issues. On the penultimate day of his term, CJI Bobde's bench took suo moto cognizance of COVID-19 related issues, while different High Courts in the country were already dealing with them at local level. The bench also appointed Senior Advocate Harish Salve as an amicus curiae in the case. The bench said that it wanted to pass a uniform order in these matters, and issued notice to parties before the High Courts, Centre and State Governments. This move of the Supreme Court came under widespread criticism, as it was apprehended that the top court was attempting to take over the cases from High Courts.

When the matter was taken by CJI Bobde on the last working day, Senior Advocate Harish Salve requested to be relieved as an amicus from the case, saying ""I don't want the case to be heard under a shadow that I was appointed because of my school friendship with the CJI".

The bench expressed strong displeasure at the criticism made by senior lawyers and clarified that it had no intention to stop the High Courts. Ultimately, the bench adjourned the matter to next week, by passing only the order to relieve Salve as amicus.

To his credit, CJI Bobde ensured that the Supreme Court worked without interruptions during the pandemic period, by quickly adopting e-filing and VC hearings. The suo moto orders passed by his bench to extend the limitation period and also to de-congest prisons during the pandemic were timely.

Shorty before retirement, CJI Bobde passed a series of notable orders aimed at judicial reforms – on expeditious trial of Section 138 NI Act cases, appointment of ad-hoc judges in High Courts, time-line for judicial appointments and criminal trial reforms.

However, as a constitutional court which is supposed to guard the fundamental rights of the citizens by holding the executive to account, the Supreme Court failed on many counts during the tenure of CJI Bobde.

In fact, this is not a new trend. We have been witnessing what many legal commentators called the 'rise of the executive court' over the past few years, where the Court shows an increased unwillingness to test the executive actions on the anvil of the Constitution(For more read here, here and here).

CJI Bobde perpetuated the status quo of judicial passivity, failed to assert judicial independence, and gave legitimacy to various executive transgressions through judicial abdications, leading to the further decline of Supreme Court as a Constitutional Court.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/cji-bobde-led-further-decline-of-supreme-court-as-a-constitutional-court-173035?infinitescroll=1

Sneak Peek:

No. of words: 2304 words

Note: In this article the author is critically analyzing the 2013 petition in Supreme Court, where Justice Ramana's elevation to the High Court was challenged. It is suggested to have a fair idea about it.

Article: 7

Now CJI, Justice Ramana's Elevation to High Court Once Came Under Supreme Court Scanner

Justice N.V. Ramana was sworn in as the chief justice of India (CJI) on Saturday and will now head the very court where a case seeking his disqualification as a high court judge was heard – and dismissed – eight years ago.

The proceedings of the case – decided by Justices Aftab Alam and Ranjana Prakash Desai of the Supreme Court in February 2013 – were marked by the absence of any prognostication that its protagonist would, within eight years, become CJI. Perhaps that was the reason the judges let out a secret, which their fraternity normally tends to safeguard in the name of the confidentiality of the Supreme Court collegium's functioning.

The petitioners in the case – M. Manohar Reddy and M.V. Narasimha Reddy – had challenged Justice N.V. Ramana's continuation as a judge of the Andhra Pradesh high court. During the hearing on December 8, 2012, the bench reminded the late Ram Jethmalani, counsel for the petitioners, that the individual against whom he was now appearing had been made a high court judge in 2000 at Jethmalani's own urging when he was law minister despite the Supreme Court collegium initially opposing his name. "Please tell us what we should do," the bench asked:

"In this particular case, the collegium had twice rejected the name of this particular judge. Not on this ground but on grounds of his eligibility for the post, age and other factors. But it was at the instance of the then Union Law Minister that his appointment was made." (emphasis added)

Unfazed, Jethmalani responded by saying that if some wrong had been done, it could be undone too.

What the petition against Justice Ramana was about

The petitioners had come to the Supreme Court to challenge the continuation of Justice Ramana as a judge of the Andhra Pradesh high court on the ground that a criminal case had been pending against him when the high court's collegium cleared his name in 1999 and the government appointed him in 2000.

On February 13, 1981, several students of Nagarjuna University in Guntur indulged in rioting and damage to public property, which included a bus, and caused injuries to passengers. On the same day, an FIR was registered at the Mangalagiri police station against the purported ringleaders of the violence. The FIR named Nuthalapati Venkata Ramana as Accused No. 4.

The petitioners, who were high court advocates, filed their petition under Article 32 of the constitution, seeking a writ in the nature of quo warranto, quashing Justice Ramana's appointment as a judge.

The ground cited was that the consultation process leading to his appointment as judge was vitiated as both the high court and the Supreme Court collegiums as well as the Central government had failed to consider an

essential fact: that at the time of his appointment, a criminal trial was pending in which Justice N.V. Ramana was not only an accused but a proclaimed offender .

The petitioners also sought a writ in the nature of mandamus commanding the Bar Council of Andhra Pradesh to cancel Ramana's enrolment as an advocate since he had "concealed" the criminal proceedings and, in the relevant column of the application for enrolment, had stated, falsely, that there was no pending proceeding against him.

N.V. Ramana's name was recommended for appointment as a judge of the high court on November 14, 1998 by the chief justice of the Andhra Pradesh high court with the other two collegium members concurring. The high court's recommendation was received in the Supreme Court on February 15, 1999. Ramana, who was 41 and had completed over 15 years of legal practice, was the additional advocate general of Andhra Pradesh at the time. He was appointed as a judge one year and four months later, on June 19, 2000 – after the "consultative process" between the Supreme Court collegium and Jethmalani's law ministry was over – and assumed office on June 27, 2000.

The apex court's findings

At the outset, the Supreme Court noted that a criminal case (No.229/83 later re-numbered as CC No.75/87 and then CC No.167/91) was undeniably pending at the time of Ramana's appointment as a judge of the high court – a fact that the Intelligence Bureau, whose report the order quotes, failed to unearth when it said "nothing adverse… has come to notice".

Though the criminal case was pending at the time of Justice Ramana's appointment, G.E. Vahanvati, who was attorney general in 2012, told the court that the removal of a judge in office was an issue directly related to the independence of the judiciary and that the constitution did not envisage any mode for a judge's removal other than impeachment by parliament.

Shanti Bhushan, who, along with Jethmalani, was representing the petitioners, disagreed, arguing that the court must not be seen as protecting someone wrongly appointed as a high court judge. He said that the faith, trust and confidence of the people in the courts and its judges was as much necessary to support the independence of judiciary as the guarantees under the constitution.

The Alam-Desai bench eventually dismissed the petition in a reasoned order that went into the minutiae of the case that the petitioners claimed had rendered Justice Ramana's judgeship untenable.

At the time of the 1981 incident, Ramana had been a student of Nagarjuna University. The students complained of inadequate public transport facilities for commuting from their homes to the university as only a few buses plying between Guntur and Vijayawada stopped at the university. They demanded that more buses should stop at the university. Some of the students launched an agitation.

On February 13, 1981, a group of about 30 students put up road blocks on the GNT road, opposite the university, stopping all vehicles on the road. A state bus became the target of the agitating students. The driver was pulled down and the door to the driver's seat was damaged. Some students pelted stones on the bus and smashed its windscreen and glass windows with iron rods. One of the passengers on the bus also received some injuries. A policeman prevented an attempt to set the bus on fire. The FIR registered after the incident was against unknown persons and the accused were described as "Nagarjuna university students".

According to the charge sheet, submitted in the court of the munsif magistrate, Mangalagiri, on October 19, 1983, the driver and the conductor of the bus, in their statements under Section 161 of the Cr.P.C., (apart from some other witnesses) identified and named five persons as the student-leaders who were leading the agitation on that fateful day. The charge sheet cited five persons as accused and N.V. Ramana figured among them at No.4. All the accused were shown as absconders.

However, the Alam-Desai bench found that

"The charge sheet… does not disclose what steps were taken by the investigating officer to secure the presence of the accused. There is no mention that the investigating officer ever tried to obtain from the court warrants of arrest or processes under sections 82 and 83 of the Cr.P.C. for apprehending the accused. They were simply shown as absconders without observing the procedure sanctioned by law before an accused can be called an absconder."

The Alam-Desai bench, however also observed that Ramana had been "repeatedly called – a little loosely and rather uncharitably – an "absconder" and a "proclaimed offender" in a case of robbery and burning down of a bus", although the criminal case in question had no element of robbery or bus burning. Moreover, the trial court, by its judgment and order dated July 4, 1988, had found accused No.1 not guilty of the offences alleged against him, and acquitted him of the charges of rioting. While acquitting him, the trial judge noted that the prosecution witnesses were not able to identify the accused. The bus conductor denied having identified the accused in his statement under Section 161 Cr.P.C.

'No record of warrants'

The Supreme Court bench also found that while the trial court had ordered the issuing of non-bailable warrants against Ramana and the other three accused, the warrants were not on record and it was not known whether any warrants had even been issued. From May 1987 to August 1991, the trial court passed orders on about 24 dates directing for issuance of non-bailable warrants of arrest against the accused, but no compliance was noted against any order, excepting the one passed on August 30, 1991. However, no warrants, even of that date, were on the file, the bench noted.

On November 5, 2001, the examination-in-chief of the bus driver (PW1) and of the conductor (PW2) were recorded. In their depositions, neither PW1 nor PW2 named anyone as accused and both of them said that they did not know the leaders of the group of students that had attacked the bus. On the same day, the assistant public prosecutor made an application to the effect that the other witnesses mentioned in the charge-sheet were passengers in the bus and their whereabouts were not known in view of the passage of time. Accordingly, he prayed that the evidence of the prosecution might be closed. On December 11, 2001, the state government decided to withdraw the prosecution against the accused. On December 26, 2001, the sessions judge gave the trial judge permission to declare the case as 'long pending', and on January 31, 2002, the assistant public prosecutor moved an application under Section 321 of the Cr.P.C. seeking permission to withdraw the case in the interest of justice. The trial judge granted permission to the prosecution to withdraw the case, and all the accused were discharged the same day.

The Alam-Desai bench found that during the entire period, no summons in the ordinary course were served on the four accused. "There is nothing on the record to show that any attempt, let alone any serious attempt, was made to serve the summons or the non-bailable warrants on any of the accused persons", the bench noted, adding:

"From the record of the case in which we have discussed in detail above, we find it very difficult to hold that Respondent No.3 [i.e. Justice Ramana] was even aware that in some record buried in the courts at Mangalagiri he was named as an accused and he was required to appear in the court in connection with that case."

Ramana 'unaware of pendency of case'

The bench also noted that Ramana was the additional advocate general of Andhra Pradesh at the time of his elevation as a judge. "If the case would have been within his knowledge, it was unimaginable that he would not have attended to it and got it concluded one way or the other," it said.

The bench referred to the detailed enquiry made by the chief justice of the AP high court. His report dated February 7, 2012, which was submitted to the then CJI, S.H. Kapadia, stated: "It does appear that Justice Ramana was unaware of the pendency of the criminal case. I say this from the record of the case, which speaks for itself, and the contents which need not be repeated. I also say this for another reason. In my opinion, Justice Ramana was truly unaware of the criminal case against him and he deserves to be believed when he says so."

Since Justice Ramana was unaware of the pending case against him, the bench concluded that he could not be accused of suppressing material facts. When counsel for the petitioners argued that the police had submitted their charge sheet against Ramana, and hence, the state government must be deemed to be aware of the fact, the bench reasoned that the state government is not a monolith and it does not function as a single person. Simply because a charge sheet was submitted by the state police, no conscious knowledge of the fact can be attributed to the state government, the bench suggested.

"From all the attending circumstances, it is clear beyond doubt that not only respondent No.3 [i.e. Justice Ramana] himself but practically no one was aware of the pendency of the case in which he was named as an accused", the bench concluded. Thus, it reasoned:

"To fault the consultative process for not taking into account a fact that was not known at that time would put an impossible burden on the constitutional authorities engaged in the consultative process and would introduce a dangerous element of uncertainty in the appointments."

While the bench did not find anything odd in the fact that the case against Ramana was closed in 2002 – within two years of his appointment as judge of the high court – it saw the petition filed 10 years after the closure of the case as a ruse to malign Justice Ramana. Finding the petition without merit and wanting in bona fides, the bench dismissed it with costs.

Lawyers may still debate whether the Alam-Desai bench was correct in dismissing the petition against Justice Ramana in 2013. But the answer to the question which the bench itself prompts us to ask – Why did the Supreme Court collegium reject Justice Ramana's name twice for elevation to the high court? – remains elusive.

Given that the collegium had opposed Justice Ramana's elevation as a high court judge not once but twice, as admitted by the Alam-Desai bench in 2013, this opaque institution's functioning will not help to restore people's confidence in the functioning of the Supreme Court under a new CJI.

In the context of the less-than-transparent clean chit which the outgoing CJI, S. A. Bobde, gave to Justice Ramana – after an 'in-house inquiry' found the allegations made by Andhra Pradesh chief minister Jagan Mohan Reddy to be "baseless" – the litigation which attended his ascent to the higher judiciary is not just of academic interest.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/now-cji-justice-ramanas-elevation-to-high-court-once-came-under-supreme-court-scanner

Sneak Peek:

No. of words: 1470 words

Note: In this article the author highlights the issues pertaining to speeches of political parties in election campaign and also highlights the importance of statutory mandate with the help of various decisions of the Supreme Court of India. As a CLAT aspirant it is a must read article.

Article: 8

What the Supreme Court Once Had to Say on Poll Speeches Harnessing Religion

Whether the apex court's observations stand negated in practice due to lack of effective implementation by the Election Commission is a question.

Election campaigns exemplify the feminist slogan "personal is political". Political parties of all ideological leanings invoke voters' religious identities while seeking votes and a rival candidate is ridiculed based on her religious affiliation.

Recently, whilst campaigning for the Assam elections, Union home minister Amit Shah asked voters to choose between 'atmanirbhar Bharat' or 'maulana nirbhar Bharat'. The latter phrase was a barbed remark at the Congress-All India United Democratic Front (AIDUF) alliance, projected by the BJP as being sympathetic to infiltrators and as a force that will destroy the culture and identity of the state.

In West Bengal, Mamata Banerjee appealed to the Muslim voters to not split the minority vote.

In Kerala, Prime Minister Modi attacked the rival party by referring to Judas betraying Christ.

These are few of the innumerable veiled and overtly sectarian appeals that have become the norm in electoral campaigns and which highlight two competing principles of our constitutional democracy: secularism and free speech. The question is whether such electoral appeals violate the secular fabric of our country or are covered under the free speech clause of the Indian constitution.

In order to understand this issue, we need to appreciate the statutory framework of election law regarding appeal to religion, and the permissible intermingling of religion in the governance of the country. Such faith based appeals are covered under the Representation of People's Act, 1951 (hereafter RPA).

A recent Supreme Court decision marks a watershed moment in outlawing any faith-based appeals in electoral campaigns. However, due to lack of voter awareness and implementation by the Election Commission, the dictum in the judgement has been unfortunately been reduced to a lofty ideal.

Section 123 Representation of People's Act, 1951

Section 123 RPA defines corrupt practices in elections.

Subsection 3 prohibits any electoral appeal based on religion, race, caste, community or language for electoral gains. The subsection forbids any appeal made by (a) a candidate or (b) his agent or (c) any other person with the consent of the candidate or his agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language. The section further prohibits the use of, or appeal to, religious symbols or national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of the candidate or for prejudicially affecting the election of the rival candidate.

In 1975, the Supreme Court in Ziyauddin Bukhari explained the crux of Section 123(3) by stating that under the provision the court has to primarily examine the cloak which the appeal wears to parade in and not only what lies beneath it.

Thus, Section 123(3) does not concern itself with substance of the appeal which politicians sometimes justify by citing the development agenda, rather it is restricted to its form, which if bears any divisive undertones constitutes a corrupt practise.

The Supreme Court has in the past convicted Balasaheb Thackeray under this provision.

Section 123(3) was amended in 1961 to strengthen the provision and curb any sectarian appeal in election campaigns. A comparison between the pre-and post-1961 amendment provisions of Section 123(3) highlight two changes: the deletion of the word 'systematic' before appeal, and the addition of the pronoun 'his'. In the same amendment Act, Section 123(3A) of RPA and Section 153A of the Indian Penal Code were also inserted to prohibit spreading communal hatred.

Recently in 2017, in Abhiram Singh v. C.D. Commachen, a seven-judge constitutional bench was constituted to answer a reference regarding the scope of the term 'his' in the provision. The question before the Supreme Court was whether the word 'his' under section 123(3) pertained to the identity of the candidate or his rival only (literal interpretation), or also extended to the identity of the voter/s (purposive interpretation).

Abhiram Singh: Majority and minority opinions

By a 4:3 margin, the court upheld the purposive interpretation of 'his' and thus proscribed any appeal pertaining to the identity of the candidate, his rival or the voter. In practice, this means that electoral appeals to voters, in Union or state elections, based on their religion is a "corrupt practice" which can result in declaring the election of the candidate as void and further disqualification for a period of six years.

The majority opinions were written by Justice Madan B. Lokur (for himself and Nageshwar Rao J.), Justice T.S. Thakur and Justice S.A. Bobde.

Justice Lokur highlighted the legislative amendments to the RPA in 1961 as significantly strengthening the previous version of the provision. He favoured a purposive interpretation by taking into account the legislative history and intention of the framers to curb any fissiparous, communal or separatist tendencies in elections.

The concurring opinion by Justice Bobde stated that Section 123(3) embraces all actors involved i.e. the candidate, his agent, the rival candidate and the voter/elector. He stated that both the literal and purposive interpretation can be applied for arriving at the conclusion that 'his' includes the religion of the voter/s.

Villagers stand in queue to cast their vote at the polling station, during the first phase of Uttar Pradesh Gram Panchayat election, in a village Phulpur, Prayagraj, Thursday, April 15, 2021.

Justice Thakur's concurring opinion highlighted the importance of secularism in the governance of the country. He stated that when two alternative interpretations were permissible, the one that furthers constitutional objectives should be preferred to the one that does not do so. He emphasised that religion cannot be mixed with any secular activity of the state and the encroachment of religion into secular activities is strictly prohibited.

The minority opinion authored by Dr. Justice D.Y. Chandrachud (for himself, and Justices U.U. Lalit and A.K. Goel) preferred the literal interpretation of the word "his".

A literal interpretation would permit the following appeal: Suppose X is a minority religion. Candidate 'A' appeals to voters of X religion by saying "Please vote for me, I will do good for you and your community as you belong to X religion!" The minority opinion justified the literal interpretation by stating that voters' identities are instrumental in recognising social and historic injustice faced by certain communities. Social mobilisation which is required to bring these marginalised communities into the mainstream cannot be achieved if references of religion, race, caste, community and language are outlawed in election campaigns.

In my opinion, the dissent conflates two important issues

(i) the importance of recognising and accounting for identities to eliminate social and historic injustice and;

(ii) using such identities in electoral appeals as a means to remedy social and historic injustice.

Section 123(3) only prohibits appeals to identities for securing votes. Such divisive factors are capable of generating powerful opinions are depriving persons of their rational thought. It does not does not eliminate the possibility of an emancipatory appeal. Thus, a Dalit or Muslim voter can raise issues of caste or religious discrimination faced by him/her as a Dalit/Muslim and the electorate's efforts to curb the same will not amount to a "corrupt practise". The public space for discussion, debate and dialogue faced by historically discriminated communities is not curbed by a purposive interpretation of the section.

The crux of the court's decision in Abhiram Singh is summed up in paragraph 74 of Justice Thakur's opinion:

"The State being secular in character will not identify itself with anyone of the religions or religious denominations. This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature. The elections to the State legislature or to the Parliament or for that matter or any other body in the State is a secular exercise just as the functions of the elected representatives must be secular in both outlook and practice. Suffice it to say that the Constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State."

The aforesaid extract highlights the secular character of the state and the impermissible intermingling of religion and governance of the country except for removing caste or religion based imbalances or discriminatory practices.

Even so, divisive electoral campaigns are an everyday part of our elections. Political parties in rampant disregard of the decision in Abhiram Singh continue to build their campaigns by pandering to voters' religions. The gaping divide between the statute and reality is indeed alarming.

Does the court's decision stand negated in practice due to lack of effective implementation of the RPA by the Election Commission?

How should we ensure that statutory mandate and its interpretation is taken seriously on the ground and political parties are held accountable for their actions during electoral campaigns?

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/what-the-supreme-court-once-had-to-say-on-poll-speeches-harnessing-religion

Sneak Peek:

No. of words: 1742 words

Note: In this article the author highlights the importance of simple language in the Judicial system so that It can be understood by layman also. A must read for every law aspirant. Enjoy this article!!

Article: 9

'Wherefore', 'Therein': Incomprehensible Writing, Thy Name Is Law

A few weeks back, a bench of the Supreme Court of India observed that simple language should be used in writing judgements. Justice D.Y. Chandrachud and Justice M.R. Shah had before them a high court judgement which they described as inexplicable, unbelievable, and incomprehensible. Here is an excerpt from that judgment where the high court judge lists certain applicable laws and then attempts an analysis:

"Provisions whereof, unveils, qua the afore provision, making an explicit statutory expression, where through, the award, of, the Tribunal concerned, is, made amenable for execution, alike the execution, of, a decree, of, a Civil Court, or explicit statutory expression(s), become(s) borne therein, for, an award, of, the Tribunal concerned…"

Now, imagine 18 pages of composition like this! No wonder that one of the justices remarked, according to news reports, that he had to use tiger balm after spending much time trying to understand the judgement.

Much of the language of the law – legalese – the gobbledygook that we of the legal fraternity have inflicted on others, has been a headache for the world even before the age of steam. For long it has been a subject of contempt and humour – expressed by insiders and outsiders.

Five hundred years back King Edward VI is quoted to have said, "I would wish that the superfluous and tedious statutes were brought into one sum together and made more plain and short so that men might better understand them".

Jonathan Swift, in Gulliver's Travels (1726), wrote of a society of lawyers who spoke in "peculiar cant and jargon of their own, that no other mortal can understand." Thomas Jefferson complained in the late 18th century that "in drafting statutes my fellow lawyers have the habit of making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means…"

The judges observed that judgments must be understandable not only to the members of the bar who have appeared in the matter or to those for whom they hold value as a precedent but must also have meaning to the general litigants who have to approach the courts for the enforcement of their rights. Otherwise, there is a disservice to the cause of ensuring accessible and understandable justice to all.

The judges while commending the use of "simple language" "in conveying what you are trying to say", delivered a powerful message about communication.

We lawyers suffer from two faults – first, we do not communicate well and the other is that we think we do! Hopefully, the message from the judges has been heard by those who write laws, rules, regulations, and judgements. And also by those wordsmiths who write contracts (whether a billion-dollar worth power

purchase agreement or a modest warranty card for a refrigerator), insurance policies, and mundane official forms – the list could go on and on because there are several touchpoints with the law in our daily lives.

In many common law countries – England and other former British colonies including the US, Canada, Australia, New Zealand – simplifying the language of the law has been a subject matter of debate and reform. Style guides for legislations, rules, and regulations promote plain English and avoid legalese. The consumer welfare groups have campaigned for the simplification of documents that a layperson deal with in daily interactions such that a lawyer is not needed to translate legalese to simple English.

Legal writing in India

In India, this subject has not attracted much attention in the legal fraternity. Lacking drafting manuals and style guides, our legislation continues to be drafted in archaic old stuffy style; our sub-ordinate legislation – such as rules, regulations, and notifications – continues to be complex and difficult to understand. And in the sphere of litigation and court procedures – from pleadings to judgements – the idea of moving to a more contemporary style of simple language has not been explored. The same applies to our commercial contracts and documents.

The observations of the judges present an opportunity and occasion for the legal fraternity to introspect and initiate a change from the old, archaic, complex, and complicated language to plain language. The change can begin only when the legal fraternity recognises the needs of our audience, which as rightly pointed out by the judges is beyond just law courts and lawyers, to understand what we are trying to convey.

Basically, legal writing suffers from two vices – first, the vocabulary we use (archaic, inflated, jargon, pompous, Latin, and too many words); second, the style of construction – how the words are put together.

The traditional style has several problems: long sentences, excessive use of passive voice, abstract nouns (instead of strong verbs), violating the simple rule of construction of keeping the subject and verb in a sentence close to each other, prepositional phrases where a single word would do, etc.

And our documents are poorly organised – we do not place the content in logically ordered parts and sub-parts, with headings and sub-headings, which help the reader navigate and understand the document easily. We also have not adopted modern techniques of document design – such as summaries, tables, lists, charts, graphs, and examples. The result is our not-so-friendly legalese – dense, verbose, and complex – which leaves the reader overwhelmed and confused.

The endurance of legalese

So, why does legalese persist? We, lawyers, use legalese because it is there. It is the tradition. That is how it has been. Lawyers "pick up" legalese from the older generation and pass it on to the younger generation – and that cycle goes on unquestioned.

While lawyers glorify legalese, most are not aware of how the "language of the law" came about and why it needs to change to serve our audience, which is not constituted of elites but is largely of laypersons who deal with the law in their daily lives. The profession has simply ignored this reality in generational handover cycles.

We also rely on myths to defend legalese. Here are a couple of key myths. First, we must use technical words and it is not possible to write most of the legal stuff in any other way. Our profession, indeed, has its "terms of art". A "term of art" conveys in a word or two a specific and settled meaning and it achieves that standing by persistent professional use in only one way to achieve a specific legal end.

For example, words like 'mortgage', 'alibi', 'agency', 'surety', 'lessor'. Although truth is that "terms of art" constitute a very small part of a legal document, research shows that it is not more than two to three percent. Rest of the document could be written in plain language, but we fill it up with "jargon" which is not "term of the art".

For example, words and expressions like 'herein', 'therein', 'wherefore', 'due to the fact', 'Now therefore these presents witnesseth that in consideration of the premises set forth' – have no special meaning in law. They are jargon and can be either eliminated or substituted with plain English words.

The second myth is that legalese is "precise". A lawyer believes that she cannot take the risk of using words and expressions which have not been used in the past. She is struck by the fear that a "new" word may not carry the "precise" and "well established" meaning that the language of the law has been familiar with for a long time. The truth is that other than the "terms of the art", there is not much precision in the language of the law. Many of the words that we now identify as law words never were precise.

Lawyers started using them at a certain time because those words were, at that time, the common currency of people who were able to read and write not because they were precise. The fashion in words changed. The styles changed. But the language of the law remained static. Our precedents and document form books remained frozen in time. And that is not because of any precision but more because of habit, inertia, and fear of change.

There is more precedent for the use of law words than there is for the law itself. Go to a law library and look at the multi-volume dictionaries of "Words and Phrases Legally Defined" and see for yourself how "precise" really are the words that we believe are "precise"!

Legalese also persists because language and writing skills, critical for legal work, are typically not part of the law school curriculum. This is like a plumber not being taught how to use a wrench!

Most lawyers and law teachers have never consulted any contemporary book on legal writing. Not many can name any authoritative text or any author on the subject. Something strange happens to us when we join law school (and it worsens later in the profession). From perfectly good writers of the language, we get brainwashed into believing that to be a lawyer one must write and speak like lawyers – the language becomes a "secret handshake in a fraternity, letting others know you are one of the tribe" as aptly put by Stuart Auerbach (a legal correspondent for The Washington Post many years ago).

The legal fraternity must first acknowledge the existence of the problem. In that context, the observations of the judges on the use of simple language are extremely relevant.

To change the traditional mindset, the legal fraternity must "unlearn" a lot of trash that was fed to us. Various constituencies can play a big role in the campaign for use of plain language. These include the judiciary, the chambers of commerce and industry, consumer welfare associations, in-house general counsel of corporations – all of them represent users of the legal system.

If the users demand that communications and documents must be in plain language, we from the supply side will have to pay heed to that demand. And let us stop polluting the young fresh minds with legalese by introducing contemporary and modern programmes for plain language in the law schools.

"In the heels of the higgling lawyers, Bob,

Too many slippery ifs and buts and howevers,

Too much hereinbefore provided whereas,

Too many doors to in and out of."

~ Carl Sandberg, from the poem 'The Lawyers Know Too Much' (1920).

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/wherefore-therein-incomprehensible-writing-thy-name-is-law

Sneak Peek:

No. of words: 1742 words

Note: In this article the author has analyzed the concept of pre-Packaged insolvency process for MSMEs in the light of the recent IBC Amendment Ordinance, 2021. It will help you to enhance your legal acumen. It is suggested to follow it. Do follow this new development of law.

Article: 10

Insolvency Amendment- Pre- Pack For MSME's

The Central Government recently promulgated the IBC Amendment Ordinance 2021, allowing a pre-packaged insolvency process for micro, small and medium enterprises (MSMEs), in consonance with international best practices. The ordinance in essence has amended the the Insolvency and Bankruptcy Code 2016 allowing the Central Government to notify such pre-packaged process for defaults of not more than Rs. 1 crore to be initiated by the corporate debtor.

The Ordinance inter alia has inserted a new Chapter-IIIA in the IBC 2016 to provide for making an application for initiating pre-packaged insolvency resolution process in respect of a corporate debtor classified as a micro, small or medium enterprise (MSME) under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.

This ordinace is a welcome step towards the resolution of insolvent MSMEs, in light of the impact that the pandemic has had on the businesses, financial markets and economies all over the world, including India, exposing many of these MSME's to financial distress. The scheme also covers businesses incorporated as partnerships, in addition to companies.

In the recent past, the Central Government has taken several measures to mitigate the distress caused by the pandemic including increasing the minimum amount of default for initiation of corporate insolvency resolution process to Rs. 1 Crore, and suspending filing of applications for initiation of corporate insolvency resolution process in respect of the defaults arising during the period of one year beginning from 25th March 2020 and ending on 24th March 2021. The IBC (amendment) Ordinance 2021 coming within two weeks of the lifting of a one-year suspension of insolvency proceedings against Covid-related defaults is a smart move amid heightened possibilities of a rise in bad loan cases.

What is the pre-packaged Insolvency resolution plan (PPIRP)?

Pre-packs are essentially a form of restructuring that allow creditors and debtors to work on an informal plan and then submit it for approval. MSME businesses are generally managed by promoters and it is difficult to revive them after the management is ousted under the normal CIRP. Under the new ordinance, participation of eligible existing promoters is encouraged, with the board continuing in control and the debtor proposing the base resolution plan, which will then be put to competitive bidding through Swiss challenge. Thus Pre-packs will help corporate debtors to enter into consensual restructuring with creditors and address entire liability side of the company.

The pre-pack insolvency shall be initiated by the corporate debtor after obtaining an approval from its financial creditors representing not less than sixty-six per cent in value of the financial debt due to such creditors.

PPIRP vis-a-vis CIRP

The most significant feature of the Pre-pack scheme is that it allows the management of the affairs of the corporate debtor to continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor, subject to conditions specified, unlike in the CIRP where the resolution professional gets to run the affairs with guidance from financial creditors. If creditors want to initiate bankruptcy proceedings against MSMEs, they can still do so but only through the CIRP.

Further, Pre-pack resolution plans have to be submitted in only 90 days and the NCLT will have another 30 days to approve them. Thus, the pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.

The IBC currently stipulates a maximum of 270 days for the completion of the entire CIRP. Given that MSMEs have limited wherewithal to go through a long and rigorous insolvency process, the reduction in the time-limit for resolution comes as a blessing for insolvent MSME's.

The scheme, where only the debtor will get to trigger the bankruptcy process, is expected to yield much faster resolution than the extant corporate insolvency resolution process (CIRP) and cut costs. It could also reduce litigation, often triggered by defaulting promoters to retain control of their firms, and help thousands of MSMEs struggling to cope with the havoc wrought by the Covid-19 pandemic.

Also, since this process can be initiated only by the companies with consent of 66% of its unrelated financial creditors, there will be lesser possibilties of disputes, which will allow the process to run more efficiently than the normal CIRP.

Procedural checks and balances: Protecting the rights of creditors

The Pre-pack insolvency resolution plan athough based on a debtor-in possession approach vests significant consent rights to financial creditors in order to ensure that the mechanism is not misused by errant promoters. Such rights include the applicability of Section 29 A (which is a restrictive provision disqualifying those who had contributed in the downfall of the corporate debtor or were unsuitable to run the company from submitting a resolution plan/ participating in the bidding of the corporate debtor) and 2/3rd of the creditors' consent for both initiation and approval of the base resolution plan. Operational creditors are protected by requiring market testing of the base resolution plan if it impairs the claims of operational creditors. In addition, the creditors' committee can also convert the pre pack process to the usual CIRP by 66% majority at any time, or require the board to cease control through the intervention of the NCLT in case of fraud or mismanagement by the existing management Further, adopting plan evaluation process akin to Swiss Challenge, it retains competitive tension such that promoters propose plans with least impairment to rights and claims of creditors.

The scheme is available to entities that have neither undergone bankruptcy proceedings in the preceding three years nor are facing liquidation orders. The scheme further disallows a business to avail of it if the major shareholder is an undischarged insolvent or wilful defaulter.

Further, the committee of creditors have the power to require dilution of promoter shareholding/ control, in cases where resolution plans submitted by the corporate debtor provides for impairment of any claims owed by such corporate debtor, which would act as a deterrant to any unreasonable resolution plan.

Further, the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, may resolve to vest the management of the corporate debtor with the resolution professional which shall be decided by the Adjudicating Authority.

In addition to these, by insertion of new Articles 67A and 77 A, the amendment provides strict penalties for fraudulent management of corporate debtor or providing false information or any material omission in the application or the list of claims.

Thus, the amendment has been designed in a manner to provide a more friendly and ameliorative mechanism of resolution of stressed assets for MSME's while ensuring that they don't go scot-free in case of any manipulation therefore keeping a fair balance to protect the interests of creditors as well.

Prospective and Overriding Effect of PPIRP

Interestingly, the disposal of a pre-pack application has been given priority over the CIRP application for the same stressed MSME under Section 7, 9 and 10 of the IBC, subject to certain conditions. However, in case of already-pending CIRP applications, NCLT will need to dispose them of before considering the pre-pack application for relevant debtors. Thus, the provisions relating to pre- pack applications are prospective and overriding in that respect.

This ordinance adopts a hybrid approach towards the resolution of insolvent MSMEs balancing the interests of creditors on the one hand and the need to preserve the autonomy/ agency of MSMEs on the other hand- to best serve the interests of both of them. The ordinance is thus a calibrated legislative effort at buffering the tumultuous impact on many MSMEs of various cataclysmic changes sweeping the globe in a post- Covid world. However, its full fledged implementation should be coupled with the government taking steps for bettering of NCLT infrastructure which is already overstretched. In summation, this ordinance is a welcome step at this juncture but it's implementation in future will tell us if this ordinance meets it's objectives, and if so, in what measure.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/insolvency-and-bankruptcy-codeibc-micro-small-or-medium-enterprise-msme-corporate-insolvency-resolution-process-cirp-172354?infinitescroll=1

Sneak Peek:

No. of words: 956 words

Note: In this article the author is critically analyzing the recent incident of force used by CISF personnels at the polling station in Sitalkuchi, W.B. in the light of the well-established principles of democracy in India. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 11

Legitimate use of force vs citizens' consent: the challenge exposed by Sitalkuchi incident

When engaging with citizens, paramilitary forces need to take on imminent danger, as well as win 'hearts and minds' through dialogue, negotiation, and welfare and relief. The shooting in West Bengal, which indicates the breakdown of this chain, has a significance far beyond a specific regional election.

Legitimate order signified by the symbolic presence of security forces is the essence of state-ness. As such, the fact that the Central Industrial Security Force (CISF), deployed to ensure the orderly conduct of polls, had to actually resort to shooting on April 10 at the polling station in Sitalkuchi, West Bengal, resulting in the death of four members of an unruly mob, indicates a threat to the very foundation of the Indian state. The security forces were gheraoed by the mob, with the implicit support of the regional government which had objected to the dispatch of paramilitary forces as mandated by the independent Election Commission of India. The shooting broke the spell of the symbolism of authority and, thereby, snapped a vital link in the causal chain that connects force and consent, and of both in the making of legitimacy.

Under normal circumstances, the presence of armed men serves a symbolic purpose. Therefore, a shot fired by the security forces at citizens strips the state of the majesty that is indispensable for its normal functioning. The incident, which points towards the vulnerable underbelly of the Indian state, also alerts us to an unsolved problem of democratic theory. Is orderly rule the outcome of a social contract, with individuals freely choosing to set up an authoritative ruler? Or, is the existence of order a precondition for people to be able to make their choices freely? Is the presence of armed security forces to reinforce civil authorities a denial of democracy, or are armed forces the last defence of democracy against anarchy, disorder and individual or collective violence?

Postcolonial states, in contrast with their peers in long-established democracies, face a special problem with regard to orderly rule. As a legacy of the anti-colonial movement, the distrust of forceful action by the state runs deep in the political culture of modern India. The same mistrust of force leads to the routine protest against the Armed Forces (Special Powers) Act,1958, which permits military authorities to "assist the civilian rule" in areas considered "disturbed". Following this incident, the deployment of paramilitary forces and the phased nature of Indian elections to facilitate the movement of troops from one location to another, a routine activity so far, can no longer be seen as unproblematic. The fact that the four individuals who were shot by the security forces belong to the minority community and that the Chief Minister of West Bengal has already labelled the episode as "genocide", adds an additional, dangerous dimension to its fallout.

In order to promote and protect the security of the state, territorial integrity and orderly rule in general, the Ministry of Home Affairs of India has been accorded vast resources, rarely discussed in the cut and thrust of everyday politics, by the Constitution. These are impressive in terms of their military strength, budget, personnel, and because of being headquartered in the national capital, their proximity to the nerve centre of the state. Since Independence, this security infrastructure has evolved with the times, and innovated new

strategies and linkages. Under the Allocation of Business Rules, nine agencies are listed as components of the Ministry's order-keeping capacity. There are: Assam Rifles, Border Security Forces, Indo-Tibetan Police, Sashastra Seema Bal, Central Industrial Security Force, Central Reserve Police Force, National Security Guard, Civil Defence and Home Guards. The capacity of these forces, reinforced by a network of intelligence agencies, is coordinated by several committees responsible for inter-ministerial and inter-federal coordination and accountable to Parliament.

Paramilitary forces form part of the two-track strategy of the Indian state, elegantly formulated by Stephen Cohen as "first hit them over the head with a hammer, [and] then teach them to play the piano". They are organised on the lines of the military but there is a radical distinction between their respective functions, which involve close cooperation with a wide spectrum of agencies. The main task of the military is to fight foreign enemies of the state whereas the insurgents, unruly mobs, and militants with whom the paramilitary forces engage are actually citizens of India, legally entitled to due process of the law. The main strategic goal of the paramilitary in this case is to contain the rebellion, discipline the mobs and wean the insurgents and rebels away from anti-state violence and persuade them back into the normal political process. The task, in this sense, is multiple, requiring well-drilled troops capable of taking on imminent danger, as well as winning "hearts and minds" through dialogue, negotiation and extending what welfare and relief they can, within their limited resources. The shooting in West Bengal, which indicates the breakdown of this chain, has a significance far beyond a specific regional election.

Force plays a residual role in all democracies. But the rulers in postcolonial democracies walk on a razor's edge. Not enough force would be self-defeating; too much force might make the system tip over into authoritarianism, or worse. The Bengal incident, thus, sheds light on the serious problem that the Indian state is up against, such as justifying the forceful presence of the paramilitary in Kashmir, central and eastern India, affected by Maoist violence, and pockets of the Northeast where insurgency is still alive. True statesmanship lies in striking the right balance between force and consent, and taking responsibility for the choices made. Therein lies a challenge for the Indian state, and her articulate and alert public intellectuals.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/paramilitary-force-cisf-west-bengal-shooting-7272624/

Sneak Peek:

No. of words: 4851 words

Note: In this article the author highlights the importance of the Supreme Court judgment, in the case of Vikas Kumar v. UPSC. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 12

Why Vikash Kumar judgement is an important step forward for people with disabilities

The Supreme Court judgment in Vikash Kumar v. UPSC ("Vikash Kumar") holding that an individual suffering from dysgraphia or writer's cramp is entitled to a scribe in the Civil Services Examination (CSE) is a significant step towards affirming the position of persons with disabilities as rights bearers. The Court said that the government needs to shed its "fundamental fallacy" that only persons with a specific disability of 40 per cent or more should be provided with a scribe while taking examinations such as the Civil Services Examination. The bench led by Justice D Y Chandrachud held that this arbitrary prerequisite clearly violates the plain terms and object of the Rights of Persons with Disabilities Act (RPwD) Act, 2016.

This case arose from the denial of services of a scribe to the petitioner, Vikash Kumar. Kumar has a disability commonly known as writer's cramp. After having graduated with an MBBS degree from the Jawaharlal Nehru Institute of Post Graduate Medical Instruction and Research, he aspired to crack the UPSC exams.

While deciding the case, the bench opined that a scribe's service is as per the statutory mandate to enable persons with disabilities to live a life of dignity and equality, based upon respect in society for their mental and bodily integrity. This will ensure that they are no longer treated as second-class citizens. The Court opined that the higher threshold as a benchmark for disability could not be levied to deny equal access to persons with disabilities. The Court cited Jeeja Ghosh v. Union of India, wherein it was held that equality is not just limited to prevention of discrimination but also extends to a wide variety of positive rights, including "reasonable accommodation". In this context, the state has an obligation to provide persons with disabilities reasonable accommodation such as the facility of a scribe, compensatory time, etc., to secure substantive equality.

The Court endeavoured to translate "human dignity" enshrined in the Preamble into the legal regime for recognition and enforcement of rights of persons with disabilities when it said: "Part III of our Constitution does not explicitly include persons with disabilities within its protective fold. However, much like their able-bodied counterparts, the golden triangle of Articles 14, 19 and 21 applies with full force and vigour to the disabled."

This judgment gave a befitting reply to the case of V Surendra Mohan v. State of Tamil Nadu ("Surendra Mohan"), in which the Supreme Court upheld the state's policy of restricting the eligibility of blind and deaf candidates and refused to allow a visually disabled person from becoming a judge. The apex court also directed the Centre to come up with norms and guidelines within three months to protect the rights of persons with disabilities to appear in the examinations with the help of scribes for the progressive realisation of the rights of disabled people, in tune with the RPwD Act of 2016.

The judgment in Vikash Kumar is progressive. It recognises that persons with disabilities could discharge their duties if reasonable accommodation is being provided to them by overruling the judgment of Surendra Mohan. There have been many examples from different countries in the world where judges with disabilities are effectively discharging their duties. Justice Chandrachud himself said in a session organised by the Nyaya

Forum of NALSAR University of Law that modern technology has enabled disabled persons so much so that there exists almost no difference today between them and the general population. He also said that we must have in due course the first judge of the Supreme Court who would be visually impaired.

In the judgment, Justice Chandrachud cautioned against perpetuating the negative imagery around disability: "When competent persons with disabilities are unable to realise their full potential due to the barriers posed in their path, our society suffers, as much, if not more, as do the disabled people involved. In their blooming and blossoming, we all bloom and blossom."

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/why-vikash-kumar-judgement-is-an-important-step-forward-for-people-with-disabilities-7268625/

Sneak Peek:

No. of words: 839 words

Note: In this article the author is evaluating the recent amendment to the GNCTD Act. It will help you to explore the journey of the legal development. Do follow it and go for that Vidhigya 360 Degree analysis and make your own notes too.

Article: 13

A step that enhances cooperative federalism

The amendments to the GNCTD Act define, without doubt, who represents the 'Government' in the unique case of Delhi.

On January 17, 2017, the Lieutenant Governor of Delhi wrote to the Speaker of the Legislative Assembly of Delhi stating that the President of India had considered the Delhi Netaji Subhas University of Technology Bill, 2015 and directed that it be returned to the Legislative Assembly of Delhi.

One of the reasons stated for the return was the inconsistent definition of the term "Government." In June 2015, when the Legislative Assembly of Delhi had passed the Delhi Netaji Subhas University of Technology Bill and sent it for the President's assent, it had defined the term "Government" as the "Government of the National Capital Territory of Delhi."

Formalises the definition

After the Bill was returned, the Delhi Assembly sent a modified version of the Bill for the President's assent where the definition of "government" was described as: "Lieutenant Governor of NCT Delhi appointed by the President."

Last week, both Houses of Parliament voted overwhelmingly in favour of the amendments to the Government of the National Capital Territory (NCT) of Delhi Act.

The aim of the amendments were to clear such ambiguities in the roles of various stakeholders and provide a constructive rule-based framework for stakeholders within the Government of Delhi to work in tandem with the Union Government. One of the changes made was to bring consistency in the definition of the term "Government". In this instance, the government was only formalising the definition of a term that the Delhi Assembly itself had already accepted. This rule-based framework is especially important given that Delhi is also India's national capital and the symbolism that comes with being the seat of the sovereign power.

Partners not adversaries

The National Democratic Alliance Government, under the leadership of the Prime Minister, has completely transformed Centre-State relationships. At the core of this transformation is the outlook that States — and by extension the Chief Ministers of the States — are partners in the national agenda, and hence must have platforms and frameworks available to work together.

In earlier governments we saw State Chief Ministers queuing up in front of unelected officials in the erstwhile Planning Commission supplicating for grants. The creation of NITI Aayog, the establishment of the Goods and Services Tax Council, the restructuring of central schemes and accepting the Fifteenth Finance

Commission's recommendations for greater devolution are clear examples of the Union Government viewing States as equal partners.

A legislative right

This partnership requires an environment of trust and mutual co-operation. A necessary condition for such an environment is the distinct delineation of roles and responsibilities, the removal of ambiguities, and the definition of a clear chain of command among stakeholders. In this regard, it was important to define, without doubt, who represents the Government in the unique case of Delhi.

On December 20, 1991, Home Minister S.B. Chavan tabled the Constitution Amendment Bill in the Lok Sabha to add Articles 239AA and 239AB into the Constitution that paved the way for the creation of a Legislative Assembly and a Council of Ministers for the National Capital Territory (NCT) of Delhi. This amendment passed in 1991 empowers Parliament to enact laws supplementing constitutional provisions. Similarly, the Government of NCT Delhi also has the power to enact laws regarding matters specified under the State list and Concurrent list, to the extent these are applicable to a Union Territory.

It becomes important to ensure there is complete synchronisation between the Union Government and the Government of NCT Delhi and that there is no encroachment in legislative matters. In the case of the Government of NCT Delhi, it has no legislative competence in matters pertaining to the police, public order, and land. The risk of incremental encroachments on these subjects in the legislative proposals under consideration of the Delhi Legislative Assembly can have severe ramifications for Delhi.

Thus, for the Opposition to portray a government exercising its constitutional responsibilities as an undemocratic act shows a wilful lack of understanding.

The national capital hosts the country's legislature, the seat of the Union Government, the judiciary, diplomatic missions, and other institutions of national importance. It deserves smooth functioning and cannot be subject to misadventures arising from the ambiguities in the roles and responsibilities of its stakeholders.

A functioning relationship

While some in the Opposition have accused the government of undermining the federal structure of the country, others have painted an even darker picture proclaiming the death of democracy itself. Nothing can be farther from the truth. Making Delhi Assembly rules consistent with the rules of the Lok Sabha or ensuring that the opinion of the Lieutenant Governor is taken can only ensure clarity and foster an environment of co-operation. In no manner do these amendments dilute or affect the powers of the Delhi Legislative Assembly. Various court judgments have also observed the ambiguities and lack of clarity. The people of Delhi deserve a functioning government, and the amendments made aid in creating such an environment.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/a-step-that-enhances-cooperative-federalism/article34209342.ece

Sneak Peek:

No. of words: 908 words

Note: This article is in furtherance of your last article. In this article the author is analyzing the recent amendment to The Government of NCT of Delhi Act, 2021 in the light of the Supreme Court 2018 judgment. A must read for every law aspirant. Enjoy this article!!

Article: 14

Delhi should be governed by its people

The intent behind this Amendment is not the efficiency of government in Delhi.

If Delhi is a question, it is this: How does one govern a megacity of 20+ million people? There is little in history to turn to for an answer to this question. The largest city regions of the world — Tokyo-Yokohama, for example — are similar in scale but not in make or structure. We have no precedence of mega-cities that are big but not powerful, expanding with entrenched inequalities. On the best of days, the city feels like a perfect (dust) storm. It is into this storm that the recently passed amendment to the GNCT of Delhi Act, which defines the Lieutenant Governor (LG) as "Government" over the elected Assembly of the Government of Delhi, has waded in.

Capital cities globally must hold both the urban and the national — be simultaneously the local, the regional and the central. Amidst such uncertainty, we must turn to principle, not quick fixes. Capital cities such as Mexico City or Manila offer a maxim worth following: Decentralise, democratise, deepen, Move past nation, city, and district to ward and neighbourhood. Scale where needed – differently for infrastructure networks compared to health, for example. Let the government connect across these scales and stitch together a patchwork recognisable to citizens as a reflection of incremental improvements in their everyday lives. Take government closer to people so that the inevitable failures and missteps can be accounted for, learnt from, moved past. It is not technical wizardry or powerful institutions that Dilliwallas seek — it is success and failure that feels intimate, involved and present; that feels, to borrow a word from the Constitution, democratic. Rajpath cannot, should not, dominate Janpath.

The Amendment does precisely the opposite. Where it should democratise, it captures, preventing the Assembly from making committees. Where it should let go, it centralises, insisting on presence even in day-to-day administration. Where the complexity of our challenges requires spreading and sharing responsibility, it seeks to problem solve through accumulating authority. Where it should expand accountability, it evades it. This is government by itself, of itself, for itself.

That the Amendment violates a 2018 five-judge Supreme Court order is clear. In GNCTD vs Union of India, the Bench had held unambiguously that Article 239 and its provisions, which lay down the governance structure of the NCT of Delhi, had to be read in the "spirit of citizenry participation in the governance of a democratic polity that is republican in character". The Bench held clearly that "the Lieutenant Governor has not been entrusted with any independent decision-making power"; that the fact that the decisions of the Council of Ministers "must be communicated to the Lieutenant Governor [did] not mean that the concurrence of the Lieutenant Governor is required"; clarified that "the words 'any matter' [did not] necessarily need to be construed to mean 'every matter'"; and that even when in case of difference of opinion with the Council of Ministers, the LG would have to meet "the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance [and] respect for a representative government". There was,

to put it simply, never any ambiguity about either the role or definition of the "Government" in the GNCT of Delhi Act. There was no doubt about the Assembly as the representation of the people and the locus of governance.

We have long misrecognised the problem in Delhi's governance both as a capital and a megacity. From, to take one example, the creation of the [also unelected] Delhi Development Authority to "manage" the city and insulate it from the messiness of democratic politics while making our Master Plans, we have long sought to retreat to the technical, the centralised, the institutional rather than the political, the local and the public. Yet the complexity of mega-city governance demands more, not less, democracy. It demands the municipality, not the developmental authority. It demands the Assembly, not the Office of the LG. Even as a capital, it demands recognition for itself outside the nation. No great capital city has been otherwise.

The intent behind this Amendment is not the efficiency of government in Delhi. Defending the Amendment in this newspaper, G Kishan Reddy, the Minister of State for Home Affairs, first invoked efficiency but, near the end of the piece, warned us against the risk of "incremental encroachments" by the Delhi Assembly on matters of police, public order, and land. This would have, he says, "severe ramifications for Delhi" ('Ending Ambiguity in Delhi,' IE, March 31). This risk is, of course, utterly fictional since the three subjects are explicitly beyond the bounds of legislation by the Assembly. Yet let us ask, why should they be? If the citizens of Delhi had a more direct say on land, police and public order, would the result not be the expansion of our democracy and the possibility of a fairer fight for a more inclusive city?

The accumulation of power in a few institutions is not about a desire for good governance. It is a sign of fearing that which is truly democratic in all its contestations. This fear lies at the heart of this Amendment — a fear felt by a state against the public, a fear wielded as threat by a Centre unwilling to yield control, a fear of a Capital that is not just a showpiece for the nation but has citizens of its own.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/national-capital-territory-act-delhi-lieutenant-governor-power-modi-govt-kejriwal-7265163/

Sneak Peek:

No. of words: 1186 words

Note: In this article the author is critically analyzing the concept of Electoral Bonds. The author is analyzing it in the light of Supreme Court judgment and various provisions of Law. As CLAT aspirants, it is a suggested to have a fair idea about it.

Article: 15

Supreme Court could have removed secrecy around electoral bonds. Too bad it didn't

The introduction of electoral bonds through the budget was not an isolated act.

The finance ministry has launched its quarterly window for sale of electoral bonds to political parties from April 1 to 10, after the Supreme Court refused to stay the scheme last week. During the hearing, the apex court, however, flagged a new issue — the possibility of misuse of money received by political parties for activities like funding terror or violent protests — and asked the Centre whether it has any control on the end use. I wish the Court had mentioned another important and new area of dubious expenditure — buying of MLAs after the elections to overturn the public mandate.

The bench was hearing a plea by the Association for Democratic Reforms (ADR) seeking a stay on fresh sale of bonds, while its petition challenging the electoral bonds scheme is pending.

The issue has been hanging fire since February 2017 when, in his budget speech, Finance Minister Arun Jaitley made two profound statements: One, without transparency of political funding, free and fair elections are not possible, and two, that despite 70 years of concern we have failed to achieve the transparency required. After these momentous statements, one expected that the issue will be resolved. However, what he announced was the opposite of the desire expressed.

Electoral bonds were born. And transparency died. Till then every transaction of more than Rs 20,000 was reported to the Election Commission. Now even Rs 20 crore or Rs 200 crore could be donated anonymously. The reason given was that the donors want secrecy.

Why should donors want secrecy? To hide return favours, like contracts, licences and bank loans, with which some of them may abscond to foreign lands? For seven decades, corporates have been donating to all parties, often the same donors donating to rival parties. Did any ruling party ever harass a donor who donated to its rivals? Did the current ruling party do it? If not, the excuse is phoney. It is, clearly, a case of private interest in conflict with public interest in transparency.

Importantly, both the RBI and ECI, standing up to their mandates, had registered their strong protest. The ECI in a letter to the ministry of law and justice warned that electoral bonds, combined with the preceding legislative amendments, would encourage large sums of illegal donations. It will lead to mushrooming of shell companies to funnel black money into the political system through these bearer bonds.

The ECI's counsel, however, has now submitted that the Commission is supporting electoral bonds, not opposing it. "Without electoral bonds, we will go back to the earlier cash system, which was unaccounted. Bonds is one step forward, as all transactions are through banking channels," he said. Exactly the government line. Is this change of stand surprising?

The introduction of electoral bonds through the budget was not an isolated act. The Finance Act 2017 introduced amendments in the Reserve Bank of India Act, Companies Act, Income Tax Act, Representation of the People Act and Foreign Contribution Regulations Act to make way for electoral bonds.

There were three serious changes which did not receive the deserved attention. First, the limit of 7.5 per cent of its profits which a company could donate was not just increased but completely done away with by amending section 182 of the Companies Act, 2013. Thus a company could donate 100 per cent of its profits to a political party. Even a loss-making company could make political donations. This is a sure step to legitimise and legalise crony capitalism. Companies could now virtually run the government, as we can see happening.

The requirements for a resolution by the board of directors for a company to make donations to political parties and to declare the political donations in the profit and loss accounts were also removed. Imagine keeping the donations secret not only from the public but the owners of the company, the shareholders — ironically, all in the name of transparency.

There was more to follow. Section 29B of the Representation of the People Act, 1951 prohibits all political parties from accepting any contribution from a "foreign source." Moreover, section 3 of the 2010 Foreign Contribution (Regulation) Act bars candidates, legislative members, political parties and party officeholders from accepting foreign contributions. When the High Court of Delhi in 2014 found Congress and BJP having accepted foreign funds in violation of the FCRA 1976, the BJP government passed a retroactive amendment through a 2016 Finance Bill which repealed the 1976 Act and replaced it with the modified 2010 statute.

If any foreign country is financing our elections, it will now be a protected secret. We have seen how foreign interference in other countries' elections is a reality. Even the superpower, US, could not protect itself from this transgression, that too from its declared enemy number one. This is a serious concern, indeed a blot, on any democracy's electoral system.

The Supreme Court's concern about the possibility of misuse of funds is very pertinent. We need transparency both about the source of income and its expenditure. The EC has been demanding that a law be passed to make political parties liable to get their accounts audited by an auditor from a panel suggested by the CAG or EC and not by their party cardholders who only whitewash the accounts.

I think the best way forward is simple — don't abolish electoral bonds if you don't want to, just disclose the donor and the recipient. This is something the government could do in 30 seconds. Since it is futile to expect the government to do it, the Supreme Court could have easily ordered this and clinched the issue. One wishes the highest court in the land would consider this case as one of national importance and show some urgency.

Let's not forget that it was the same Supreme Court which had done great service in 2002-3 to transparency when it made it compulsory for the candidates to declare their financial dealings and criminal cases while filing nominations. When the government tried to dilute the judgement by an enactment, the Court even declared the law ultra vires. Is it wrong to expect the same judicial standards?

An alternative is to do away with private fund collection altogether and replace it with public funding of political parties. This is not likely to be more than Rs 10,000 crore every five years, if we were to go by the entire collection all the parties make together. It's a small price for democracy.

Another feasible option is to establish a National Election Fund to which all donations could be directed. This would take care of the imaginary fear of political reprisal of the donors. Income tax rebates would make it an attractive proposition. The Fund could then be allocated to political parties on the basis of their electoral performance.

Let's end by reminding the finance minister of her predecessor's opening statement in the 2017 Budget speech that "without transparency of political funding, free and fair elections are not possible".

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/supreme-court-transparency-election-funding-7263402/

Sneak Peek:

No. of words: 722 words

Note: In this article the author is critically analyzing the recent draft policy of Niti Aayog on Migrant Labour. It is suggested to have a fair idea about it.

Article: 16

An effective migrant labour policy must consider where existing labour laws fail

The Niti Aayog's draft Migrant Labour Policy is a clear statement of intent to better recognise migrants' contribution to the economy and support them in their endeavours. It puts forward several radical ideas, including the adoption of a rights-based approach and establishing an additional layer of institutions to create a more enabling policy environment for migrants. It proposes a new National Migration Policy and the formation of a special unit within the Labour Ministry to work closely with other ministries. The new structure would bring about much-needed convergence across line departments and would be a huge step towards a universal understanding of the causes and effects of migration as well as the interventions needed.

The policy calls for improving the record on the implementation of the country's many labour laws that have, by and large, failed to make a difference to the lives of labour migrants. It discusses at length the provisions under the Equal Remuneration Act, The Bonded Labour Act, the Building and Other Construction Workers Act and the Interstate Migrant Workmen Act, among others. The draft also invokes the ILO's Decent Work Agenda as well as the Sustainable Development Goals which aim to protect labour rights. It acknowledges the challenges of welfare provision to a highly fragmented migrant workforce due to recruitment patterns and the lack of data. It refers to the importance of collective action and unions and there are detailed plans for improving the data on short-term migration, especially seasonal and circular migration. As a statement of goals, the draft contains much to be celebrated.

But the policy needs to delve deeper into the causes underlying the poor implementation of labour laws that are linked to the political economy of recruitment and placement. Labour migrants from rural areas find work in the urban economy and high productivity rural enterprises either through kinship networks or labour market intermediaries. These networks are critical for supplying workers that can be positioned in jobs, where there is a demand for hard-working and controllable workers who will stay tied to the job. One way of ensuring that workers do not leave because of harsh conditions is to bond them through the notorious system of advances. Although illegal, this kind of arrangement is attractive for migrants from relatively disadvantaged backgrounds as they cannot mobilise large sums of money for weddings, housing and repaying loans. There is reference to unfair recruitment practices in the document, but virtually no analysis of why the system persists and how it is enabled by the employment structure of businesses and enterprises.

Another area where the draft needs to be strengthened is addressing gender differences in employment. Domestic work is one of the most important occupations for migrant women from relatively disadvantaged backgrounds. Although the new policy aims to be inclusive of all kinds of marginalised migrants, it could do more to explicitly mention the challenges faced by domestic workers. It would be very easy for them to remain excluded as India has not ratified the ILO Convention on Domestic Workers and The Domestic Workers Bill 2017 has not become law. Other kinds of home-based work, enormously important for female migrants could similarly remain excluded.

Another point to raise here is the apparent ambivalence about the ability of tribal migrants to think for themselves and decide how they access the opportunities offered by migration. Early in the draft we see a commitment to recognising migrant agency, but this is less clear in the section where tribal migration policies are discussed. Tribal migration is constructed as a process whereby recruiters are "luring" or even trafficking them. Domestic work, which is mentioned in this context, is an important source of income for tens of thousands of tribal women from impoverished backgrounds in eastern Indian states. There are, of course, some instances of abuse, but these do not represent the majority experience. There is a need to better understand how migrants themselves weigh up the costs and risks against potential benefits of working in the city. Controlling tribal migration would go against the objective of recognising migrant agency.

To conclude, the draft policy is a good start which could, with a few adjustments, reduce the vulnerability and risks faced by labour migrants and ultimately build a more sustainable model of development.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/national-migration-policy-labour-laws-niti-aayog-7261732/

Sneak Peek:

No. of words: 996 words

Note: In this article the author highlights the issues with the exemption of aided and non-aided minority institutions under The Right to Education Act. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 17

Time to undo the RTE bias against private non-minority institutions

The right to education was initially mentioned in Article 45 as a part of the Directive Principles. It indicated that the state should provide free and compulsory education to children up to the age of 14 within a decade.

Most fundamental rights are enforceable against the state, not against private individuals. This is known as the vertical application of fundamental rights. Certain rights, however, are horizontally enforceable too, that is, they can be enforced against individuals. The Right to Free and Compulsory Education Act or RTE falls in the latter category.

The right to education was initially mentioned in Article 45 as a part of the Directive Principles. It indicated that the state should provide free and compulsory education to children up to the age of 14 within a decade. The Supreme Court in 1992 held in Mohini Jain v. State of Karnataka that the right to education was a part of the right to life recognised in Article 21.

The next year, the court in Unnikrishnan JP v. State of Andhra Pradesh held that the state was duty-bound to provide education to children up to the age of 14 within its economic capacity. The court acknowledged that such a task could not be fulfilled by the state alone and held that private educational institutions, including minority institutions, would have to play a role alongside government schools. The right to education was finally given the status of a fundamental right by the 86th constitutional amendment in the year 2002 by the addition of Article 21A in the Constitution.

Landmark judgments such as TMA Pai Foundation and P A Inamdar laid the groundwork for the constitutional right to education. The court held in Inamdar that there shall be no reservation in private institutions and that minority and non-minority institutions would not be treated differently.

But in 2005, the Constitution was amended by the 93rd amendment to include Clause(5) to Article 15 which dealt with the fundamental right against discrimination. Ironically, this new provision effected heavy discrimination against a class of private citizens. The clause permitted the state to provide for advancement of "backward" classes by ensuring their admission in institutions, including private institutions. The clause, however, excluded both aided and unaided minority educational institutions thus overruling the Supreme Court's judgment in Inamdar.

When the RTE Act was subsequently enacted in 2009, it did not directly discriminate between students studying in minority and non-minority institutions. Its provision of 25 per cent reservation in private institutions was however challenged in Society for Unaided Private Schools of Rajasthan v. Union of India where the court upheld the validity of the legislation exempting only unaided minority schools from its purview. In response to the judgment, the RTE Act was amended in 2012 to mention that its provisions were

subject to Articles 29 and 30 which protect the administrative rights of minority educational institutions. This was completely different from the way the court had envisaged the issue in its earlier judgments.

This arbitrariness of the Act was challenged several times with the court conceding in Pramati Educational Trust that while non-minority aided and unaided schools were bound by the legislation, both aided and unaided minority schools were exempt. Given the stringent requirements under the legislation, this judgment gave rise to an absurd situation where the onus on private unaided schools was much higher than that on government schools, while even aided minority schools were exempt. It must be noted that the constitutional provision enabling the RTE Act, that is, Article 21, does not make any discrimination between minority and non-minority institutions.

The above provisions of RTE made it violative of Article 14 and also economically unviable for many private schools. While the state does have the power to impose reasonable restrictions on the fundamental right to carry on any occupation, it does not have the power to enact a legislation which violates the constitutionally guaranteed tenet of equality in Article 14. Not only has RTE unreasonably differentiated between minority and non-minority schools without any explicable basis, there is also no rational nexus between the object of universal education sought to be achieved by this act and the step of excluding minority schools from its purview.

Moreover, while dealing with beneficial legislations such as RTE, courts are generally inclined to ensure maximum reach. Given the doctrine of harmonious construction of fundamental rights, it is unclear why the court granted complete immunity to minority institutions when several provisions of RTE would not interfere with their administrative rights.

In 2016, A Muhamed Mustaque, judge of the Kerala High Court held in Sobha George v. State of Kerala that Section 16 of RTE, which forbids non-promotion till the completion of elementary education, will be applicable to minority schools as well. The respondent contended that they were an unaided minority school and were covered by the Pramati judgement, making them immune to provisions of RTE. Justice Mustaque, however, explained that although functioning of minority institutions is not subject to RTE, they are subject to fundamental rights enshrined within the Constitution. He stated that courts must examine whether provisions such as Section 16 of RTE are statutory rights or fundamental rights expressed in a statutory form. If the latter, then Pramati will not be fully available to minority institutions.

RTE has provisions such as prevention of physical/mental cruelty towards students as well as quality checks on pedagogical and teacher standards which children studying in minority institutions should not be deprived of and to that extent be discriminated against.

RTE as a legislation may be well-intentioned, but the time has come to relook at the discriminatory nature of RTE against private non-minority institutions, and to that extent, undo the damage done by 93rd Amendment and the subsequent SC judgments. As a start, the Supreme Court should take inspiration from the prudent decision delivered by the Kerala High Court and overrule its own judgment delivered in the Pramati Educational Society.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/rte-fundamental-rights-private-non-minority-institutions-7256439/

Sneak Peek:

No. of words: 945 words

Note: In this article the author highlights the role that the Supreme Court can play in universal vaccination in India. It is suggest to do read it.

Article: 18

The Supreme Court must oversee vaccination to protect Indians' right to life

We live in a time that comes once in a century. The pandemic carries on with no end in sight, except the departure of near and dear ones. What can the Supreme Court of India possibly do to safeguard the right to life guaranteed under Article 21, for which it is duty-bound to exercise jurisdiction under Article 32 of the Constitution of India?

Let us consider one aspect, namely, universal vaccination. It is a glimmer of hope when a small country like Israel resumes normal life after the vaccination of almost its entire populace. China, too, impresses with large-scale vaccination and pandemic-free movement of its people and economy, though too many reliable details are not available from the other side of its iron curtain. The Supreme Court of India can facilitate speed and deeper penetration of universal vaccination, which is now commonly accepted as the only possible solution to the pandemic in the long run.

There has been an enormous burden on the Government of India (GoI) to conceptualise, roll out and respond dynamically to the goal of universal vaccination within and outside the country, as the pharmacy of the world. The unprecedented severity of the second wave has moved us away from a universal to a domestic, inward gaze. It reveals that any institution, howsoever well-meaning, committed and hard-working, in this case, the executive, has the limitation of one. The scattered and untapped energy of civil society, NGOs and public-spirited people needs a proactive push from the judiciary to rally behind science, scientists and medical wherewithal.

First, the conceptual issue, which still intrigues us. Should the vaccination be confined to 18-plus or be made available to all? An informed debate as to desirability, availability and targeted goals is needed. The Supreme Court can provide an open and transparent platform by invitation to eminent individuals and impleadment of institutions such as WHO, ICMR, AIIMS, IITs, major universities, hospitals from India and abroad. On its part, the Supreme Court can have a dedicated bench available for e-filing and virtual hearing anytime that is convenient for the judges during and after normal judicial hours.

Let it be clear that this exercise on conceptual clarity is not for an academic seminar. In retrospect, we might have evaded some of the horrendous consequences of the second wave if there had been a wider authoritative debate beyond the self-serving media. For the road ahead, this exercise is extremely important for a more effective vaccination regime.

To ensure an equitable and pervasive rollout with easy availability of vaccines, the legal frame of three Ps (production, price and patents) needs a rigorous look by the court to protect life. The environment cases provide a long line of precedents — if at all any jurisprudential basis is needed. This time, the danger is far greater than sporadic events of pollution from industry, mining and infrastructural development. There cannot be a better case for proactive suo motu jurisdiction to ensure the right to life.

It is time to question patents, real and allegedly WTO-protected, or claimed by vaccines that have been developed with aid from the state in research and development. These patents, if established, must be immediately acquired with just and adequate compensation and made accessible to all manufacturers. This was done for medicines for AIDS. It can be done again under the Patents Act. The Court can also issue mandamus to undertake this exercise on an emergency basis. Thereafter, all pharmaceutical companies with Good Manufacturing Practices (GMP) as per the Drugs and Cosmetics Act must be allowed to manufacture vaccines at a pre-approved price of cost + 6 per cent return on investment. States can also be directed to incentivise the setting up of new manufacturing facilities as a possible third wave, periodic booster doses and the need for ancillary vaccines make it a long-term phenomenon. Of course, all this has to be ensured in addition to the free import of vaccines approved by advanced nations.

The availability of all the vaccines, whether indigenous or imported, must be free for all the recipients to be paid by GoI. The vaccines can be distributed to states on a pro-rata basis as per population and price adjusted as part of general revenue sharing in GST. After all, we are one nation with one tax. Those who want to pay may channelise their charity elsewhere but not to distort priorities in the vaccination drive.

Likewise, the vaccine administration needs to be ramped up both in state and private facilities. We need a massive Swachh Bharat-like propaganda exercise and mobile vans for "at your doorstep" vaccination. For vaccine hesitancy, we need to incentivise the vaccination through a direct deposit of Rs 500 in Jan Dhan accounts for each vaccinated member of BPL families. This vaccination can be made compulsory for identifiable categories of persons from MGNREGA beneficiaries to Aadhaar Card holders to income-tax payers to bank account holders to driving-licence holders. There must be a strict penalty to be recovered from those who do not get vaccinated without medical reasons. Private efforts can be made eligible for reimbursement of cost.

The Supreme Court needs to, can and must look into systemic issues where a lot needs to be done, can be done and must be done with utmost urgency. Vaccination is one major issue amid a clamour for oxygen, medicines, medical infrastructure and lockdowns. The politics which goes with all this is inevitable in a democratic society. So be it! The Supreme Court can steer us, with greater emphasis on the right to life. The pandemic may leave nothing and nobody behind to bicker about.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/the-supreme-court-must-oversee-vaccination-to-protect-indians-right-to-life-7295956/

Sneak Peek:

No. of words: 487 words

Note: This article is about Derek Chauvin, a former Minneapolis police officer, who was found guilty of murdering an unarmed African-American man, George Floyd in May 2020. It is suggested to have a fair idea about it.

Article: 19

Towards racial justice: On George Floyd case verdict

Conviction in the George Floyd case and the police reform bill should help build bridges.

A U.S. judge found Derek Chauvin, a Minneapolis police officer, guilty of murdering an unarmed African-American man, George Floyd, an incident last May that ignited a nationwide storm of protest against police brutality and a worldwide outpouring of anger at America's racial injustice. Mr. Chauvin has been convicted of second-degree and third-degree murder, and manslaughter — all three for an encounter that lasted around nine minutes, during which he pinned Mr. Floyd's neck to the roadside with his knee until he stopped breathing. Mr. Floyd's final words, "I can't breathe", became the clarion call of a massive wave of street protests across the U.S. At the time, erstwhile President Donald Trump fanned outrage when he described the protests a result of the "radical left" and threatened to send in the National Guard. President Joe Biden, at the time a presidential race frontrunner, contrarily went to Houston to meet with Mr. Floyd's relatives. He said at the time that he would not "fan the flames of hate", but instead, "seek to heal the racial wounds that have long plagued this country". A few months ahead of one of the most remarkable presidential elections in recent history, his words lent hope to many Americans that should he win, there might be a real possibility for reform in law enforcement and criminal justice that could result in less violence against racial minorities.

Yet, it is clear that the road towards achieving a more perfect union is laden with pitfalls that render the task at hand formidable. Literally minutes before the verdict in the Chauvin trial, a teenage girl in Columbus, Ohio, was killed by the police. Her death comes in the wake of others felled in police encounters, including Eric Garner, Michael Brown and Tamir Rice in 2014, and Breonna Taylor in 2020, to name but a few. In most such cases, charges have been rare, and convictions rarer still. Analysis of these cases suggested that most often charges were dropped, or plea bargains and civil settlements agreed. It is only a minority of these instances of what many consider police brutality against people of colour that result in convictions at trial. Four years under Mr. Trump did little to build, across communities, bridges of the sort necessary to bring about a greater measure of empathy and nuance in policing. Now, Mr. Biden's ambitious police reform bill, which bans chokeholds, offers qualified immunity from lawsuits for law enforcement and creates national standards for policing towards greater accountability, has cleared the House and faces a steep climb at the Senate, where analysts say it is unlikely to pass without the support of at least some Republicans. If some of these Republicans can eschew unproven allegations about Democrats seeking to "defund the police" that will be a good start.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/towards-racial-justice/article34379435.ece

Sneak Peek:

No. of words: 1234 words

Note: In this article the author is highlighting the rules of Intellectual Property Rights and the importance of waiver of the said rules in the wake of the global pandemic. A must read for every law aspirant. Enjoy this article!!

Article: 20

A patently wrong regime

Even an unprecedented pandemic can do little, it appears, to upset the existing global regime governing monopoly rights over the production and distribution of life-saving drugs. If anything, since the onset of COVID-19, we've only seen a reaffirmation of intellectual property rules that have served as a lethal barrier to the right to access healthcare over the last few decades. The neo-liberal order, under which these laws exist, is so intractable today that a matter as seemingly simple as a request for a waiver on patent protections is seen as a claim unworthy of exception.

Request for waiver

On October 2 last year, India and South Africa submitted a joint petition to the World Trade Organization (WTO), requesting a temporary suspension of rules under the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). A waiver was sought to the extent that the protections offered by TRIPS impinged on the containment and treatment of COVID-19. As we now know, quick and efficient vaccination is the surest route to achieving global herd immunity against the virus. Should the appeal for waiver be allowed, countries will be in a position, among other things, to facilitate a free exchange of know-how and technology surrounding the production of vaccines.

The request for waiver has, since, found support from more than 100 nations. But a small group of states — the U.S., the European Union, the U.K. and Canada among them — continues to block the move. Their reluctance comes despite these countries having already secured the majority of available vaccines, with the stocks that they hold far exceeding the amounts necessary to inoculate the whole of their populations. Their decision is all the more galling when one considers the fact that for the rest of the world mass immunisation is a distant dream. Reports suggest that for most poor countries it would take until at least 2024 before widespread vaccination is achieved.

A patent is a conferral by the state of an exclusive right to make, use and sell an inventive product or process. Patent laws are usually justified on three distinct grounds: on the idea that people have something of a natural and moral right to claim control over their inventions; on the utilitarian premise that exclusive licenses promote invention and therefore benefit society as a whole; and on the belief that individuals must be allowed to benefit from the fruits of their labour and merit, that when a person toils to produce an object, the toil and the object become inseparable. Each of these justifications has long been a matter of contest, especially in the application of claims of monopoly over pharmaceutical drugs and technologies.

A new world order

In India, the question of marrying the idea of promoting invention and offering exclusive rights over medicines on the one hand with the state's obligation of ensuring that every person has equal access to basic

healthcare on the other has been a source of constant tension. The colonial-era laws that the country inherited expressly allowed for pharmaceutical patents. But in 1959, a committee chaired by Justice N. Rajagopala Ayyangar objected to this on ethical grounds. It noted that access to drugs at affordable prices suffered severely on account of the existing regime. The committee found that foreign corporations used patents, and injunctions secured from courts, to suppress competition from Indian entities, and thus, medicines were priced at exorbitant rates. To counter this trend, the committee suggested, and Parliament put this into law through the Patents Act, 1970, that monopolies over pharmaceutical drugs be altogether removed, with protections offered only over claims to processes.

This change in rule allowed generic manufacturers in India to grow. As a result, life-saving drugs were made available to people at more affordable prices. The ink had barely dried on the new law, though, when negotiations had begun to create a WTO that would write into its constitution a binding set of rules governing intellectual property. In the proposal's vision, countries which fail to subscribe to the common laws prescribed by the WTO would be barred from entry into the global trading circuit. It was believed that a threat of sanctions, to be enforced through a dispute resolution mechanism, would dissuade states from reneging on their promises. With the advent in 1995 of the TRIPS agreement this belief proved true.

As the Yale Law School professor Amy Kapczynski has written, compelling signatories to introduce intellectual property laws like those in the global north was nothing short of a scandal. The follies in this new world order became quickly apparent when drugs that reduced AIDS deaths in developed nations were placed out of reach for the rest of the world. It was only when Indian companies began to manufacture generic versions of these medicines, which was made possible because obligations under TRIPS hadn't yet kicked in against India, that the prices came down. But lessons from that debacle remain unlearned.

Refuting objections

Instead, two common arguments are made in response to objections against the prevailing patent regime. One, that unless corporations are rewarded for their inventions, they would be unable to recoup amounts invested by them in research and development. Two, that without the right to monopolise production there will be no incentive to innovate. Both of these claims have been refuted time and again.

Most recently, it has been reported that the technology involved in producing the Moderna vaccine in the U.S. emanated out of basic research conducted by the National Institutes of Health, a federal government agency, and other publicly funded universities and organisations. Similarly, public money accounted for more than 97% of the funding towards the development of the Oxford/AstraZeneca vaccine. Big pharma has never been forthright about the quantum of monies funnelled by it into research and development. It's also been clear for some time now that its research is usually driven towards diseases that afflict people in the developed world. Therefore, the claim that a removal of patents would somehow invade on a company's ability to recoup costs is simply untrue.

The second objection — the idea that patents are the only means available to promote innovation — has become something of a dogma. But other appealing alternatives have been mooted. The economist Joseph Stiglitz is one of many who has proposed a prize fund for medical research in place of patents. Under the current system, "those unfortunate enough to have the disease are forced to pay the price… and that means the very poor in the developing world are condemned to death," he wrote. A system that replaces patents with prizes will be "more efficient and more equitable", in that incentives for research will flow from public funds while ensuring that the biases associated with monopolies are removed.

The unequal vaccine policy put in place by the Indian state is indefensible. But at the same time, we cannot overlook the need for global collective action. If nation states are to act as a force of good, they must each

attend to the demands of global justice. The pandemic has demonstrated to us just how iniquitous the existing world order is. We cannot continue to persist with rules granting monopolies which place the right to access basic healthcare in a position of constant peril. In its present form, the TRIPS regime, to borrow the law professor Katharina Pistor's words, represents nothing but a new form of "feudal calculus".

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/a-patently-wrong-regime/article34424840.ece

Sneak Peek:

No. of words: 1547 words

Note: In this article the author highlights the issue of lack of clarity on the extent of the power of the Election Commission of India. Author discusses the issues and ambiguous provisions that affect the functioning of the Election Commission of India.

Article: 21

The Election Commission of India cannot be a super government

There is still some confusion about the extent and nature of the powers that are available to the Election Commission

Elections bring the Election Commission of India (ECI) into sharp focus as this constitutional body superintends, directs and controls the conduct of elections. It is the constitutional duty of the ECI to ensure that the elections held are free and fair.

It is an interesting aspect of the ECI's history that before T.N. Seshan came on the scene as the Chief Election Commissioner, no one in the country ever knew or felt that the ECI had any powers. Seshan discovered the ECI's powers hidden in Article 324 of the Constitution which was then used to discipline recalcitrant political parties which had till then believed that it was their birth right to rig elections. Thus there was a very high level of confidence in the minds of Indian citizens about the ECI's role restoring the purity of the elected legislative bodies in the country.

It became rather easier for Seshan to locate the powers of the ECI after the Supreme Court held in Mohinder Singh Gill vs Chief Election Commissioner (AIR 1978 SC 851) that Article 324 contains plenary powers to ensure free and fair elections and these are vested in the ECI which can take all necessary steps to achieve this constitutional object. All subsequent decisions of the Supreme Court reaffirmed Gill's decision and thus the ECI was fortified by these court decisions in taking tough measures.

The model code

The model code of conduct issued by the ECI is a set of guidelines meant for political parties, candidates and governments to adhere to during an election. This code is based on consensus among political parties. Its origin can be traced to a code of conduct for political parties prepared by the Kerala government in 1960 for the Assembly elections. It was adopted and refined and enlarged by the ECI in later years, and was enforced strictly from 1991 onwards.

There is absolutely no doubt that elections need to be properly and effectively regulated. The Constitution has clothed the ECI with enough powers to do that. Thus, the code has been issued in exercise of its powers under Article 324. Besides the code, the ECI issues from time to time directions, instructions and clarifications on a host of issues which crop up in the course of an election. The model code is observed by all stakeholders for fear of action by the ECI. However, there exists a considerable amount of confusion about the extent and nature of the powers which are available to the ECI in enforcing the code as well as its other decisions in relation to an election.

Since it is a code of conduct framed on the basis of a consensus among political parties, it has not been given any legal backing. Although a committee of Parliament recommended that the code should be made a part of

the Representation of the People Act 1951, the ECI did not agree to it on the ground that once it becomes a part of law, all matters connected with the enforcement of the code will be taken to court, which would delay elections.

Unresolved question

The position taken by the ECI is sound from a practical point of view. But then the question about the enforceability of the code remains unresolved. Paragraph 16A of the Election Symbols (Reservation and Allotment) Order, 1968 says that the commission may suspend or withdraw recognition of a recognised political party if it refuses to observe the model code of conduct.

But it is doubtful whether this provision is legally sustainable. The reason is that withdrawal of the recognition of a party recognised under these orders seriously effects the functioning of political parties. When the code is legally not enforceable, how can the ECI resort to a punitive action such as withdrawal of recognition?

There are two crucial issues which need to be examined in the context of the model code and the exercise of powers by the ECI under Article 324.

Transfer of officials

One issue relates to the abrupt transfer of senior officials working under State governments by an order of the commission. It may be that the observers of the ECI report to it about the conduct of certain officials of the States where elections are to be held. The ECI apparently acts on such reports and orders the transfer on the assumption that the presence of those officials will adversely affect the free and fair election in that State. Transfer of an official is within the exclusive jurisdiction of the government. It is actually not clear whether the ECI can transfer a State government official in exercise of the general powers under Article 324 or under the model code.

The code does not say what the ECI can do; it contains only guidelines for the candidates, political parties and the governments. Further, Article 324 does not confer untrammelled powers on the ECI to do anything in connection with the elections. If transfer of officials is a power which the ECI can exercise without the concurrence of the State governments, the whole State administration could come to a grinding halt. The ECI may transfer even the Chief Secretary or the head of the police force in the State abruptly. In Mohinder Singh Gill's case (supra), the Court had made it abundantly clear that the ECI can draw power from Article 324 only when no law exists which governs a particular matter. It means that the ECI is bound to act in accordance with the law in force. Transfer of officials, etc is governed by rules made under Article 309 of the Constitution which cannot be bypassed by the ECI under the purported exercise of power conferred by Article 324. Further, to assume that a police officer or a civil servant will be able to swing the election in favour of the ruling party is extremely unrealistic and naive. It reflects in a way the ECI's lack of confidence in the efficacy of politicians' campaigns.

Administrative moves

Another issue relates to the ECI's intervention in the administrative decisions of a State government or even the union government. According to the model code, Ministers cannot announce any financial grants in any form, make any promise of construction of roads, provision of drinking water facilities, etc or make any ad hoc appointments in the government. departments or public undertakings. These are the core guidelines relating to the government. But in reality, no government is allowed by the ECI to take any action, administrative or otherwise, if the ECI believes that such actions or decisions will affect free and fair elections.

A recent decision of the ECI to stop the Government of Kerala from continuing to supply kits containing rice, pulses, cooking oil, etc is a case in point. The State government has been distributing such free kits for nearly a year to meet the situation arising out of the pandemic, which has helped many a household. The decision to stop the kit distribution was reportedly on a complaint from the Leader of the Opposition in the Assembly. The question is whether the ECI could have taken such a decision either under the model code or Article 324. The model code does not provide any clue. As regards the use of Article 324, the issue boils down to whether distribution of food items to those in need in a pandemic will affect free and fair elections.

The Supreme Court had in S. Subramaniam Balaji vs Govt. of T. Nadu & Ors (2013) held that the distribution of colour TVs, computers, cycles, goats, cows, etc, done or promised by the government is in the nature of welfare measures and is in accordance with the directive principles of state policy, and therefore it is permissible during an election. If colour TVs, computers, etc can be promised or distributed during an election and it does not influence the free choice of the people, how can the distribution of essential food articles which are used to stave off starvation be an electoral malpractice? Further, Section 123 (2)(b) of the Representation of the People Act, 1951 says that declaration of a public policy or the exercise of a legal right will not be regarded as interfering with the free exercise of the electoral right.

Insightful words

There is no doubt that the ECI, through the conduct of free and fair elections in an extremely complex country, has restored the purity of the legislative bodies. However, no constitutional body is vested with unguided and absolute powers. Neither citizens nor the ECI is permitted to assume that the ECI has unlimited and arbitrary powers. It would be useful to remember the insightful words of Justice S.M. Fazalali, in A.C. Jose vs Sivan Pillai (1984): “if the [Election] Commission is armed with such unlimited and arbitrary powers and if it ever happens that the persons manning the commission shares or is wedded to a particular ideology, he could by giving odd directions cause a political havoc or bring about a constitutional crisis, setting at naught the integrity and independence of the electoral process so important and indispensable to the democratic system.”

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/the-eci-cannot-be-a-super-government/article34353019.ece

Sneak Peek:

No. of words: 1174 words

Note: In this article the author discusses the idea of judicial federalism and autonomy of the High Courts in India. Author highlights the need for a uniform judicial order across India. As a CLAT aspirant it is suggested to have a fair idea about it.

Article: 22

A case for judicial federalism

The need for a uniform judicial order across India is unwarranted in COVID-19-related cases

In comparison to the legislature and the executive, what the judiciary can deliver in the realm of socio-economic rights is limited. Courts cannot build better health infrastructure or directly supply oxygen; neither are they functionally bound to. Courts often lack the expertise and resources to decide social rights issues. What they can do is to ask tough questions to the executive, implement existing laws and regulations, and hold the executive accountable in various aspects of healthcare allocation. In Parmanand Katara v. Union of India (1989), the Supreme Court underlined the value of human lives and said that the right to emergency medical treatment is part of the citizen's fundamental rights. As such, constitutional courts owe a duty to protect this right.

In the face of a de facto COVID-19 health emergency, the High Courts of Delhi, Gujarat, Madras and Bombay, among others, have done exactly that. They considered the pleas of various hospitals for oxygen supply. The Gujarat High Court issued a series of directions, including for laboratory testing and procurement of oxygen. The Nagpur Bench of the Bombay High Court was constrained to hold night sittings to consider the issue of oxygen supply. It directed immediate restoration of oxygen supply that had been reduced from the Bhilai steel plant in Chhattisgarh. The Delhi High Court directed the Central government to ensure adequate measures for the supply of oxygen. It cautioned that we might lose thousands of lives due to lack of oxygen.

Transfer of cases

On April 22, the Supreme Court took suo motu cognisance of the issue in 'Re: Distribution of Essential Supplies and Services During Pandemic'. It said, "Prima facie, we are inclined to take the view that the distribution of these essential services and supplies must be done in an even-handed manner according to the advice of the health authorities" and asked the Central government to present a national plan. In addition, it issued an order asking the State governments and the Union Territories to "show cause why uniform orders" should not be passed by the Supreme Court. The court thus indicated the possibility of transfer of cases to the Supreme Court, which it has done on various occasions before.

Under Article 139A of the Constitution, the Supreme Court does have the power to transfer cases from the High Courts to itself if cases involve the same questions of law. However, what make the court's usurpation disturbing are two well-founded observations regarding its contemporary conduct. One, the court has been indifferent to the actions and inactions of the executive even in cases where interference was warranted, such as the Internet ban in Kashmir. Two, where effective remedies were sought, when activists and journalists were arrested and detained, the court categorically stayed aloof. It acted as if its hands were tied. Lawyers will

find it difficult to recall a significant recent case of civil liberty from the court where tangible relief was granted against the executive, except for rhetorical statements on personal liberty.

These features, coupled with the unhealthy characteristics of an executive judiciary, makes the court's indication for a takeover disturbing. On April 23, presumably due to widespread criticism of the court's move, especially from a section of the legal fraternity, the court backtracked and simply adjourned the case.

The matter might be heard by the Supreme Court in the coming days. Significantly, the developments so far offer some crucial lessons for judicial federalism in India. The very fact that many from different High Court Bar Associations spoke up against the move to transfer the cases from the High Courts to the Supreme Court is a positive signal that underlines re-emergence of internal democracy within the Bar. Navroz Seervai, a noted lawyer from the Bombay High Court, critiqued the views of the top court saying that they reflected "arrogance of power" and "rank contempt for and disregard of the High Courts in the country, and the extremely important and vital role they play in the constitutional scheme".

In the Supreme Court, the judges sit in Benches of two or more. The purpose of this practice is to encourage deliberation on the Bench to have a higher level of deliberative justice. This necessarily presupposes dissent. A characteristic feature of the apex court in the recent years is general lack of dissent in issues that have serious political ramifications. This deficit occurs not only in the formally pronounced judgments and orders; dissenting judges on the Bench are rare, and the hearing on the COVID-19 case was no exception.

According to the Seventh Schedule of the Constitution, public health and hospitals come under the State List as Item No. 6. There could be related subjects coming under the Union List or Concurrent List. Also, there may be areas of inter-State conflicts. But as of now, the respective High Courts have been dealing with specific challenges at the regional level, the resolution of which does not warrant the top court's interference.

In addition to the geographical reasons, the constitutional scheme of the Indian judiciary is pertinent. In L. Chandra Kumar v. Union of India (1997), the Supreme Court itself said that the High Courts are "institutions endowed with glorious judicial traditions" since they "had been in existence since the 19th century and were possessed of a hoary past enabling them to win the confidence of the people". Even otherwise, in a way, the power of the High Court under Article 226 is wider than the Supreme Court's under Article 32, for in the former, a writ can be issued not only in cases of violation of fundamental rights but also "for any other purpose". This position was reiterated by the court soon after its inception in State of Orissa v. Madan Gopal Rungta (1951).

Autonomy is the rule

Judicial federalism has intrinsic and instrumental benefits which are essentially political. The United States is an illustrative case. Scholar G. Alan Tarr of Rutgers University hinted, "Despite the existence of some endemic and periodical problems, the American system of judicial federalism has largely succeeded in promoting national uniformity and subnational diversity in the administration of justice". Justice Sandra Day O'Connor rightly said in a 1984 paper that the U.S. Supreme Court reviews "only a relative handful of cases from state courts" which ensures "a large measure of autonomy in the application of federal law" for the State courts.

This basic tenet of judicial democracy is well accepted across the courts in the modern federal systems. The need for a uniform judicial order across India is warranted only when it is unavoidable — for example, in cases of an apparent conflict of laws or judgments on legal interpretation. Otherwise, autonomy, not uniformity, is the rule. Decentralisation, not centrism, is the principle. In the COVID-19-related cases, High

Courts across the country have acted with an immense sense of judicial responsibility. This is a legal landscape that deserves to be encouraged. To do this, the Supreme Court must simply stay away.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/a-case-for-judicial-federalism/article34408548.ece

Sneak Peek:

No. of words: 655 words

Note: In this article the author argues for an ex post facto pardon to those who were convicted under Section 377 of the Indian Penal Code (IPC). As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 23

It's time to enact a Siras Act

It would do justice to those convicted in the LGBTQ+ community, including Ramchandra Siras

A law to accord an ex post facto pardon to those who were convicted under Section 377 of the Indian Penal Code (IPC) would do poetic justice to the LGBTQ+ community and Professor Ramchandra Siras. What happened to Siras is a perfect example of the persecution faced by the LGBTQ+ community in India. He was a Professor and head of the Department of Modern Indian Languages at Aligarh Muslim University. On a winter night in 2010, two men trespassed into Siras' house and caught him having consensual sex with another man. Siras was suspended by AMU for "gross misconduct". Hansal Mehta's critically acclaimed biopic, Aligarh (2015), portrayed the social ostracism and mental trauma suffered by Siras. Even though he won his case against the university in the Allahabad High Court and got his job back, Siras died a mysterious death on April 7, 2010.

Alan Turing

From Oscar Wilde to Alan Turing, many well-known as well as unknown people were haunted by anti-LGBTQ+ laws, and many jurisdictions repented later. A memorial in honour of the gay and lesbian victims of National Socialism stands in the city of Cologne in Germany today. The U.K. passed the Alan Turing law in 2017, which grants amnesty and pardon to those convicted of consensual same-sex relationships. The law is named after Alan Turing, the computer scientist who was instrumental in cracking intercepted coded messages during World War II and was convicted of gross indecency in 1952. The Alan Turing law provides not only a posthumous pardon but also an automatic formal pardon for living people.

R. Raj Rao, in Criminal Love?: Queer Theory, Culture and Politics in India (2017), says homosexuality has always been looked upon with disfavour by three agencies universal to mankind: religion, law and medicine. Among them, the law committed the "most unkindest cut of all". From 1862, when Section 377 of the IPC came into effect, until September 6, 2018, when the Supreme Court of India ruled that the application of Section 377 of the IPC to consensual homosexual behaviour between adults was "unconstitutional, irrational, indefensible and manifestly arbitrary", the LGBTQ+ community was treated as a criminal tribe in India.

Resurrection of Naz Foundation

The Delhi High Court's verdict in Naz Foundation v. Govt. of NCT of Delhi (2009) resulted in the decriminalisation of homosexual acts involving consenting adults. The Court held that Section 377 offended the guarantee of equality enshrined in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Justice A.P. Shah observed in the judgment that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

"Specifically, Naz Foundation understood that in promising non-discrimination and equal treatment before the law, the Constitution spoke to a past — and a present — where certain personal characteristics had become the sites of structural and systemic exclusion, marginalisation, disadvantage, and indignity. The jurisprudence of Naz Foundation was an attempt to fulfil the constitutional purpose of redressing this reality," writes Gautam Bhatia in The Transformative Constitution: A Radical Biography in Nine Acts (2019). In a retrograde step, the Supreme Court, in Suresh Kumar Koushal vs. Naz Foundation (2013), reinstated Section 377 in the IPC. Fortunately India witnessed the resurrection of Naz Foundation through the apex court's judgment in Navtej Singh Johar & Ors. v. Union of India (2018).

The spirit of Navtej Singh Johar should be pushed further. To make amends for the excesses committed against the LGBTQ+ community in the past and present, the Indian state should enact a 'Siras Act' on the lines of the Alan Turing law. Ex post facto pardon may be a novel concept in India, but it would do justice, even though delayed, to the prisoners of sexual conscience and Siras.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/its-time-to-enact-a-siras-act/article34320153.ece

Sneak Peek:

No. of words: 1252 words

Note: In this article the author highlights the important role played by the Lok Adalats in dispute resolution and raises concerns over undermining of justice for the sake of speedy disposal. It is very informative text and as a CLAT aspirant you do not need to mug up each and every facts but just to have a fair idea about it.

Article: 24

For Lok Adalats, speed overrides quality

The system must look beyond swift disposal of cases and focus on just and fair outcomes

Justice delayed is justice denied. Access to justice for the poor is a constitutional mandate to ensure fair treatment under our legal system. Hence, Lok Adalats (literally, 'People's Court') were established to make justice accessible and affordable to all. It was a forum to address the problems of crowded case dockets outside the formal adjudicatory system.

The first National Lok Adalat (NLA) of 2021 will be held on April 10. As of now, Lok Adalats have been functioning for 38 years, but have they performed efficiently? Do they empower the poor or coerce them to accept unjust compromises? Do they trade justice off for high settlement numbers and speed, ignoring the old dictum that justice hurried is justice buried? Have we tailored a dual system of justice dispensation, where the formal legal system, i.e., the court, is meant only for the rich and powerful, as was recently stated by former Chief Justice of India Ranjan Gogoi? These questions are worth consideration.

Lok Adalats had existed even before the concept received statutory recognition. In 1949, Harivallabh Parikh, a disciple of Mahatma Gandhi, popularised them in Rangpur, Gujarat. The Constitution (42nd Amendment) Act, 1976, inserted Article 39A to ensure "equal justice and free legal aid". To this end, the Legal Services Authorities Act, 1987, was enacted by Parliament and it came into force in 1995 "to provide free and competent legal services to weaker sections of the society" and to "organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity".

A dispute resolution avenue

As an alternative dispute resolution tool, Lok Adalats are regularly organised to help parties reach a compromise. Motor-accident claims, disputes related to public-utility services, cases related to dishonour of cheques, and land, labour and matrimonial disputes (except divorce) are usually taken up by Lok Adalats.

The State Legal Services Authorities (SLSAs) have been organising Lok Adalats on a daily, fortnightly and monthly basis. Data from the National Legal Services Authority (NALSA) show that Lok Adalats organised across the country from 2016 to 2020 disposed of 52,46,415 cases. Similarly, National Lok Adalats (NLAs) organised under the aegis of NALSA settle a huge number of cases across the country in a single day. For instance, NLAs conducted on February 8, 2020, disposed of 11,99,575 cases. From 2016 to 2020, NLAs have disposed of a total of 2,93,19,675 cases.

The Indian judicial system is often lambasted, perhaps justifiably, for its endemic delays and excessive backlogs. As per the National Judicial Data Grid, 16.9% of all cases in district and taluka courts are three to five years old; for High Courts, 20.4% of all cases are five to 10 years old, and over 17% are 10-20 years old. Furthermore, over 66,000 cases are pending before the Supreme Court, over 57 lakh cases before various

HCs, and over 3 crore cases are pending before various district and subordinate courts. Justice V.V.S. Rao, former judge of the Andhra Pradesh High Court, calculated a few years ago that it will take around 320 years to clear the existing backlog of cases.

As a result, litigants are forced to approach Lok Adalats mainly because it is a party-driven process, allowing them to reach an amicable settlement. When compared to litigation, and even other dispute resolution devices, such as arbitration and mediation, Lok Adalats offer parties speed of settlement, as cases are disposed of in a single day; procedural flexibility, as there is no strict application of procedural laws such as the Code of Civil Procedure, 1908, and the Indian Evidence Act, 1872; economic affordability, as there are no court fees for placing matters before the Lok Adalat; finality of awards, as no further appeal is allowed. This prevents delays in settlement of disputes. More importantly, the award issued by a Lok Adalat, after the filing of a joint compromise petition, has the status of a civil court decree.

As per data from NALSA, subject matter-specific NLAs were organised in 2015 and 2016 on a monthly basis. Therefore, each NLA dealt with a specific type of dispute on a single day, each month. However, from 2017, this practice was discontinued. Thereafter, each NLA has been handling all types of cases on a single day. This was done to reduce the costs of organising the NLAs, and more importantly, to allow parties more negotiation time. But this, in turn, led to a significant drop in the number of cases settled. In 2015 and 2016, ten NLAs were held each year that disposed of 1,83,09,401 and 1,04,98,453 cases respectively. In 2017 and 2018, the number of NLAs dropped to five, with 54,05,867 and 58,79,691 cases settled respectively. In 2019, four NLAs were organised, and they disposed of 52,93,273 cases.

In 2015, the average number of cases settled per NLA was 18,30,940, which came down to 10,81,174 in 2017, but rose to 11,75,939 in 2018, and 13,23,319 cases in 2019. This throws up questions about the efficiency of NLAs. The data show that the average number of cases disposed of per NLA since 2017 has gone up even when the number of NLAs organised each year has reduced. This proves that on average, the system is certainly efficient.

To overcome the challenges posed by the COVID-19 pandemic, e-Lok Adalats were organised at both national and State level. However, the first national e-Lok Adalat was conducted both physically and virtually using videoconferencing tools, and it disposed of 10,42,816 cases. But this was less than the average of settled cases in 2017, 2018, and 2019. This suggests that the performance of the NeLA was less efficient than physical National Lok Adalats organised in 2017, 2018, and 2019.

Justice D.Y. Chandrachud, who chairs the SC's e-Committee, recently published the draft of phase three of the e-Courts project. Once implemented, it may prove to be a game-changer in improving the efficiency of the adjudicatory process.

Conciliatory role

However, besides efficiency and speed, Lok Adalats both online and offline should focus on the quality of justice delivered. The Supreme Court, in State of Punjab vs Jalour Singh (2008), held that a Lok Adalat is purely conciliatory and it has no adjudicatory or judicial function. As compromise is its central idea, there is a concern, and perhaps a valid one, that in the endeavour for speedy disposal of cases, it undermines the idea of justice. In a majority of cases, litigants are pitted against entities with deep pockets, such as insurance companies, banks, electricity boards, among others. In many cases, compromises are imposed on the poor who often have no choice but to accept them. In most cases, such litigants have to accept discounted future values of their claims instead of their just entitlements, or small compensations, just to bring a long-pending legal process to an end. Similarly, poor women under the so-called 'harmony ideology' of the state are virtually dictated by family courts to compromise matrimonial disputes under a romanticised view of

marriage. Even a disaster like the Bhopal gas tragedy was coercively settled for a paltry sum, with real justice still eluding thousands of victims.

A just outcome of a legal process is far more important than expeditious disposal. With Justice N.V. Ramana's elevation as the new Chief Justice of India, it is hoped that he would take some concrete and innovative steps in improving the quality of justice rendered by National Lok Adalats.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/for-lok-adalats-speed-overrides-quality/article34267191.ece

Sneak Peek:

No. of words: 1051 words

Note: This article gains prominence since an important announcement regarding provident fund has been made in the Union Budget 2021 by Finance Minister that interest on employee contributions to provident fund of over Rs 2.5 lakh per annum would be taxed, starting from April 1, 2021. It is suggested to follow this new development of law.

Article: 25

Re-examining the EPF tax rules

The recent policy changes are flawed and take a myopic view of the interests of beneficiaries

Gene Roddenberry's Star Trek had a wonderful concept, one called 'Prime Directive'. It required outer space explorers from Earth to avoid interference with the affairs of civilisations they came across. This ensured natural progression instead of a nudged progression, biased by Earth sensibilities. Events over the past few years in the Employees' Provident Fund programme can make one think that policymaking should take a 'Prime Directive' break in affairs related to the EPF.

Take, for instance, the recent amendments to tax regulation affecting EPF. For long, taxation surrounding the EPF was simple to understand and easy to execute. If one contributed more than the limit prescribed under Section 80C of the Income Tax Act, they did not get a tax break on the excess contribution. Earnings on contributions rarely suffered taxation since tax laws pegged tax-free earnings to rates higher than that of interest rate on the EPF. One paid tax on their corpus only if they withdrew it within five years of commencing contribution. Rightly so, since the EPF is a retirement product. This taxation framework incentivised employees to use the EPF as their primary retirement saving. Indeed, for many, the EPF remains the sole 'risk-free' retirement savings mode given its design, asset allocation and the 'government-run' tag.

'HNI' individuals

This will change for many because of the new tax regulation that, in effect, labels one "a high net worth individual (HNI) who is misusing EPF" if one contributes more than ₹2.5 lakh per annum to the EPF. The limit is ₹5 lakh in cases where employers do not make contributions to the provident fund. Indeed, the day after the announcement of this change, the media was filled with statistics of a staggering twenty members that had over ₹800 crore in their EPF accounts — just twenty out of the several crore accounts overseen by the Employees' Provident Fund Organisation (EPFO). The move should be given a rethink because it is flawed in principle and difficult to administer.

Regressive view

The basis of this new tax law reeks of a 1970s' Bollywood-style narrative where the affluent do only evil and need to be punished. The 'rich man's pension vs. poor man's pension' divide, that we have seen earlier in policymaking in case of superannuation plans (the Fringe Benefit Tax and the perquisite tax on superannuation contributions), and now in the case of EPF, is regressive. It assumes that the government knows what is adequate for an individual on retirement.

We live in an era of evolving post-retirement aspirations, medical cost inflation, volatile interest rate cycles, credit busts and minimal choices for post-retirement investments. The best bet for employees, then, is to maximise savings via statutory and voluntary contributions. Intuitively, most employees who start to contribute large sums of money to their retirement plan do so when there are surpluses — when mortgages have been paid off and children's education is funded. This occurs closer to retirement. So, the need to catch up is significant.

While other investment products have grown in popularity, one does realise that for most working Indians, the EPF typifies safety with governance. For the government, therefore, to decide on a common threshold of adequacy is incorrect — it suffers the flaws of a one-size-fits-all approach.

Furthermore, the 'misuse' that was used to justify the imposition of the tax is difficult to comprehend. The EPF is solely a payroll deduction and cannot be contributed in any other manner. It, therefore, suffers taxation for amounts exceeding the limit prescribed in Section 80C of the Act. This last point makes the new clause bring the EPF to the borders of double taxation.

Further, close to 65% of EPF is invested in government securities, with the rest being invested largely in PSU bonds and the equity index. Earnings are made available to the employee via an interest credit mechanism. Despite the stickiness of these interest rate declarations and their often being higher than market rates, it is certain that the government does not subsidise this interest rate credit.

Unlike the Employees' Pension Scheme (EPS), the EPF remains a subsidy-free, pay-what-is-earned retirement fund. The flaws it suffers are related to design and administration and are equally applicable to all segments of its members — the affluent and not-so-affluent. It is accessible to employees on permanent cessation of employment and, thanks to the Universal Account Number (UAN) regime, cannot be accessed easily before retirement. Given all this, the argument of misuse of the EPF by the higher-salaried segment is incorrect.

In addition to flaws in the principle, there can be difficulties in the administration of the new tax rule. Various interpretative inadequacies surrounding the applicability to EPF, especially in light of the changed threshold from ₹2.5 lakh to ₹5 lakh, remain. It is also unclear if the interest on such excess contributions is taxed once during the year of contribution or throughout the term of investment in EPF. The mechanism of tax communication from the EPFO to the member also remains uncertain. One assumes that the systems at the EPFO will need changes and such ongoing taxation of the annual interest rate credit is a first-time measure for the organisation.

The bigger picture

In a wider context, it is important that policymakers reflect on what the EPF has come to signify. While pension funds are seen by governments in myriad policy contexts, they should remain, foremost, the retirement funds of their beneficiaries.

Regulations governing contributions, taxation, investments, administration and benefits should be made in the interest of the beneficiary. But it may seem that other imperatives dominate the agenda in pension policymaking in India. Hence, the resultant outcomes are, at best, sub-optimal from a beneficiary point of view. An example of this is how regulation has obsessed over the coverage of lower-income employees, who have often preferred current compensation over deferred compensation such as retirement funds, while tax laws frown upon other segments of employees increasing voluntary provident fund.

Some of these re-looks are important to execute over time, but an immediate rollback of the tax rules will demonstrate the will of the policymakers to encourage retirement savings. And then, a period of 'Prime Directive' adoption will help 'energise' the vision of a pensioned society.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/re-examining-the-epf-tax-rules/article34209922.ece

Sneak Peek:

No. of words: 1098 words

Note: In this article the author has discussed the Places of Worship Act, 1991 and highlighted that this Act bars judicial review under Article 32 of the Indian Constitution. It will help you to enhance your legal acumen. It is suggested to follow it.

Article: 26

An Act of colourable legislation

Enactment of the Places of Worship Act, 1991 in its current format damages the liberty of belief, faith and worship to all

In his article, The needless resurrection of a buried issue (The Hindu, March 29, 2021), Dushyant Dave, senior advocate of eminence, has articulated why he opposes the challenges on constitutional grounds to the Places of Worship Act, 1991, now before the Supreme Court.

We have by way of a public interest litigation (PIL) in the Supreme Court (WP(C) 619 of 2020, which was filed earlier but notice was issued later vide order of the Supreme Court dated March 26, 2021), challenged Sections 3 and 4 of the Places of Worship Act, 1991 being unconstitutional, void ab initio, and against the Basic Structure of the Constitution of India.

No precedential value

Mr. Dave has relied mainly on the Supreme Court's observation in the Ram Janmabhoomi Case of November 9, 2019 (M. Siddiq vs. Mahant Suresh Das) with respect to the Places of Worship Act, 1991. However, there was no application of the provisions of the Places of Worship Act, 1991 to the case (Shri Ram Janmabhoomi dispute).

Section 5 of the Places of Worship Act, 1991 clearly states that nothing in the Act shall apply to any suit, appeal or other proceedings relating to the said place or place of worship, i.e. the Ram-Janmabhoomi-Babri Masjid situated in Ayodhya, in the State of Uttar Pradesh. Thereby, the 2019 judgment of the Supreme Court's (Shri Ram Janmabhoomi dispute (2020 1 SCC 1)) observation(s) with respect to the Places of Worship Act, 1991 lacks any precedential value.

The pith and substance of the Act of 1991 is that it is ultra vires the fundamental rights enshrined in the Constitution since it bars the jurisdiction of the Supreme Court and furthermore nullifies the Fundamental Right(s) guaranteed by the Constitution of India as elucidated in Article 32 of "enforcement of fundamental rights" which cannot be suspended except as otherwise stated in the Constitution.

This importance of Article 32 can be understood by the words of the Chairman of the Constitution Drafting Committee, B.R. Ambedkar who asserted, inter alia, that Article 32 is the very soul of the Constitution and the most important Article in the Constitution.

Under Article 32 of the Constitution of India, the Supreme Court has the power to issue writs appropriate for enforcement of all the Fundamental rights conferred by Part III of the Constitution.

The top court, on various instances, ruled that in view of the constitutional scheme and the jurisdiction conferred on the Supreme Court under Article 32 and on the High Courts under Article 226 of the Constitution that "the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights".

The Act of 1991, is appropriately called an Act of colourable legislation. As the Courts have held, "you cannot do indirectly which you are prohibited from doing directly".

A weakening

The Preamble in the Constitution gives prominent importance to liberty of belief, faith and worship to all citizens, and the same is sought to be weakened and effectively nullified or severely damaged by the enactment of the Act of 1991 in its current format.

The concepts of faith, belief and worship are the foundations of Articles 25 and 26 of the Constitution of India. Therefore, prohibiting citizens from approaching appropriate courts with respect to suit or any other proceedings to handover the land of any temple of certain essential significance (such as being the birthplace of Lord Rama in Ayodhya and Lord Krishna in Mathura or Lord Shiva sending his fiery Jyotirlinga in the Gyanvapi premises of Varanasi), is arbitrary, unreasonable and mala fide in the context of the fundamental rights to pray and perform religious practice as guaranteed by Articles 25 and 26 of the Constitution of India. The intent of the Act of 1991 under Section 5, i.e. exception extended to the "Ram-Janmbhoomi matter" identifies the need and importance of resolution of such a controversy and settling long on-going disputes before the courts. But such an exception should be made for other two matters of dispute stated above.

Other disputes

The exclusion of the Mathura and Varanasi disputes as being additional exceptions from the Act of 1991 is wholly unacceptable and against what is given by the people of India to the makers of the Constitution, enshrined in the Preamble, which is part of the Basic Structure of the Constitution.

Those who rely on the Act of 1991 to avoid the settlement of the dispute in Varanasi Mathura have failed to anticipate the legal principles enunciated in the judgment of the top court (in Ismail Faruqui vs. Union of India (1994 6 SCC 360)), on the religious significance of mosques and temples. Even in countries like Saudia Arabia, only Mecca and Medina have the immutable religious protection from demolition. And only authorised demolition is permitted.

Section 4 (1) of the Act declaring that religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day, is no longer good law after this Court's judgment in ((1994) 6 SCC 360) which held that a mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in the open maidan, on the road, railway platforms or airports.

Ultimately, students of law are also students of history and we must not lose sight of the past. We must learn from it. But we accept one sentiment of Mr. Dave — that we cannot open the flood gates of rebuilding all 40,000 temples which were demolished on firmans of the Mughal emperors.

Yet, where by faith Hindus believe there was a forcible demolition of an irreplaceable non-shiftable temple, it has to be rebuilt. There are only two more such temples in the list of 40,000 — the Gyanvapi Kashi Vishwanath Temple in Varanasi and the Krishna Janmabhoomi Temple in Mathura.

Hence, by the doctrine of casus omissus, the Supreme Court can in an appropriate case before it order that the number of exceptions in Section 5 of the Places of Worship Act, 1991, be three as an alternative solution. The Supreme Court under Article 142 of the Constitution can pass any order to carry out for doing complete justice being in the public interest, while upholding the Constitution of India.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/an-act-of-colourable-legislation/article34218227.ece

Sneak Peek:

No. of words: 1004 words

Note: In this article the author is paying tribute to the former attorney general of India, a staunch proponent of freedom of speech and an eminent lawyer associated with a series of landmark judgments.

Article: 27

The Passing of a Legend: Soli Sorabjee's Contribution to the Evolution of India's Democracy

For Soli Sorabjee, who began his legal practice in 1953, it is no wonder that his professional achievements over the years were a reflection of his contribution to the quality of India's democratic life, as articulated in its court rooms.

Landmark judgments owe their debt not just to their author judges, but to the countless unsung senior lawyers who argued before them using their skills which they learnt from the profession: perception of legal principles, close train of logic and command over language and eloquence. It is the legal debates in the courtrooms which refine the judges' thoughts and help in the development of law.

Sorabjee was the Attorney General for India twice – first from 1989 to 1990 and again from 1998 to 2004. But his contribution to the evolution of India's democracy can be gleaned only from the innumerous judgments which sum up his arguments in cases in which he appeared and argued before the judges.

It is true that all lawyers tend to be client-centric. Soli Sorabjee was no different from others in that he argued what was best for his clients; but the respect which he earned from those who practised the profession, and the litigants stemmed from his legal principles, whether or not they formed the basis of the judgments, which resolved the disputes before the courts.

Take the basic structure doctrine, as evolved by the Supreme Court in the Kesavananda Bharati case. To him, the decision in this case might not be justifiable on sound juristic basis. But Sorabjee was clear that every country has to work out its constitutional salvation taking into account its peculiar problems and specific needs. Therefore, he believed that thanks to the doctrine, no party having absolute majority in either House of Parliament can effect a constitutional amendment which would make India a theocratic State by providing that members of certain communities or religion alone can hold the office of president, vice-president, prime minister and the Chief Justice of India.

He was also categorical that thanks to the doctrine, provisions for free and fair elections cannot be repealed from the constitution, nor can the constitution be amended to the effect that elections would take place if and when parliament determines instead of every five years. To this, he also added that judiciary cannot be deprived of the power of judicial review, nor can the rule of law be abrogated. Sorabjee was of the firm view that federalism cannot be obliterated and states cannot be made vassals of the Centre. "In the Indian context and experience, these are tangible and substantial gains resulting from the basic structure doctrine and a bulwark against further erosion of basic fundamental rights," Sorabjee said once.

The respect Sorabjee earned for his contribution to the working of Indian constitution also stems from his off-the-court interventions in terms of erudite columns to newspapers. In these, he simplified complex questions concerning constitution and law in layman's terms. Thus, judicial activism, to him, denotes a judiciary in which judges discharge their functions in a vigorous and decisive manner to achieve an end. This 'end',

according to him, is dispensing justice with a view to righting wrongs, enlarging and protecting the human rights of our people and fashioning effective remedies. Another instance of judicial activism, he suggested, is the rule about giving reasons for a decision even when the statute does not expressly so provide. This rule, he believed, promotes good governance and fair administration by ensuring transparency and openness in decision-making.

Sorabjee was convinced that Supreme Court can deduce fundamental rights, even if they are not expressly mentioned. Freedom of the press, right to privacy, right to travel abroad, right to education, freedom from cruel and inhuman punishment or treatment are all such rights which enlarge fundamental rights of our people, and a result of activist judicial approach, he once explained.

Sorabjee invited criticism from civil society for advising the Indian government as the AG against seeking the extradition of the former chairman of the Union Carbide Corporation (UCC), the late Warren Anderson, from the United States in connection with his trial in the Bhopal gas leak disaster case. Sorabjee had defended the cause of the gas victims before the 1989 settlement was reached under the Supreme Court's supervision, clinching the measly $470 million package as compensation.

Later, as AG, he supported a review by the court of the 1989 settlement, and succeeded in persuading it to reinstate the criminal charges against the accused, which included Anderson, and which were sought to be extinguished by the settlement. Sorabjee advised the then Atal Bihari Vajpayee government at the Centre not to pursue the extradition proceedings against Anderson because they were unlikely to succeed. The inordinate delay in seeking Anderson's extradition, and his advancing age raising a humanitarian concern, were cited as grounds against pursuing extradition by Sorabjee.

Sorabjee also felt that it would be futile to seek someone's extradition without first obtaining some prima facie evidence that he might be guilty. In an interview to this writer, Sorabjee candidly admitted that his opinion did not prevent the Centre from going ahead with the extradition proceedings, if it wanted to. "Maybe I could have stopped saying that proceedings for his extradition are not likely to succeed. I need not have said that the same may not be pursued. That might have satisfied the victims," he responded, when I persistently asked him how evidentiary links be furnished unless the Union Carbide Corporation, which Anderson headed, allowed access to its records in the US. That was quintessential Sorabjee: an intellectual giant, and an honest lawyer, deeply sensitive to the concerns of the common man.

Sorabjee's contribution to Supreme Court's jurisprudence will long be remembered especially in cases like police reform (Prakash Singh vs Union of India), and imposition of president's rule (S.R. Bommai vs Union of India), in which he strove to use constitutional principles to resolve contemporary problems of politics and governance.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/soli-sorabjee-former-attorney-general-india-democracy-constitution

Sneak Peek:

No. of words: 2343 words

Note: In this article the author is criticizing the Election Commission's functioning in poll-bound states like West Bengal and Tamil Nadu with regards to its irresponsible actions, which have led to the surge in the number of cases of COVID 19.

Article: 28

Election Commission's Apathy As Citizens Gasp For Breath

The essence of any nation which claims itself to be democratic emanates from the fact that the people governing it are appointed in a democratic manner. The only democratic way by which a government can be appointed is by way of free and fair elections – which has the capability of reflecting the will of the people. This principle is enunciated under Article 21(3) of the Universal Declaration of Human Rights, which states "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Also backed by the United Nations, as described above, it is an undisputed notion that regular elections are the only means which can assist in ensuring that the handful of people who are enshrined with the authority to rule the citizens are appointed by the citizens with their free will.

In India, which is perhaps the largest and the most complex democracy in the world, the task of holding free and fair elections has been cast upon an autonomous body – The Election Commission of India. The Election Commission is solely responsible for the planning and execution of elections not only of the Union, but also for all States and Union Territories across the nation. So much reliance and faith has been placed upon this autonomous body that the courts have been as a matter of rule been dismissing requests for stay or adjournment of elections for any reason once an election notification has been issued by the Election Commission. The most landmark pronouncement in this regard has been N.P. Ponnuswami and Ors. v. Returning Officer, Namakkal Constituency and Ors. wherein the Hon'ble Supreme Court while placing emphasis over the importance of elections in democratic countries, held that elections shall be concluded as early as possible and all disputes and grievances therefrom shall be postponed till after the said elections are over. This judgment has since been used as the rule of thumb by all other courts in dismissing any plea made before them for the postponement of elections due to any reason whatsoever.

What is noteworthy, and perhaps the object of this article, is that the aforementioned judgment passed by the Hon'ble Supreme Court holds good in times when the world is not faced by exigencies such as a global Pandemic like COVID 19. It is extremely ironical to observe that the Election Commissions in most poll-bound states have turned a blind eye towards the health and safety concerns of the electorate in light of the deadly Pandemic.

It is pertinent to note that the Election Commission cannot and should not be absolved of all responsibilities in relation to its passiveness with regards to public health of which they are also responsible for, especially when our country is gripped by the deadly Pandemic. Legally speaking, the autonomous body has tremendous powers under Article 324 of the Constitution of India and Sections 57 and 153 of the Representation of Peoples Act, 1951 to postpone / adjourn elections, or even increase the timeline for the completion of elections. Further, as holding and managing elections come under the sole ambit of the authority of the Election Commission, the courts in various matters have placed faith upon the body to decide in the larger

interest of the public, whether it should proceed with, or postpone elections. Recently, seized with a plea to direct the Election Commission to defer / postpone the legislative assembly elections in the State of Bihar, the Hon'ble High Court of Judicature at Patna in the matter of Badri Narayan Singh & Ors. v. Ministry of Home Affairs (MHA) Government of India & Ors. held, "The Election Commission is the sole authority responsible for the conduct of elections, including the decision on the schedule of the election. The ultimate decision on when to hold elections lies with the Commission. It cannot be assumed that the Election Commission has taken/or would take its decision without considering the prevailing situation. The Commission cannot be directed to act in any-what-way by any authority.". Similarly, the Hon'ble Supreme Court of India in Election Commission of India v. State of Haryana[6], while dealing with the order of the High Court of Punjab and Haryana staying the notification issued by the Election Commission, while respecting its independence, placed utmost faith in the autonomous body by holding the following: "But the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission, It is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner. Arbitrariness and mala fide destroy the validity and efficacy of all orders passed by public authorities.". Further, and more importantly, the Supreme Court directed that it shall be the duty of the Chief Election Commissioner to be constantly vigilant of the situation in the poll-bound areas and adjust his decision in relation to the date of elections with the "realities of the situation". Needless to mention, with such great power, authority and most importantly, the independence to exercise it freely without any hindrance whatsoever, a great duty is also cast upon the Election Commission not only by the courts, but also the Constitution of India as well as the Union Legislature – by way of the Representation of Peoples Act, 1951. Further, it is the duty of the Commission to ensure maximum participation of the electorate in any given election. With the Pandemic at its new peak, a vast majority of voters who are physically vulnerable to the virus have been advised not to step out of their "bio-bubbles", shall not be able to exercise their democratic right despite the will to do so. By simply ignoring innumerable pleas to postpone / defer elections until the surge in the number of cases stops, the Commission has caused grave injustice to the part of the electorate, which is willing to cast vote, but cannot for the sake of their health and life. In light of the above-mentioned, from the point of view of the assembly elections that are underway in the States of West Bengal and Tamil Nadu, is it at all incorrect to infer that the Election Commission has miserably failed to adhere to the great duty cast upon it?

Having understood the wide ambit of the powers of the Election Commission, let us take a look at some of the latest figures emerging from the poll-bound states of West Bengal and Tamil Nadu. In the last 24 hours (as per the data available on the Aarogya Setu Application on 28.04.2021) the state of West Bengal has witnessed 16,403 new cases of COVID 19, whereas the number of new cases in the State of Tamil Nadu in the last 24 hours is 15,830.

It is no news that despite clear directions from the courts, the Election Commission, which is vested with the sole duty and authority to control the manner in which election rallies take place, has for reasons best known to itself, chose to close its eyes to the millions of supporters who have time and again gathered with little to no precautions with respect to COVID 19. No evidence is required to be induced to showcase that these election rallies were "super-spreader" events and have caused unprecedented spread of the deadly virus to thousands of people across these two states.

Upon no action whatsoever from the Election Commission, the respective High Courts of both the poll-bound states – West Bengal and Tamil Nadu have now questioned the body on its culpability in the new and deadly wave of the virus that has now engulfed the states. Most recently, the Hon'ble Madras High Court in its order dated 26.04.2021 came down heavily on the Election Commission for its role in the spread of the virus across the state, to say the least. While recording the inactivity of the autonomous body, the Court held, "Public health is of paramount importance and it is distressing that Constitutional authorities have to be reminded in

such regard. It is only when the citizen survives that he enjoys the other rights that this democratic republic guarantees unto him. The situation is now one of survival and protection and, everything else comes thereafter." Apart from the recorded observations, the Court has been reported to mention the following to the counsel of the Election Commission, "Your institution is singularly responsible for the second wave of COVID-19. Your officers should be booked on murder charges probably." while discussing the culpability of the Election Commission in the increase in the number of deaths in the State due to the spread COVID 19.

Similarly, the Hon'ble Calcutta High Court in its order dated 22.04.2021 called upon the Election Commission to explain as to what steps had it taken to enforce the circulars issued by it in relation to COVID Protocols to be adopted by inter alia, political parties and their workers in their election campaigns. While recording its dissatisfaction with the inactivity of the Election Commission in this regard, the court held, "We are unable to reconcile with the fact that the Election Commission of India is not able to update us as to what action by way of enforcement of the circulars has been obtained. Issuance of circulars and holding of meetings by themselves do not discharge the onerous responsibility of the Election Commission of India and officers under its command in due performance of not only the statutory power and authority under the Representation of People Act, 1950 and the Representation of People Act, 1951 but the confidence that the Indian polity would have in it to carry forward the mechanism of upholding the democracy by use of requisite facilities even in pandemic times like heightened challenge by COVID-19 virus and its variants.".

The Hon'ble Allahabad High Court on 27.04.2021 taking cognisance of the death of 135 election workers involved in the "Panchayat Election Duty" due to COVID, issued show-cause notice to the State Election Commission calling upon them to explain as to why action should not be taken against the officers thereof for their failure to enforce the guidelines issued to curb the spread of the virus. Coming down heavily on both, the Commission as well as the State Government, the court observed, "We, make it clear that we will not tolerate any paperwork or public announcements to show account of the steps taken and its sufficiency as it is now an open secret that government had gone complacent due to weakening of virus impact by the end of 2020 in the state and the government got more involved in other activities including Panchayat elections. Had it been constantly vigilant, it would have prepared itself to face the onslaught of the pandemic in its second wave. Posterity would never forgive us if we remain oblivious to the real public health issues and let the people die for want of adequate health care."

It is but pertinent to note that the Hon'ble Madras High Court has travelled to the extent of stating that it will stop the counting – which is scheduled to take place on 02.05.2021 – if a proper "blueprint" is not tabled before it on 30.05.2021. This observation by the Court reflects the disappointment of the Hon'ble Court with the continuous insensitivity shown by the Election Commission towards the life and health of the common man – who ironically, in theory, is the centre of the entire complex exercise of election. Another reason for which the aforementioned oral direction of the court – and perhaps it is the most important one – is that the court which giving this direction has had to threaten the Election Commission to reach out of its judicial domain and enter that of the executive, despite clear faith placed by courts across the country, including the Hon'ble Supreme Court, on the body to take each and every decision in relation to elections.

The larger question which needs to be answered here, is that should the Election Commission be held liable for the spread of COVID 19 in the election-bound states of West Bengal and Tamil Nadu, where there is clear data depicting that the number of cases have drastically increased post the rampant campaigning and election rallies conducted by political parties and candidates – due to the failure of the Commission to enforce its guidelines issued in the wake of the Pandemic. A common man, if found to violate the protocols put in place by the State, is prosecuted mercilessly. Should the same standards not apply to constitutional bodies vested with such unfettered and unabridged powers to carry the beacon of democracy, if they fail (actively) to carry out their functions for reasons best known to themselves? Now that the Hon'ble Supreme Court has taken suo

moto cognisance of all matters pertaining to COVID 19, the stage is set for the apex court to take stringent action against the Election Commission not only for the ends of justice to meet, but also so that a clear message is sent to all autonomous bodies of our country that their doings and undoing shall not go unnoticed and unaccounted. It is perhaps time the Doctrine of Checks and Balances takes a practical avatar so that trust of the common man remains placed in the judiciary. What we as a people of the world's largest democracy need to understand and appreciate is that the existence of the ones governing us emanates from us, and not the other way round. Until the life and health of the weakest section of the society does not become the top-most priority of the government – be it State or Centre – it has no right to rule. It about time, we, and more importantly, the constitutional bodies with power to 'govern' us understand that elections are only means to an end, and not the end itself.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/election-commissions-apathy-as-citizens-gasp-for-breath-173304

Sneak Peek:

No. of words: 2871 words

Note: This article is about the Medical Termination of Pregnancy (Amendment) Bill (MTP) which received the president's assent recently. The Bill amends the MTP Act 1971, which regulates the conditions under which a pregnancy may be aborted. The amendments to the new Bill increase the time period within which an abortion can be legally conducted.

Article: 29

India's amended abortion law still gives doctors, not women, the final say in terminating pregnancy

The terms for abortion have been liberalised in India after an amended law received the President's assent on March 25. But gender and reproductive rights activists are disappointed that the law still does not recognise abortion as a woman's choice that can be sought on-demand, as is the practice in 73 countries.

These are the key changes that the Medical Termination of Pregnancy (Amendment) Act, 2021, has brought in:

The gestation limit for abortions has been raised from the earlier ceiling of 20 weeks to 24 weeks, but only for special categories of pregnant women such as rape or incest survivors. But this termination would need the approval of two registered doctors.

All pregnancies up to 20 weeks require one doctor's approval. The earlier law, the MTP Act 1971, required one doctor's approval for pregnancies upto 12 weeks and two doctors' for pregnancies between 12 and 20 weeks. The approval of two doctors is now needed only for the 20-24 timeline reserved for abortion seekers of special categories.

Women can now terminate unwanted pregnancies caused by contraceptive failure, regardless of their marital status. Earlier the law specified that only a "married woman and her husband" could do this.

There is also no upper gestation limit for abortion in case of foetal disability if so decided by a medical board of specialist doctors, which state governments and union territories' administrations would set up.

Yet, the law does not grant women complete control over reproductive choices, abortion advocates say.

"To me, the provisions [of MTP Amendment Act 2021] are progressive in a paternalistic, victimhood kind of way," said Suchitra Dalvie, gynaecologist and coordinator for Asia Safe Abortion Partnership, a pan-Asia network for safe abortion advocacy.

Critics of the law also pointed out that it does not take into account the crisis of healthcare caused by the ongoing pandemic. Given this and the chronic shortage of doctors in India, demanding that women seek out the opinion of two practitioners and a medical board for certain kinds of abortions is unfair, they said. Disability advocates have also raised objections that we detail later.

Abortion remains stigmatised in India, even within the medical fraternity, as IndiaSpend reported in September 2020. There have been several reports of women being denied abortions on "moral" grounds by doctors or being asked to bring partners or parents along for the procedure. This is especially the case when

the abortion is sought on grounds not related to a woman's physical health, as specified in the MTP Act, but because it can cause "injury to her mental health" (also covered by the Act), these reports showed.

The law also recognises mental health-related reasons for seeking an abortion that doctors may not support if it violates their personal belief system – doctors could withhold approval for abortion due to changed psycho-social circumstances that make a pregnancy unwanted, unintended pregnancy, and unwillingness in a young, single woman to have a child.

Safe access is critical

India's amended abortion law was passed 50 years after the first law on the subject was brought in, the MTP Act, 1971. The MTP Bill 2020 was passed by the Lok Sabha in March 2020, just before the coronavirus pandemic-led lockdown was announced. A year later, on March 16, it was passed by the upper house of Parliament and got the President's assent as the Medical Termination of Pregnancy (Amendment) Act, 2021.

The abortion law had been briefly amended in 2002 to allow for the use of the then-new medical abortion pills, mifepristone and misoprostol.

"There is need for increasing access of women to legal and safe abortion services in order to reduce maternal mortality and morbidity caused by unsafe abortions," said health minister Harsh Vardhan during the Rajya Sabha debate on March 16.

Unsafe abortions are among the most common causes of maternal deaths in India. In 2015, 1.56 crore abortions were accessed annually in India, according to a study in The Lancet. Of these, 78% or 1.23 crore were conducted outside health facilities.

More than half or 56% abortions in India are unsafe and 10 Indian women die daily due to unsafe abortion, as per a 2015 report by Ministry of Health and Family Welfare that cites data from research done between 2001 and 2004.

Abortion is said to be safe if it is done with a method recommended by the World Health Organization that is appropriate to the duration of the pregnancy and the training received by the person providing or supporting the abortion. The WHO classifies abortions as safe, less safe, and least safe. The latter two being unsafe.

Only 20% of abortions take place in public sector facilities and 52% in private, as per the National Family Health Survey, 2015-'16. Further, NFHS 2015-16 showed that "only 53% of abortions were performed by registered medical doctors".

Amee Yajnik, Member of Parliament in the Rajya Sabha said, "The rest were done by midwives, auxiliary nurses or dais [traditional birth attendants] as we call them in the villages." Also, specialists required for the medical boards that are supposed to sanction post-24 week abortions – gynaecologist, paediatrician, radiologist or sonologist – are in short supply, she added.

Rural India, where 66% of the country's population resides, reports a 70% shortfall in the number of obstetrician-gynaecologists, according to the 2019-'20 Rural Health Statistics Report of the Ministry of Health and Family Welfare.

To deal with the problem of access to healthcare in the pandemic, abortion advocates had sought enhanced self-management of medical abortion through medical abortion pills, perhaps with remote supervision. Even before the pandemic, they had demanded better provision of abortion self-management in the first trimester

and that the opinion of only one MTP provider be required instead of two for terminations between 20 and 24 weeks of pregnancy. Other demands included training of more mid-level healthcare staff to provide abortions.

Not progressive enough

"With the passage of time and advancement of medical technology for safe abortion, there is scope for increasing the upper gestational limit for terminating pregnancies…," Union health minister Harsh Vardhan had said in Rajya Sabha.

But abortion advocates are disappointed that the amended law still does not give women the right to get an abortion on demand, as we said. "If they are willing to look at medical technology advancement, they could have also considered [the fact] that women's agency has changed so much," said Jasmine George, lawyer and founder of Hidden Pockets Collective, a young people's charity that works on the rights-based framework for abortion and adolescent sexuality.

As we said, 73 countries make abortion available at the pregnant person's request, including India's neighbour Nepal and other Asian countries such as Uzbekistan, Tajikistan, China, Vietnam, Thailand and Cambodia. Of these, 25 countries also require parental or spousal authorisation or notification.

"A pregnant woman [in India] cannot go to a certified provider and say that I want you to terminate this pregnancy because that is what I want," said Anubha Rastogi, a Mumbai lawyer who authored a report on the judiciary's role in helping women access safe abortions for Pratigya Campaign, a network working for gender equality and safe abortion access. "If the doctor says no, then that is that."

Rastogi points out that Section 312 of the Indian Penal Code that labels "causing miscarriage" as an offence has not been scrapped yet. The MTP Act is seen as an exception to IPC; that is, abortion is available only under the conditions specified in it.

The amended law comes against the backdrop of scores of women approaching the Supreme Court and high courts across the country to secure permission for abortion post 20 weeks upon the discovery of a foetal anomaly, late detection of a pregnancy caused by sexual assault, or changed psycho-social circumstances.

Maternal mortality

Within the women's rights framework, India's MTP law falls in the category of laws that allow abortion on "broad social or economic grounds", next to the best option of "on request", according to the Centre for Reproductive Rights, a global human rights organisation.

Restrictive abortion laws are associated with higher levels of maternal mortality: The average maternal mortality ratio is three times higher in countries with more restrictive abortion laws (223 maternal deaths per 1,00,000 live births) compared to countries with less restrictive laws (77 maternal deaths per 1,00,000 live births), according to the WHO.

Global examples show that easier access to abortion encourages women to seek pregnancy termination in the earlier weeks of gestation, resulting in better-managed abortions. Sweden, for example, has one of the most liberal abortion laws – it makes MTP available on request up to 18 weeks.

Most abortions there are conducted around the 12-week-gestation mark usually through the two-pill combination method that is preferred in first-trimester abortions and whose effect mimics a natural miscarriage.

In 1988, Canada became the first country to decriminalise abortion and it has reported a fall in the gestational age at abortion without a rise in the abortion rate. By making abortion a state-funded procedure and allowing telemedicine facility for medical termination through pills, it has managed greater abortion equity across socio-economic and geographical backgrounds.

Appeals during lockdown

Even during pandemic-induced lockdowns, in four months to August 2020, 112 cases of abortion appeals were heard across 14 high courts in India, according to the report authored by Rastogi for Pratigya. To place this in perspective, over 15 months to August 2020 (including the four months of the lockdown when 112 cases were heard), she found 243 such cases before the high courts – substantially more in a shorter period than the 175 cases in the 35-month span from June 2016 to April 2019. This indicated a higher proportion of abortion appeals in courts during the lockdown.

"Even within the four months of the lockdown when only urgent matters were getting listed, this was happening," said Rastogi. The Union government had listed abortion as an essential service three weeks into the lockdown in April 2020 after several reports emerged of women struggling to access reproductive health services.

Due to restricted access to contraceptives during the lockdown, at least 1.18 million abortions from unintended pregnancies were predicted by the Foundation for Reproductive Health Services, India. In the first three months of the pandemic, 18.5 lakh women in India could not access abortion services, according to the non-profit IPAS Development Foundation. Several hospitals reported a higher number of abortions compared to previous years, even as out-patient facilities remained suspended for several months to provide Covid-only services.

The increase in abortion seekers accompanied an increase in women sustaining domestic violence during lockdowns.

George, whose Hidden Pockets Collective supported women struggling to access reproductive healthcare during pandemic lockdowns, spoke of the problems faced by a 21-year-old, unmarried law college student in Kochi who was nearly five weeks pregnant in March 2020.

"She went to four private hospitals because government hospitals anyway do not provide easy abortion access," said George. "But here too they refused to give her medical abortion pills until her parents came in." Even the older MTP Act – that was in place when the pandemic struck – had no requirement for an adult woman to bring anyone along for consent.

The hospitals also sought her identity documents for consultation, though it is not required unless one is seeking an ultrasound, said George.

"Finally, the fifth hospital provided her medical abortion for Rs 21,000," said George (a two-pill medical abortion kit is not supposed to cost over Rs 390). The woman was staying with her parents and was experiencing adverse symptoms of pregnancy.

She had to not only hide these symptoms from her parents but also find a way to venture out with her friends or partner – who had organised the funds – in search of a hospital. "It was surprising even during lockdown they (healthcare providers) were playing with a woman's health," George said.

The pandemic magnified the existing barriers that resource-poor women have been facing, said gynaecologist Dalvie: "There is no stock of drugs, the doctor is not available, no bus and so on."

Demands for further changes to the abortion law were ridiculed by the Union health minister – "being in some particular ideology, thoda thoda symbolic virodh karna bhi zaruri hai (opposition MPs feel the need to oppose the Bill symbolically)". The proposed amendments were not passed.

Disability bias, ethics

The removal of the gestation limit in the case of "substantial foetal abnormality" and counting "differently-abled women" as vulnerable – both these intents of the amended law encroach on the rights of persons with disability, said activists.

"A lot of times, even doctors say that she (a woman with a disability) is not capable of giving birth or she's not capable of taking care of the child. Because they see women with disabilities as women who need care as opposed to those who can give care," said Divya Goyal, who is co-authoring a chapter in a book on the hierarchies of disability human rights for Routledge, along with Maitreya Shah, a lawyer, disability rights advocate and director of EnableMe Access. Both are persons with disabilities themselves.

The lack of counselling for women carrying disabled foetuses is another concern, said Goyal, the author of the upcoming Routledge research. "We do not invest a lot in creating social services for families where there are disabled children," said her co-author Shah. "Instead, we are focusing on preventing the birth of disabled children. If you see the MTP Amendment, whatever debates happened in Parliament, none of them was on disability; no one mentioned it at all."

The law also makes no mention of providing financial and logistical aid to pregnant women who want to access medical boards. Making a woman who is pregnant with a disabled foetus run to medical boards where doctors and officials will decide for her "is extremely demeaning to her, is an invasion of her privacy, invasion of her choice and also, creating more bureaucratic hurdles than needed at a time when she needs to take that decision", MP Priyanka Chaturvedi said in parliament, joining eight of her colleagues in calling for the bill to be sent to a select committee for updation. This proposal could not get through and the bill passed the Rajya Sabha without any major amendments.

The usage of the term foetal "abnormality" is also derogatory, implying a condition of disability is abnormal, said Rastogi. "Instead, you could use the term foetal anomaly," she said.

There is a unique issue of ethics involved in abortions past the 24-week limit when termination of pregnancy is carried out by inducing labour: The foetus could be born alive, which raises a question: Should it be resuscitated? And if yes, who will take responsibility for the child?

In countries where abortion can be accessed beyond 20 weeks, it involves introducing an injectable into the foetal tissue to prevent live births. "That injection is not a part of how gynaecologists are trained in India because abortions never exceeded 20 weeks," Dalvie said. "Doctors will bring their own biases, personal moralities, and values and they may refuse it even if it is 20-24 weeks."

At least two MPs in Rajya Sabha – Amee Yajnik and Fauzia Khan – also asked to consider transgender persons' abortion rights. "The terminology that it (MTP Act 2021) uses is non-inclusive: only using the term "woman" especially when we now have the Transgender Persons (Protection of Rights) Act, 2019. You are [the government is] not in harmony with the other laws you yourself have passed," said Rastogi.

Privacy clashes

The MTP Act 2021 also contradicts the Supreme Court's 2017 privacy judgement (Justice KS Puttaswamy versus Union of India and others), which ruled that a woman's right to make reproductive choices is a dimension of personal liberty as understood under Article 21 of the Constitution. Any law that restricts a person's privacy must be "just, reasonable, and fair", a test that India's abortion law, if challenged, could fail, activists say.

This is because the law does not allow a woman to decide for her own pregnancy but gives her a narrow set of conditions where doctors and medical boards decide for her. A 2016 Bombay High Court judgement in a suo motu public interest litigation on the condition of a prison inmate emphasised the right of a woman to control her body and fertility – "the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant".

"There is a lot of grey area or overlap between MTP and other laws," said advocate Rastogi. She cited the Protection of Children from Sexual Offences Act and the Drugs and Cosmetics Act, 1940. POCSO mandates that if a minor conceives, even through consensual sex (even though POCSO does not recognise consent of a person below 18 years), and wants to abort, the matter has to be reported to the police. The amended MTP law, though, largely guarantees privacy to the parties involved in abortion.

Similarly, medical abortion pills are classified as Schedule H drugs for which a pharmacist must maintain a record of sales under the Drugs and Cosmetics Act. This violates the confidentiality promised by MTP Act 2021, abortion advocates say.

Courtesy: 'Scroll' as extracted from:

https://scroll.in/article/993527/indias-amended-abortion-law-still-gives-doctors-not-women-the-final-say-in-terminating-pregnancy

Sneak Peek:

No. of words: 956 words

Note: In this article the author is critically analyzing the recent EU proposed decision to 'unacceptable' uses of artificial intelligence. As a CLAT aspirant it is a must read article. Do follow this new development of law.

Article: 30

Europe is set to ban artificial intelligence that is a threat to the safety and rights of people

Europe is set to ban artificial intelligence that is a threat to the safety and rights of people

The European Union looks set to ban some of the most concerning forms of artificial intelligence, such as the "social credit" surveillance system used in China, according to draft AI regulations published by the bloc.

The proposed regulations, which will be reviewed by elected representatives before passing into law, will also bring some comfort to those outraged by instances of bias and discrimination generated by AI.

These include hiring algorithms found to systematically downgrade women's professional profiles and flawed facial recognition technology that has led police to wrongfully arrest black people in the United States. Such AI applications are regarded by the EU as high-risk and will be subject to tight regulations, with hefty fines for infringement.

This is the latest step in the European discussion of how to balance the risks and benefits of AI. The aim appears to be to protect citizens' fundamental rights while maintaining competitive innovation to rival the AI industries in China and the US.

The regulations will cover EU citizens and companies doing business in the EU and are likely to have far-reaching consequences, as was the case when the EU introduced data regulations in 2018. The proposals are also likely to inform and influence the United Kingdom, which is currently developing its own strategic approach to this area.

Strong new laws

Most strikingly, the draft legislation would outlaw some forms of AI that human rights groups see as most invasive and unethical. That includes a broad range of AI that could manipulate our behaviour or exploit our mental vulnerabilities – as when machine-learning algorithms are used to target us with political messaging online.

Likewise, AI-based indiscriminate surveillance and social scoring systems will not be permitted. Versions of this technology are currently used in China, where citizens in public spaces are tracked and evaluated to produce a trustworthiness "score" that determines whether they can access services such as public transport.

The EU also looks set to take a cautious approach to a number of AI applications identified as high-risk. Among these technologies are large-scale facial recognition systems – considered easy to deploy using existing surveillance cameras – which will require special permission from EU regulators to roll out.

Contentious facial recognition AI is regarded as 'high-risk' by the EU. Photo credit: Reuters

Many systems known to contain bias also classify as high-risk. AI that assesses students and determines their access to education will be tightly regulated – such technology achieved notoriety after an algorithm unfairly determined UK students' grades in 2020.

The same caution will apply to AI used for hiring purposes, such as algorithms that filter applications or evaluate candidates, as well as financial systems that determine credit scores. Similarly, systems that assess citizens' eligibility for welfare or judicial support will require organisations to make detailed assessments to ensure they meet a new set of EU requirements.

To give it some teeth, and in line with the EU's existing punishment for serious data misuse, the AI regulations include fines for infringements of up to €20 million or 4% of global turnover, whichever is higher.

Reckoning with AI

Globally unique and sweeping in its application, the proposed regulation is a clear statement from Europe that it prioritises citizens' fundamental rights over technical autonomy and economic interests.

But there are also concerns. Some will argue the measures go too far, stifling Europe's AI innovation. The White House in fact warned Europe not to overregulate AI in 2020, with the US aware that China's relative lack of protections could see it achieve a competitive advantage over its rivals.

On the other hand, privacy advocates and campaigners against bias in AI may be left disappointed. Some of the most problematic AI systems are excluded from the regulation, notably those used for military purposes, such as drones and other automated weapons – again speaking to fears of Chinese dominance in weaponised AI.

It is also possible that other applications, such as the fusion of AI with existing mass surveillance capabilities, could be permitted where authorised by law. This would leave the door open for their use in law enforcement, which is exactly the area that some observers are most worried about. Such loopholes for AI-driven state surveillance systems will trouble human rights and privacy advocates.

Contested definitions

Critics have highlighted the vague definition of AI detailed in the draft legislation, which focuses in particular on machine learning but may not apply to the next generation of computing technologies, such as quantum computing or edge computing. As always with legal documents, the devil will be in the detail.

Equally, there are open questions about the distinction between high-risk and low-risk AI. The regulations only apply to the former, but it's not clear whether it's always possible to determine the nature of AI's risks during the development cycle. Risk is a continuum, and a dichotomy between high and low will always require an arbitrary distinction which may cause problems down the line.

The regulation is no doubt a bold step in the right direction. It will now be reviewed by the European Council and the European Parliament. The process of reading, reviewing and agreeing will likely take some time, during which the questions raised here can be explored and attended to.

But it stands to reason that many of the building blocks of the regulation will persist. By standing firm against forms of invasive surveillance and bias-prone AI systems, the legislation is a strong reminder that Europe takes seriously its obligation to safeguard its citizens' fundamental human rights in a period of disruptive technological change.

Courtesy: 'Scroll' as extracted from:

https://scroll.in/article/993011/europe-is-set-to-ban-artificial-intelligence-that-is-a-threat-to-the-safety-and-rights-of-people

Sneak Peek:

No. of words: 1970 words

Note: In this article the author is analyzing the recent decision of Central government that allowed vaccination of all persons above the age of 18 from May 1. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 31

Arbitrariness of Centre's COVID Vaccination Policy Which Forces States To Compete In Open Market for Vaccines

Asking State Governments to compete in open market for vaccine procurement, while Centre keeps an assured quota for itself, is manifestly arbitrary and discriminatory.

Acclaimed legal scholar Michael J Sandel starts his book "Justice: What is the right thing to do?" by discussing the justness of sellers charging higher prices for essential goods during a natural calamity.

After laying out the competing arguments of free-market and social-welfare in support and opposition of 'price-gouging' during a disaster, Sandel asks :

"This dilemma points to one of the great questions of political philosophy: Does a just society seek to promote the virtue of its citizens? Or should law be neutral toward competing conceptions of virtue, so that citizens can be free to choose for themselves the best way to live?".

These questions come to mind while discussing the issue of pricing of COVID-19 vaccines.

During the surge of the second wave of the COVID-19 pandemic, the Central Government - which was facing a lot of public resentment and anger-announced a new vaccine policy on April 19.

In a press release, the Ministry of Health and Family Welfare announced that all person above the age of 18 years will be eligible for COVID-19 vaccine under the "liberalized and accelerated" phase III of vaccination strategy from May 1. Right now, vaccines are restricted to those above the age of 45 years and frontline workers.

This news generated a lot of positive vibes among the general public, who were reeling under panic and anxiety. However, as it is said, the devil lies in the details! While the headlines and news-tickers celebrated the opening of vaccines for all above the age of 18 years, many other aspects of the policy escaped public scrutiny.

The terms and conditions of the policy can be broken down as follows :

Private vaccine manufactures need not supply the whole vaccine stock to the Central Government. They are allowed to sell 50% stock in open market, while the rest 50% should be given to the Centre.

State Governments and private players have to purchase vaccines from open market at a price declared in advance by the manufacturers.

Private hospitals can provide vaccination at a "self-set vaccination price", which should be transparently declared.

The vaccines for the category 18-45 years will be through the open-market channel. In other words, they have to take vaccination from private hospitals or the state government agencies.

The Centre will distribute its share free of cost to frontline workers, health care workers and those aged above 45 years.

The Centre has discretion to allot from its 50% quota a share to states based on a review of their performance and extent of infection.

The effect of this policy is that dual-pricing of vaccines is allowed, and states are forced to compete with private players to procure vaccines from the open market, while the Centre is likely to get them at a discounted rate.

Also, there will be three streams of vaccine distribution :

Through the Centre's channel - free of cost to frontline workers, health care workers and those aged above 45 years.

Through State Government channel - the vaccines procured by states from open market(some states have announced that they will give these vaccines free).

Through private hospitals/clinics at their self-set price the vaccines procured by them from open market.

Yesterday, Serum Institute of India, a private company which produces the 'COVISHIELD' vaccine, announced that it will sell vaccines to States at Rs 400 per dose and to private entities at Rs 600 per dose. To put this in context, the rate at which SII is supplying to Centre at present is Rs.150 per dose.

Discrimination against States

It is important to note that "public health" is a state subject as per Entry 6 of the List II of the Second Schedule.

The Centre's power in the issue is derived from Entry 29 of the Concurrent List(List III, over which States also have power) which says "Prevention of extension from one State to another of infectious or contagious diseases or pests affecting men,animals and plants".

Since COVID-19 has been declared as a "national disaster", the Central Government has been using its vast powers under the National Disaster Management Act to take various decisions in relation to pandemic management.

It is a different point of discussion whether the policy relating to vaccine allocation will come under the ambit of disaster management. Since we only have a press release in public domain, it is not yet clear whether this vaccine policy has been taken in exercise of powers under the NDMA or using the general executive powers of the Union Health Ministry.

Be that as it may, it is indisputable that both States and the Centre have the same constitutional obligation to protect the health of the citizens. In that regard, there cannot be distinction between a State Government and the Central Government. Therefore, asking State Governments to compete in open market for vaccine procurement, while Centre keeps an assured quota for itself, is manifestly arbitrary and discriminatory.

It is also to be noted that the policy does not make any assurance of vaccine availability to the States. The States have to compete with private entities in open market. So, when there are private players willing to

purchase vaccines at Rs 600, is there any guarantee of vaccine availability for states at the rate of Rs 400? If a larger chunk of the open market pool gets diverted to the private entities, would it not mean that the general public will have to pay even higher prices for the vaccine?The promise of free vaccines made by some state governments will not materialize if they don't get adequate quota of doses.

This policy also puts states in a position of competing with each other for the share of vaccines in the open market. The availability of vaccine for a person in the age bracket of 18-45 years is perhaps contingent on the ability of his state government in outsmarting other state governments in open market. Can the health of a citizen be left to the vagaries of the open market competition, especially during a pandemic? Promoting such inter-state competition can lead to regional disparities in vaccine availability, undermining the goal of universal vaccination.

Mumbai-based lawyer Murali Neelakantan, who has been actively writing and commenting about the vaccination policy in leading dailies and public platforms, said that the there is a clear violation of the right to equality(Article 14) and right to health (Article 21) in this issue. He pointed out that dual-pricing in other commodities has only resulted in corruption and black-marketing. According to him, dual pricing means that private sector will get more supplies and government vaccination for the masses will suffer. He also pointed out that the policy is against the Centre's own policy of one company, one drug, one price. The present policy, he said, will lead to multiple prices charged to different patients since service provides will add their "service charges".

Public health expert and epidemiologist Chandrakant Lahariya told the Firstpost that the new policy can lead to an unfair burden on the states.

"For all other vaccination efforts—such as polio, BCG, etc—the funds traditionally come from the Centre. For COVID-19 vaccination too, the Centre should have provided the funds. Now, the strategy announced by the government on Monday will effectively lead to states competing with one another and private sector, to procure vaccines. It is quite possible that richer states will gain at the expense of less affluent ones. Also, as of now, state governments do not have experience in dealing and negotiating with vaccine manufacturers. This lack of experience can also create hurdles for them", he commented.

He further remarked, "When India is in the middle of a pandemic and the Central government has already allocated Rs 35,000 crore for COVID-19 vaccines, it would be incorrect to push states in the uncharted territory of procurement of vaccines."

Violations of Article 14 and 21

For a classification to be valid under Article 14, it must pass a two-pronged test:

(i) it should be founded on an intelligible differentia, which distinguishes those that are grouped together from those that have been excluded; and

(ii) the differentia must have a rational nexus with the object that the statute seeks to achieve.

Here, there is no intelligible differentia between the States and the Centre as far as their duties to protect public health is concerned. Both have the same constitutional obligation.

Also, the classification is defeating the purpose of universal vaccination. The policy leads to a lot of uncertainties, as discussed above. There is no assurance that the States will get the required doses. If universal vaccination was the intention, the policy should have given states an assured share, avoiding dual-pricing.

The exclusion of persons below the age of 45 years from the free vaccine pool of the Centre also smacks of unreasonable classification.

The policy has also created uncertainties about the second pending dose of persons in the category of above 45 years. As per certain reports, private hospitals will no longer offer the Rs 250 option for the second dose from May 1. According to a report in the Economic Times "from May 1, private hospitals will no longer offer the Rs 250 per jab option. Persons seeking their second dose after May 1 can choose to get the jab for free at a government centre or pay the price negotiated with vaccine manufacturer at a private facility, provided supplies are available".

In this backdrop, the principle of 'manifest arbitrariness' also comes into application. As per Supreme Court precedents, actions taken capriciously, irrationally and/or without adequate determining principle are "manifestly arbitrary".

The policy can lead to the denial of vaccines to persons, especially to those belonging to marginalized and vulnerable sections, leading to the negation of right to health and life under Article 21 of the Constitution.

The UNESCO has urged that COVID19 vaccines be treated as a global public good to ensure they are made equitably available in all countries, and not only to those who bid the highest for these vaccines.

If we approach the issue from the angle of public interest, complete vaccination of all is essential for the overall welfare of the country. It is not just a matter of individual choice. So, the vaccine strategy should be devised in such a way to minimize vaccine hesitancy and to ensure access for all. Maximizing free access to vaccines is the answer to this.

As written by lawyers Mukund Unny and Radhika Roy in The Indian Express earlier, "if the right to health is a guaranteed fundamental right for an Indian citizen, she also possesses a right to free vaccine as it is a sub-set of the right to life which is guaranteed by our Constitution".

Recently, the Supreme Court had quashed the Central Government's policy to deny the benefit of interest waiver during loan moratorium to loans above Rs 2 crores. The Court held that the policy of the Government to restrict such interest waiver to loans below Rs 2 crores was "arbitrary and discriminatory", as no justification or reasons were given for making such a classification. The Court's conclusion was based on its observation that the hardships faced by both the categories were similar.

If the same principle is applied, this vaccination policy will not pass the muster of constitutionality.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/arbitrariness-of-centres-covid-vaccination-policy-forces-states-compete-open-market-vaccines-172920?infinitescroll=1

Sneak Peek:

No. of words: 1651 words

Note: This article is about The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 which was promulgated on April 4, 2021. It dissolves certain existing appellate bodies and transfers their functions (such as adjudication of appeals) to other existing judicial bodies. It is suggested to follow it and make your own short notes too.

Article: 32

Tribunals Reforms Ordinance : Certain Points Of Concern

Adding another episode to its attempts to overhaul the Tribunal system in the country, the Union Government recently brought the Tribunals Reforms (Rationalization and Conditions of Service) Ordinance 2021.

The Ordinance, promulgated by the President on April 5, follows the Rules made by the Centre in 2017 and 2020, which came under severe criticism from the Supreme Court. The 2017 Tribunal Rules were quashed by the Supreme Court in the 2019 case Rojer Mathew vs South Indian Bank Ltd and others on the ground that they affected judicial independence. The Centre then framed another set of Rules in February 2020, which was nothing but an old wine in a new bottle, as they suffered from the same deficiencies as in the 2017 Rules.

In November last year, the Supreme Court, finding several faults with the 2020 Tribunal Rules, issued a slew of directions to modify them in the case Madras Bar Association vs Union of India

Following that, the Centre introduced the Tribunals Reforms (Rationalization and Conditions of Service) Bill 2021 in the Parliament during the budget session. The bill, among other things, sought to make fundamental changes to Section 184 of the Finance Act 2017, which is the source of power for the Centre to make Rules relating to Tribunals and its members.

Since the bill could not get passed in the Parliament, the Centre has now brought it as law in the form of an Ordinance.

The Ordinance has already become a discussion point on account of its abolition of nine appellate tribunals, such as Film Certification Appellate Tribunal, IPAB etc., and transferring the appellate powers to High Courts. However, the primary focus of the present article is on certain issues relating to the amendments made to Section 184 Finance Act through Section 12 of the Ordinance.

Term of office of Chairperson and Members of Tribunals

The Ordinance amends Section 184 of the Finance Act 2017 to fix the term of offices of Chairperson and Members of the Tribunals.

It says :

The Chairperson of a Tribunal shall hold office for a term of four years or till he attains the age of seventy years, whichever is earlier;

The Member of a Tribunal shall hold office for a term of

four years or till he attains the age of sixty-seven years, whichever is earlier.

The pre-amended Section 184 did not fix the tenure except saying that the Chairperson shall not hold office beyond 70 years and the members beyond 67 years. The tenure of the Tribunal members was earlier left to be decided by the Rules.

The tenure of four years fixed by the Ordinance is contrary to the directions issued by the Supreme Court in the Madras Bar Association case(2020). In this case, the Supreme Court had ordered that "the Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment". This was subject to the age cap of 70 years for the Chairperson and 67 years for the Members.

This direction was issued by the Court holding that a short-tenure will discourage meritorious candidates. It was also observed that a short-tenure increases executive interference jeopardizing the independence of the Tribunals. In fact, similar observations were made in the Rojer Mathew case as well, with respect to the tenure of 3 years fixed by the 2017 Tribunal Rules. The 2020 Rules increased the term as 4 years, which was also held to be inadequate in the Madras Bar Association case.

"In the said judgment(Rojer Mathew) it was further observed that the Tribunals would function effectively and efficiently only when they are able to attract younger members who have a reasonable period of service. In spite of the above precedent, a tenure of three years was fixed for the members of Tribunal sin the 2017 Rules. While setting aside the 2017 Rules,this Court in Rojer Mathew(supra) held that a short period of service of three years is anti-merit as it would have the effect of discouraging meritorious candidates to accept the posts of judicial members in the Tribunals. In addition, this Court was also convinced that the short tenure of members increases interference by the executive jeopardizing the independence of judiciary", SC in Madras Bar Association case(2020)

Now, the same tenure of four years is incorporated into the parent statute, ignoring the clear and categorical direction of the Supreme Court for giving a term of five years for Tribunal Chairperson and Members.

The provision introduced by the Ordinance to fix the tenure as four years - Section 184(11) added in the Finance Act 2017 - reflects a brazen disregard to the judiciary as it seeks to override the Supreme Court judgment by stating that it will apply "Notwithstanding anything contained in any judgment, order, or decree of any court or any law for the time being in force".

Practice of Committee recommending panel of names reintroduced

Deprecating the practice of the search-cum-selection committee giving a panel of two names for all appointments, the Supreme Court had directed that the committee should only recommend one name for each post. However, the Ordinance has re-introduced the idea of a panel of two names being recommended by the Committee(Section 184(11) of Finance Act introduced by the Ordinance).

The Supreme Court had also given a peremptory direction that the Central Government should make appointments within 3 months of the recommendations being given by the Committee. The Ordinance dilutes it by saying that the Central Government should make appointments "preferably within 3 months"(Section 184(11) of Finance Act introduced by the Ordinance)

Court suggestions on selection committee incorporated

It is notable that the Ordinance has incorporated into the parent statute the suggestions made the Supreme Court regarding the composition of the search-cum-selection committee.

It also incorporates the Court direction that the recommendations made by the Search-cum-Selection Committee in matters of disciplinary actions shall be final and be implemented by the Central Government.

The Ordinance is silent about the other directions of the Court regarding the housing allowance to Tribunal Chairpersons and Members, appointment of advocates with ten years of practice as Tribunal members etc. It remains to be seen if such directions will be implemented by way of executive rules.

Also, an important direction issued by the Court for the constitution of a National Tribunals Commission - which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals - is yet to be implemented.

Abolition of appellate tribunals

The Ordinance has amended some other enactments to abolish the appellate tribunals under the Cinematograph Act, Copyright Act, Patents Act, Trademarks Act, Customs Act, Airport Authority Act, Control of National Highway Act, Geographical Indications Act, Protection of Plant Varieties and Farmers Protection Act.

The powers exercised by the appellate tribunals under these Acts will be now exercised by the High Courts. This move is expected to ensure more judicial independence. However, there is a point of concern. The High Courts are already reeling under mounting case arrears and rising vacancies. The Supreme Court has taken cognizance of this grave crisis which is looming over the High Courts. Appointment of specialized judges at High Court might also be needed to effectively the matters from tribunals. It is to be noted that the Ordinance gives High Courts appellate powers, which means that they have to go into questions of fact, unlike the present judicial review powers exercised by them under Article 226/227 of the Constitution over the Tribunals.

In this backdrop, a judicial impact assessment and widespread deliberations with stakeholders ought to have preceded the changes brought by the Ordinance.

This matter deserves serious study, and probably an examination by a Standing Committee of the Parliament. In the Rojer Mathew case, the Supreme Court had spoken about the need to carry out a 'judicial impact assessment' before the passing of a legislation which has the effect of increasing pending litigations. In Salem Advocate Bar Assn. (II) v. Union of India, 2005 (6) SCC 344, the Court observed that it is imperative for the Legislature to perform a Judicial Impact Assessment of the enactment passed to assess its ramifications on the judiciary.

"Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country", SC in Salem Bar Association case

It is difficult to fathom the compelling circumstances which forced these drastic changes through the short-cut route of Ordinance, without waiting for any deliberations or assessments.

While we discuss these aspects, the elephant in the room must not be missed – the money bill issue relating to Section 184 of Finance Act.

The issue whether these changes relating to Tribunals could have been introduced through money bill(Finance Bill) – which enable the bill to circumvent the Rajya Sabha scrutiny – is now before a larger bench following the reference made by the Rojer Mathew decision.

A verdict on this substantial constitutional issue is awaited.

With Section 184 Finance Act- whose origin itself is suspect – undergoing another amendment through an Ordinance, the situation has become curious.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/tribunals-reforms-ordinance-certain-points-of-concern-172437?infinitescroll=1

Sneak Peek:

No. of words: 1703 words

Note: This article is about a suo moto case where the Competition Commission passed a 21-page order directing a probe into the recently updated WhatsApp privacy policy alleging it of abuse of dominance. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 33

CCI Takes On Tech Behemoths: WhatsApp Policy Update And Antitrust Concerns

Ever since WhatsApp notified its Terms of Service and Privacy Policy 2021 ('2021 update') on 4 January 2021, it raised eyebrows throughout the world, the most notable being Tesla CEO Elon Musk's tweet encouraging users to switch to Signal. Notably, the Union government has opposed the 2021 update on the grounds of data privacy concerns and differential treatment between Indian users and their counterparts in the European Union (EU).

While WhatsApp has adopted a 'take-it-or-leave-it' approach in India, it allows users in the EU to opt-out from sharing their data with Facebook companies or third parties to ensure compliance with the General Data Protection Regulation (GDPR). However, while data privacy concerns have remained at the forefront of the developments since WhatsApp's January update, there exist antitrust concerns too. In a welcome development, the Competition Commission of India (CCI), after a suo moto cognisance, passed a Section 26(1) order on 24 March 2021, causing the Director General (DG) to initiate an investigation into the matter to ascertain potential contravention of Section 4 of the Competition Act, 2002 ('the Act').

Preliminary Objections Brushed Aside by the CCI

The Commission arrayed both WhatsApp and Facebook as Opposite Parties in the proceedings. Facebook contended that both are different legal entities and that WhatsApp is the appropriate entity to provide information to the Commission. However, considering that Facebook is a direct and immediate beneficiary, the Commission rejected its contention as evasive, egregious and ignorant.

WhatsApp further claimed that the 2021 update falls within the purview of the IT Act framework, which was sub judice before other forums and as such, the CCI should not proceed simultaneously. Herein, WhatsApp relied on CCI v. Bharti Airtel Ltd (2019) 2 SCC 521, wherein the Apex Court held that the CCI should exercise its jurisdiction after the sectoral regulator has concluded its proceedings. However, the question of comity between decisions does not arise since no sectoral regulator is seized of the matter. The authors have dealt with this predicament in detail here.

Furthermore, Section 62 of the Act declares that the Act is in addition to and not derogation of other statutes. While the Courts may consider data, public policy and national security concerns, the same cannot preclude the country's competition watchdog from looking into exploitative and/or exclusionary effects resulting from unreasonable data collection and sharing.

Placing reliance on Harshita Chawla v. WhatsApp Inc. 2020 SCC OnLine CCI 32, WhatsApp submitted that its 2021 update's implementation was postponed to 15 May 2021, and the Commission should refrain from recording a prima facie finding since abuse of dominance is a post-facto analysis. The Commission,

unimpressed by the submission, pointed out that the 2021 update is already in effect with users only given a deadline of 15 May 2021. Accordingly, the conduct has already taken place, and Section 4 may be invoked.

Prima Facie Abusive Conduct

In Harshita Chawla, the Commission has already defined WhatsApp's relevant market as the market for Over-The-Top (OTT) messaging apps through smartphones in India', and WhatsApp was held to be dominant in the same under the provisions of the Act.

In the present case, the Commission noted that, unlike the August 2016 update, users had not been given a choice to opt-out and the range of data the 2021 update seeks to capture is unduly expansive and disproportionate. It includes transactions and payments data, data related to battery level, signal strength, app version, mobile operator, ISP, language and time zone, device operation information, service-related information and identifiers, location information of the user even if the user does not use location-related features, amongst other data.

Furthermore, the policy update uses open-ended, vague and unintelligible terms while specifying the scope of data collection, rendering it impossible to ascertain data cost for a user. Such overarching collection of data based on 'involuntary consent' because of WhatsApp's dominant position as the users are 'locked-in' due to strong network effects resultant from a large consumer base was held as imposing unfair terms on the users and prima facie violative of Section 4(2)(a)(i) of the Act.

The CCI correctly noted that creating a 360-degree profile of users through personal data exploitation would place immeasurable market power at WhatsApp and Facebook's disposal. This would allow them to leverage it in adjacent and unrelated markets, such as the display advertising market, leading to a denial of market access for other players and insurmountable entry barriers for new entrants in potential contravention of Sections 4(2)(c) and 4(2)(e) of the Act.

Analysis – Antitrust Concerns at Play

WhatsApp has the audacity to ask for such intrusive information in utter disregard of the users' choice and privacy concerns because of its position as a de-facto unavoidable partner for many Indian businesses and the most widely used instant messaging app among Indian consumers. Since almost all user acquaintances are available on WhatsApp, it increases its value to the user. In a sense, it has locked-in its users since, in the absence of interoperability, one cannot switch to another app without one's contacts doing the same. This is evident from the Commission's observation that even with the surge in Signal and Telegram's downloads, there has been no substantial loss in WhatsApp's consumer base.

The proposed Digital Markets Act (DMA) and Digital Services Act (DSA) in the EU aims to regulate the online intermediaries and marketplaces. The DMA extensively deals with digital gatekeepers, including social networking services, and prohibits them from combining personal data from their core platform services with data from other sources (including other services offered by the gatekeeper). With the 2021 update in play, Facebook will have control over a large consumer base's data and may combine it with data collected from other sources (subsidiaries and third-party apps).

The strong network-effects enjoyed by WhatsApp can be fuelled by potential data-driven advantages that may lead to an increased dependency of businesses and consumers on WhatsApp. In a data-driven digital world, where data is regarded as consideration and is being monetised in the form of targeted advertisements, the competition and data protection watchdogs cannot ignore the possibility of its abuse. The Competition Law Review Committee, in its report, had concluded that the definition of 'price' as set out in Section 2(o) of the

Act is broad enough to capture non-monetary considerations like data and therefore is amenable to the jurisdiction of the CCI.

In a joint paper (2016), the French and German Competition authorities expressed that even though 'data protection and competition laws serve different goals', collecting and using personal data by a dominant undertaking can be considered from a competition standpoint. Recently, in the Market Study on the Telecom Sector, the CCI has clarified that even though India is still to legislate a domestic data protection law, the existing antitrust law framework is broad enough to address the exploitative and/or exclusionary conduct arising out of privacy standards of enterprises commanding market power.

In the instant case, the question which needs to be answered by the DG is whether WhatsApp's conduct is 'unfair' and 'unilaterally imposed' to fall foul of section 4(2)(a)(i) of the Act. In 2019, the German competition authority (Bundeskartellamt) held that Facebook's data-sharing practices amounted to an abuse of a dominant position and prohibited it from combining user data collected from its subsidiaries and third-party apps. It was stated that if a dominant company, such as Facebook and WhatsApp, makes using its services conditional upon the user granting the company extensive permission to use their personal data- it would amount to 'exploitative business terms'.

In an almost identical proceeding against WhatsApp and Facebook in Italy, the Italian competition authority imposed a EUR 3 million fine on WhatsApp over data sharing with its parent company. Although the Italian competition authority relied primarily on consumer protection law, WhatsApp's conduct of forcing its users to consent to data-sharing or leave the app could also be pursued as a unilateral imposition of unfair contractual terms under Section 4(2)(a)(i) of the Act.

Further, the new privacy-policy tying is equivalent to a unilateral degradation of privacy, which may amount to an abuse of dominance as it lowers privacy standards to the consumers' detriment. WhatsApp has tied its privacy policy to its services by employing the 'take-it-or-leave-it' approach, which is tantamount to a constructive refusal to supply.

WhatsApp might argue that collection and processing of data are indispensable for its business model as it provides 'free services' and the primary way to generate income is personalised and targeted advertisements for which access to personal data is a pre-requisite. While access to personal data is necessary for WhatsApp's business model, merging or tying data with Facebook-owned companies is intrusive and unreasonable. It will further strengthen the data advantage enjoyed by Facebook by cross-linking the data collected across services.

Concluding Remarks

Facebook can be characterised as a 'data monopoly' after acquiring WhatsApp and Instagram. Facebook and WhatsApp have maintained their dominance, individually and as a group, independently of market forces. Turkey has also opened an antitrust investigation into WhatsApp's 2021 update. In India, the CCI's prima facie order against WhatsApp's 2021 update signals that the excessive collection and usage of data, degradation of privacy standards, data sharing with a group company, and unfair and unilateral terms imposed by a dominant undertaking are amenable to the Commission's jurisdiction.

Japan Fair Trade Commission has formulated guidelines that state that the digital platforms' practice of compelling the users to share their personal information to use their services would be tantamount to 'abuse of a superior bargaining position' under Japan's Anti-monopoly Act. In the Indian context, there is an urgent need

to formulate similar guidelines, which mandate the companies to formulate a transparent policy on data collected, used, and shared by them with their subsidiaries and third-party companies.

Although the CCI has caused the DG to investigate, it has failed to take interim measures under Section 33 of the Act, such as an injunction on the operation of the 2021 update until the final decision is taken since serious and irreparable harm may occur because of the said practices, if implemented from 15 May 2021. As observed in the order, the Commission has a duty to prevent practices that may harm competition.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/whatsapp-privacy-policy-2021-general-data-protection-regulation-gdpr-competition-commission-of-india-cci-competition-act-2002-172427

Sneak Peek:

No. of words: 1515 words

Note: This article is about decade-long battle over copied code in Google's Android operating system which has ended in the US Supreme Court. The Court's decision will undoubtedly have ramifications for decades to come on the "fair use" doctrine in commercial works, and in particular in the use of computer code in commercial software.

Article: 34

Google v. Oracle : Perspectives on Copyright, Fair Use and Industry Implications

On 5th April 2021 the United States Supreme Court (USSC) finally delivered its verdict on the most keenly watched copyright dispute of this century. USSC's 6-2 decision is a big win for Google as it overturned the 2018 decision of Court of Appeals for the Federal Circuit which decided in favour of Oracle. USSC held that Google's use of the Java Application Program Interface was a fair use as a matter of law.

Origins of the Dispute

The case started in 2010 when Oracle filed a law suit against Google in the United States District Court for the Northern District of California (District Court) for both patent and copyright infringement. The main allegation of Oracle was that Google's unauthorised use of 37 packages of Oracle's Java Application Programming Interface (API) in its Android operating system infringed the patents and copyright of Oracle. An API divides and arranges the world of computing tasks in a particular manner and programmers can then use the API to select the specific task that they need for their programs

The case had lots of twists and turns in the last ten years both at the District Court and the Court of Appeals for the Federal Circuit (CAFC). In 2018 CAFC held that the API packages are copyrightable and Google's copying of the API packages will not fall under the doctrine of fair use. Finally, the case reached USSC which heard the appeal filed by Google against the decision of CAFC.

This dispute has very high stakes and in a way, it can be viewed upon as a challenge posed by Oracle (who owns the copyright in Java) against the Android operating system which had been conceived and implemented by Google as part of its entry into the smart mobility segment.

Java developed by Sun in 1996 has been one of the world's most popular programming languages and platforms. The Java language itself is composed of keywords and other symbols and a set of pre-written programs to carry out various commands called the API. In 2007, Google started rolling out its Android software platform for mobile devices based on the poplar programming language Java. In 2010, Oracle acquired Sun Microsystems that owned Java and thereafter Oracle, sued Google and accused its Android platform as infringing Oracle's Java-related copyrights and patents.

Java and Android are complex platforms that include virtual machines, development and testing kits, and APIs. Oracle's copyright claim involves 37 packages in the Java API. Java API had 166 packages, divided into more than six hundred classes which are subdivided into more than six thousand methods. Google replicated the exact names and exact functions of virtually all of these 37 packages but used a different code to implement them. Google wrote its own source code to implement virtually all the functions of the 37 API packages in question. Thus, the main issue is whether the names, organization of those names, and

functionality of 37 out of 166 packages in the Java API, (called as the "Structure, Sequence and Organization or SSO) are copyrightable and secondly if SSO of the packages are copyrightable whether Google's inclusion of them in its Android platform constitutes fair use under the US Copyright law. If one were to make a side-by-side comparison of the 37 Java and Android packages, only 3% of the lines of code are the same. The identical lines pertain to those that specify the names, parameters and functionality of the methods and classes, lines called "declarations" or "headers." This three percent is the heart of the main copyright issue

Main Issues before the USSC

Google's petition raised two questions. The first question dealt with the copyrightability of Java's API. Google contended that that the API's declaring code and organization could be classified as processes/systems/methods of operation that were expressly excluded from copyright protection. The second question was whether Google's use of Java's API was a "fair use".

Unfortunately, USSC did not answer the first question, by pointing out that determination of second question on fair use was enough to adjudicate the case. "We shall assume, but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted". USSC observed that US Congress, along with the courts, had limited the scope of copyright protection regarding works that were entitled to a copyright and a copyright holder cannot prevent another person from making a fair use of copyrighted material. §107 of US Copyright Act. For determining whether the use made of a work can be classified as fair use, the following four factors are relevant under the US Copyright law

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes

(2) the nature of the copyrighted work

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Dealing with the first factor USSC noted the following.

Google copied portions of the Sun Java API precisely, and it did so in part for the same reason that Sun created those portions, namely, to enable programmers to call up implementing programs that would accomplish particular tasks. Google's use of the Sun Java API sought to create new products with the intention of expanding the use and usefulness of Android-based smartphones. Google's new product gave programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used portions of the Sun Java API to create a new platform that could be immediately used by programmers, Google's use was consistent with creative progress that was the objective of copyright itself. Allowing reasonable fair use of functional code enables innovation that created new opportunities for the whole market to grow.

Based on this USSC held that even though Google's use was a commercial activity it would still fall under fair use because of the inherently transformative role that the reimplementation played in the new Android system.

Coming to the second factor on the nature of copyrighted work, it should be noted that the API consisted of three main portions, the first portion consists of an "implementing code" which actually instructs the computer on the steps to follow to carry out each task. The second portion consists of a particular command, called a "method call" with the calling up of each task. The third portion called the "declaring code" consists of a computer code that will associate the writing of a 'method call' with particular places in the computer that contain the needed implementing code. The main dispute between the parties is over the declaring code.

Here USSC observed that the declaring code was different from many other kinds of copyrightable computer code. It was inextricably bound together with a general system, the division of computing tasks, that no one claimed was a proper subject of copyright. It was inextricably bound up with the idea of organizing tasks which were not copyrightable.

"In our view, for the reasons just described, the declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright"

Dealing with the third factor, USSC noted that Google copied those lines not because of their creativity or purpose. It copied them because programmers had already learned to work with the Java API's system, and it would have been very difficult to attract programmers to build its Android smartphone system without them. Further, Google's basic purpose was to create a different task-related system for smartphones and to create a platform called the Android platform which would help achieve and popularize that objective.

Regarding the fourth factor, USSC opined that given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement of Java API was not feasible. This would make Java's "declaring code" similar to a lock that would limit the future creativity of new programs which in turn would cause considerable public harm. The uncertain nature of Java's ability to compete in Android's market place, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convinced USSC that the fourth factor i.e. market effects, also weighed in favour of fair use.

Implications

The software industry was waiting eagerly for the verdict. There was a fear that a win for Oracle/Sun would have created multiple problems for the software industry by forcing them either to reinvent the wheel on every occasion they wanted to instruct a computer to do something, or to pay high licensing fees to the leading software companies for the right to carry out trivial routine tasks. The verdict gives legal approval to the common practice adopted by software developers which involves using, re-using, and re-implementing software interfaces written by others. In a nutshell this verdict is a victory for innovation, interoperability and computer programming.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/google-v-oracle-perspectives-on-copyright-fair-use-and-industry-implications-172306

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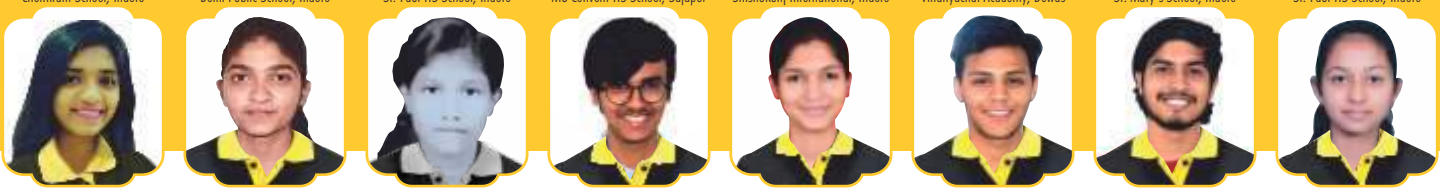

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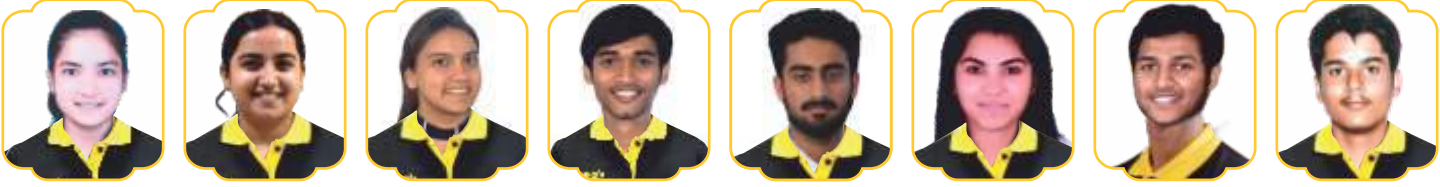

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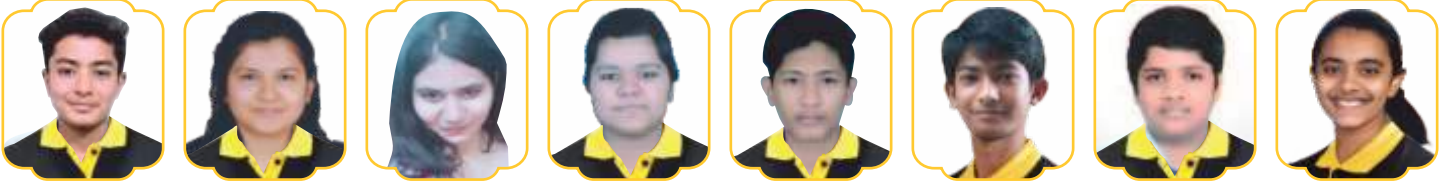

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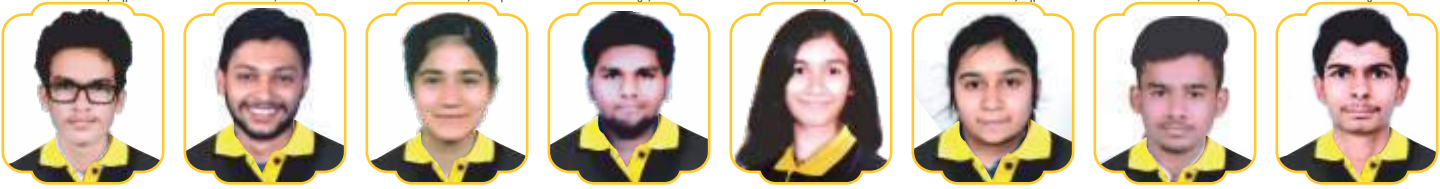

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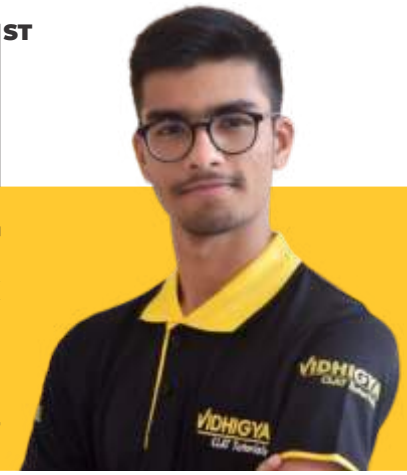

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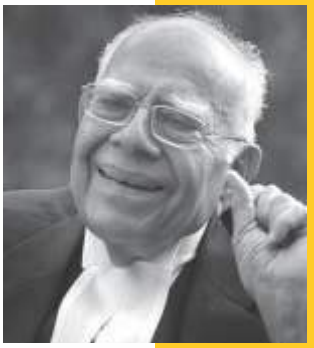

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