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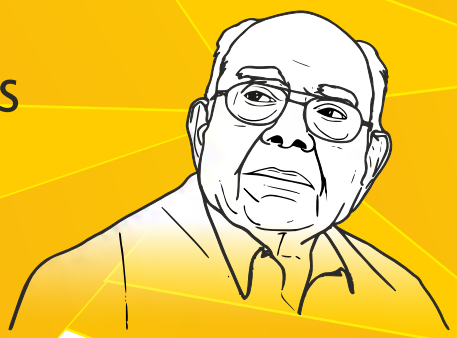

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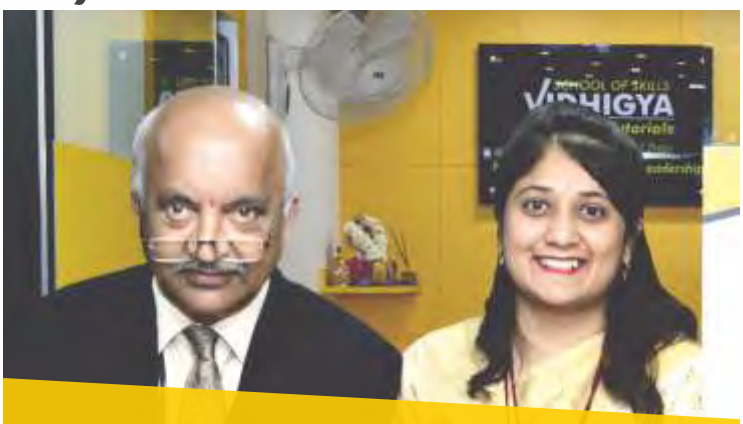

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TOPICS

10. **Central Vista, executive's caprice, and rule of law**

*By Suhrith Parthasarathy

11. **Underutilisation of Environmental Relief Fund defeats the "Polluter Pays" principle**

*By Tarika Jain

12. **Punitive responses to sexual violence need rethink, given perverse consequences**

*By Neetika Vishwanath & Preeti Pratishruti Dash

13. **Personal Data Protection Bill 2019 needs to be debated thoroughly**

*By Christophe Jaffrelot & Aditya Sharma

14. **The buzz around the WhatsApp privacy policy and a possible antidote**

*By Vasu Bhushan

15. **Are WhatsApp Chats Admissible In Evidence?**

*By LiveLaw Research Team

16. **NEP's regulatory architecture is too monolithic for higher education in a diverse country**

*By Furqan Qamar & Krishna Kumar

17. **The village song**

*By Indian Express Editorial

18. **A Budget blueprint for difficult times**

*By Manmohan Singh, P. Chidambaram & Praveen Chakravarty

19. **Beef ban, 'love jihad' laws, degrading of protesters undermine the idea and promise of fraternity**

*By Darius J Khambata

20. **Digital Services Tax: Not about India vs US**

*By Shilpa Goel & Ashish Goel

21. **In Bombay HC verdict on sexual assault, issue of mandatory minimum sentencing**

*By Apurva Vishwanath

22. **Two Tales of Judicial Indiscretion: Recent Controversial POCSO Decisions of Bombay High Court**

*By Dr. Kumar Askand Pandey

23. **Artificial and Unreasonable Veil of Legal Protection- A Critic of Bombay High Court's POCSO Judgment**

*By Siddharth Shivakumar

24. **Maximum Governor: On Governor's role**

*By The Hindu Editorial

25. **An anti-disclosure amendment that hits public health**

*By Pankhuri Agarwal

26. **The dark step of writing hate into law**

*By Seema Chishti

27. **An ill-conceived, overbroad and vague ordinance**

*By Madan B. Lokur

28. **A plaintive lament on liberty that rings hollow**

*By Gautam Bhatia

29. SC upholds IBC's Section 32A: Why is it important, what are the implications?

*By Aashish Aryan

30. What are the amendments in Thailand's abortion law?

*By Mehr Gill & Edited by Explained Desk

31. How CSR expenditure rules have changed for Indian companies

*By Karunjit Singh & Edited by Explained Desk

32. Suspension Of Insolvency Proceedings And Its Effect On Bilateral Investment Treaties

*By Tariq Khan & Animesh Upadhyay

33. Need For Minimum Practice As Advocate For Judicial Service : Reigniting The Debate

*By Shashank Pandey

34. Should India Grant Compulsory Licences to Increase the Supply of Vaccines?

*By Shambhavi Sinha

35. Is It Time for a Right to Disconnect?

*By Feza Tabassum Azmi

Sneak Peek:

No. of words: 1056 words

Note: In this article, the author has critically analyzed the recent incident of US Capitol Hill Siege. Here, the author further analyzed the role played by US Courts and suggested how courts can help and play important role in such a devastating situation. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 1

When history is written, US courts may be singled out for protecting nation's election integrity

That coups take place in developing countries has been an article of faith of political scholarship since the 1960s. What happened in Washington on January 6 was a striking refutation of this conventional wisdom.

It was not a classic coup because the military was not involved. But it was an executive coup, in that President Donald Trump, the head of the executive, incited a mob of supporters — many thousand strong, with a substantial proportion belonging to vigilante groups — to "show the kind of pride and boldness" that would force the two Houses of Congress to overturn the election, which he lost on November 3.

Lacking an independent election commission, the US has a complicated electoral administration system. Legally, states decide who will be president. After people cast their votes, states certify election outcomes, forming an electoral college, whose vote is finally accepted by US legislators on January 6. The vice-president presides over this politically ceremonial but legally necessary step, the last one before a president can be inaugurated on January 20. Mike Pence, Trump's vice-president, refused to overturn the election, infuriating his boss. A huge majority of Republican senators also expressed unwillingness to comply. In the end, the coup failed and Biden was ratified. And as these lines are being written, Trump seems to have recognised — publicly — that the violence has hurt him.

Why do scholars believe that developing countries have coups, but richer democracies do not? Two arguments are often advanced. First, in poorer countries the institutions of oversight, being much weaker, crumble under the onslaughts of mighty politicians. Second, politics in developing countries can have an all-or-nothing quality. The government has such control over the economy and society that once out of power, losses can be huge and imprisonment may not be too far. That generates a political tendency to stay in power at all costs. In richer democracies, opportunities beyond the government are plentiful. An electoral loss does not rob life of all enhancements. Company boards, memoirs, consulting and speaking, legal practices and business openings can fetch millions. The government does not have a decisive control over all sectors of society.

Trump's motivations remain open to speculation. Of the two main hypotheses, one is ideological, another personal. His commitment to a political order that restores white supremacy has been repeatedly noted. Many in the mob were carrying Confederate flags. Since the Civil War (1861-65), these flags, representing those southern states that broke away to preserve slavery, have stood for white supremacy and Black subjugation.

A second hypothesis is that once out of power, Trump fears prosecution for crimes. In addition to the potentially criminal charges of tax fraud, there are questions about corruption, abuse of power, and violation

of campaign finance laws. Ironically, inciting a mob to pressure the legislature, aimed at solving an immediate problem, might now lead to the most serious charge of all: Abetting an insurrection.

Nancy Pelosi, Democratic Speaker of the House of Representatives, and Chuck Schumer, who will soon take over the leadership of a Democratic-majority Senate, have already called for the invocation of the 25th Constitutional Amendment. If supported by a majority of the cabinet, the amendment allows the vice president to unseat the president. In case the amendment is not invoked, say Pelosi and Schumer, they would like to impeach Trump, even if less than two weeks remain in his term. That will, in all likelihood, disqualify him from running again in the 2024 elections. This is important because a self-pardon might well save Trump from criminal prosecution, at least for federal crimes, though many legal scholars have serious doubts about the constitutionality of self-pardon.

A coup like this would be inconceivable in a parliamentary democracy. Presidential democracies are more vulnerable to coups because the executive and the legislature are independently elected and, if run by different parties, they can be arch rivals at the polity's heart. In parliamentary systems, the two are intertwined and a parliamentary majority is the prime minister's source of power, making deadly executive-parliament clashes unlikely. Prime ministers don't send mobs, vigilantes or armies to attack parliaments; brazen presidents do.

In the end, of course, the coup failed. So how might one understand the failure? The proximate reason is simply that with no military support coming, the mob failed to occupy the Capitol building for more than a few hours. That is why, without the military's involvement, coups rarely succeed. And in richer democracies, the armed forces tend not to help the leader in electoral disputes.

But the deeper question is: Why did most Republican politicians in the US Congress, while initially quiet, not support Trump in the end? Here, the role of two institutions is noteworthy.

First, given the state-centric nature of US presidential elections, the behaviour of state officials in swing states is critical. Two of the five swing states — Arizona and Georgia — have Republican governments. Yet their officials did not bow to the wishes of Trump. A leaked tape of Trump's phone call to Georgia's Secretary of State, revealed that to flip the state won by Biden, Trump asked the secretary to "find 11,780 votes". Despite being a Republican, Secretary Brad Raffensperger declined, instead doing the right thing. Legal propriety defeated partisanship.

But the most important role has been played by America's courts. Trump's campaign filed more than 60 legal challenges — from the state courts to federal courts, all the way up to the US Supreme Court. Trump lost all cases but one. The victory was very small, but the defeats were huge. Many of the judges in federal courts were appointed by Trump, who often boasted that if necessary, his judicial appointees would win him the day. But instead of displaying personal loyalty, they applied the law, tossing out the evidence of election fraud as legally flimsy. In the end, it became impossible for most Republicans to go against so many court judgments. Courts defined the permissible limits of politics.

When the history of this period is written, America's courts might be singled out as the institution that protected the nation's election integrity. But it also says something larger about the role of the judiciary in preserving democracy as a system. If independent and unafraid, courts can clip the wings of marauding politicians.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/us-capitol-hill-siege-donald-trump-election-joe-biden-7138871/

Sneak Peek:

No. of words: 1185 words

Note: In this article, the author has explained the process of impeachment in U.S. in the light of Donald Trump case. It is very informative text to understand the legal position about the subject. It is suggested to do follow it.

Article: 2

Why remove Donald Trump now? A guide to the second impeachment of a president

Donald Trump impeachment: The process is taking place with extraordinary speed and will test the bounds of the impeachment process, raising questions never contemplated before. Here's what we know

The House on Wednesday impeached President Donald Trump for a second time, a first in American history, charging him with "incitement of insurrection" one week after he egged on a mob of supporters that stormed the Capitol while Congress met to formalize President-elect Joe Biden's victory.

Democrats moved swiftly to impeach Trump after the assault, which unfolded after he told supporters at a rally near the National Mall to march on the Capitol in an effort to get Republicans to overturn his defeat. At least five people, including a Capitol Police officer, died during the siege and in the immediate aftermath.

The process is taking place with extraordinary speed and will test the bounds of the impeachment process, raising questions never contemplated before. Here's what we know.

Impeachment is one of the Constitution's gravest penalties.

Impeachment is one of the weightiest tools the Constitution gives Congress to hold government officials, including the president, accountable for misconduct and abuse of power.

Members of the House consider whether to impeach the president — the equivalent of an indictment in a criminal case — and members of the Senate consider whether to remove him, holding a trial in which senators act as the jury. The test, as set by the Constitution, is whether the president has committed "treason, bribery, or other high crimes and misdemeanors."

The House vote requires only a simple majority of lawmakers to agree that the president has, in fact, committed high crimes and misdemeanors; the Senate vote requires a two-thirds majority.

The charge against Trump is 'incitement of insurrection.'

The article, drafted by Reps. David Cicilline of Rhode Island, Ted Lieu of California, Jamie Raskin of Maryland and Jerrold Nadler of New York, charges Trump with "incitement of insurrection," saying he is guilty of "inciting violence against the government of the United States."

The article cites Trump's weekslong campaign to falsely discredit the results of the November election, and it quotes directly from the speech he gave on the day of the siege in which he told his supporters to go to the Capitol. "If you don't fight like hell," he said, "you're not going to have a country anymore."

Proponents say impeachment is worthwhile even though Trump has only days left in office.

While the House moved with remarkable speed to impeach Trump, a Senate trial to determine whether to remove him cannot begin until Jan. 19, his final full day in office. That means any conviction would almost certainly not be completed until after he leaves the White House.

Democrats have argued that Trump's offense — using his power as the nation's leader and commander in chief to incite an insurrection against the legislative branch — is so grave that it must be addressed, even with just a few days remaining in his term. To let it go unpunished, Democrats argued, would set a dangerous precedent of impunity for future presidents.

"Is there little time left?" Rep. Steny Hoyer, D-Md., the majority leader, said during the debate. "Yes. But it is never too late to do the right thing."

Republicans, many of whom voted to overturn the election results, have claimed that going through the impeachment process so late in Trump's term will foster unnecessary division and that the country should move on from last week's siege.

The biggest consequence for Trump could be disqualifying him from holding office again.

Conviction in an impeachment trial would not automatically disqualify Trump from future public office. But if the Senate were to convict him, the Constitution allows a subsequent vote to bar an official from holding "any office of honor, trust or profit under the United States."

That vote would require only a simple majority of senators. Such a step could be an appealing prospect not just to Democrats, but also to many Republicans who either have set their sights on the presidency themselves or are convinced that it is the only thing that will purge Trump from their party. Sen. Mitch McConnell of Kentucky, the Republican leader, is said to hold the latter view.

There is no precedent, however, for disqualifying a president from future office, and the issue could end up before the Supreme Court.

A Senate trial most likely won't start until after Biden becomes president.

Democrats who control the House can choose when to send their article of impeachment to the Senate, at which point that chamber would have to immediately move to begin the trial. But because the Senate is not scheduled to hold a regular session until Jan. 19, even if the House immediately transmitted the charge to the other side of the Capitol, an agreement between Senate Republican and Democratic leaders would be needed to take it up before then.

McConnell said Wednesday that he would not agree to do so, meaning that the proceeding could not be taken up until the day before Biden is sworn in. Since time is needed for the Senate to set the rules for an impeachment trial, that means the proceeding probably would not start until after Biden was president, and Democrats had operational control of the Senate.

"Given the rules, procedures, and Senate precedents that govern presidential impeachment trials, there is simply no chance that a fair or serious trial could conclude before President-elect Biden is sworn in next week," McConnell said. "In light of this reality, I believe it will best serve our nation if Congress and the executive branch spend the next seven days completely focused on facilitating a safe inauguration and an orderly transfer of power to the incoming Biden administration."

A trial could consume the Senate during Biden's first days in office.

Once the Senate receives the impeachment charge, it must immediately take up the issue, as articles of impeachment carry the highest privilege. Under rules in place for decades, impeachment is the only issue the Senate can consider while a trial is underway; it cannot simultaneously consider other legislative business.

But Biden has asked McConnell whether it would be possible to alter that rule, allowing the Senate to conduct Trump's impeachment trial on a parallel track to consideration of his Cabinet nominees, splitting its days between the two. McConnell told Biden he would consult with the Senate parliamentarian on whether that would be possible.

If such a bifurcated process were not possible, House Democrats might choose to hold back the article to allow Biden time to win confirmation of his team before a trial got underway.

The Senate could hold a trial for Trump even after he has left office, though there is no precedent for a president being tried after his term is over. Other government officials who were impeached have been tried after they departed.

Only two presidents other than Trump have been impeached — Andrew Johnson in 1868 and Bill Clinton in 1998 — and both were ultimately acquitted and completed their terms in office.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/donald-trump-impeachment-explained-7145551/

Sneak Peek:

No. of words: 564 words

Note: In this article, the author has critically analyzed and explained the 25th Constitutional Amendment. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the Amendment and make your own short notes too.

Article: 3

What is the 25th Amendment of the US Constitution, that could be used to remove Trump?

25th Amendment US Constitution: In the aftermath of Donald Trump supporters storming the US Capitol, many have urged Vice President Mike Pence to invoke the 25th Amendment.

In the immediate aftermath of Donald Trump supporters storming the US Capitol building, which houses both the US Senate as well as the House of Representatives, there are calls by many to either impeach President Trump or invoke the 25th Amendment.

What is the 25th Amendment of the US Constitution?

This amendment lays out how a US president and vice president may be succeeded or replaced.

According to Cornell Law School, "The Twenty-fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if for some reason the President becomes disabled to such a degree that he cannot fulfill his responsibilities."

The amendment has four sections.

According to Encyclopedia Britannica, while the first section codified the traditionally observed process of succession in the event of the death of the president—that the vice president would succeed to the office—it also introduced a change regarding the ascent of the vice president to president should the latter resign from office.

"In the event of resignation, the vice president would assume the title and position of president—not acting president—effectively prohibiting the departing president from returning to office," states Britannica.

The second section of the amendment addresses vacancies in the office of the vice president.

The third section of the amendment set forth the formal process for determining the capacity of the president to discharge the powers and duties of office.

If the president is able to declare his/her inability, then the vice president takes over as the acting president.

In case the president is unable to declare his/her incompetence, the fourth section of the amendment requires the vice president and the cabinet to jointly ascertain this and if they do so, then the vice president immediately assumes the position of acting president.

It is this fourth section of the 25th Amendment that many are asking Vice President Pence to invoke against President Trump.

When was it introduced and has it been used in the past?

In the aftermath of the assassination of President John F. Kennedy, the 25th Amendment was proposed by Congress on July 6, 1965, and ratified by the states on February 10, 1967.

According to Cornell Law School, "The Watergate scandal of the 1970s saw the application of these procedures, first when Gerald Ford replaced Spiro Agnew as Vice President, then when he replaced Richard Nixon as President, and then when Nelson Rockefeller filled the resulting vacancy to become the Vice President."

However, the fourth section of the 25th Amendment has never been invoked.

Why did Donald Trump supporters storm the Capitol?

Trump has repeatedly asserted, although without any valid evidence, that the presidential election in November, in which he lost to Democratic Party candidate Joe Biden, was rigged.

He has been urging his supporters to make their voices heard as members of the US Congress came together to confirm the counting of Electoral College votes and formally pave the way for Joe Biden to take over on January 20th.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/what-is-the-25th-amendment-of-the-us-constitution-7136263/

Sneak Peek:

No. of words: 1121 words

Note: In this article, the author has explained Section 230 of the Communications Decency Act which was invoked to suspend the social media account of former President of U.S., Donald Trump. It will help you to explore the journey of the legal development and also help you to enhance your legal acumen.

Article: 4

What is Section 230, the law used to ban Trump from Twitter?

Over the years, reform of Section 230 has been a bipartisan issue — with both the Democrats and the Republicans calling for it to be amended, if not repealed.

Soon after a mob of President Donald Trump's supporters stormed the US Capitol last week, his social media accounts were suspended by Big Tech companies like Twitter and Facebook for his alleged role in inciting violence and spreading misinformation. The incident spurred a renewed debate about Section 230 of the US' Communications Decency Act — the controversial piece of internet legislation that permitted these tech companies to flex their powers and ban the president in the first place.

Over the years, reform of Section 230 has been a bipartisan issue — with both the Democrats and the Republicans calling for it to be amended, if not repealed. President Trump, himself, has been a vocal critic of the law, which shields tech companies from being held accountable for what users post online. President-elect Joe Biden, too, has criticised the law and even proposed revoking it completely.

But while the law is widely criticised, most agree that it is essential for ensuring a relatively free, safe and open internet.

What is Section 230?

Section 230 of the Communications Decency Act was passed in 1996 and provides legal immunity to internet companies for content that is shared on their websites. The act was first introduced to regulate pornography online. Section 230 is an amendment to the act, which holds users responsible for their comments and posts online.

According to the regulation, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

This means that online companies, including social media platforms, are not liable for the content shared on their website by its users. So if a user posts something illegal on the website, the company is protected from lawsuits. In addition, the regulation also states that private companies have the right to remove content that violates their guidelines and values. Thus, the big tech companies were well within their rights when they decided to suspend Trump's accounts.

The legislation was drafted by Democratic Senator from Oregon Ron Wyden and Republican Congressman from South Carolina Chris Cox over two decades ago to encourage up-and-coming technology companies and

to protect free speech, enshrined in the first amendment of the US Constitution. The international digital rights group Electronic Frontier Foundation calls Section 230 "the important law protecting internet speech".

What has it got to do with the siege on Capitol Hill?

Soon after a violent mob of US President Donald Trump's supporters stormed the historic US Capitol building last Wednesday, the finger of blame was pointed at social media platforms and online forums — where right-wing extremists were openly planning the attack for weeks.

The posts, in which the US President's supporters described how they would break into the Capitol, have prompted questions over why violent content is often unregulated on social media sites. Facing growing backlash, Facebook, Twitter and Google started to crack down heavily on social media users sharing inflammatory content online.

From Google suspending pro-Trump social media site Parler, to President Trump being banned from nearly every major social media platform — big tech firms left no stone unturned. The reason they were able to respond to the incident so swiftly and with such ferocity is largely because of Section 230, as it protects these companies from lawsuits in the future.

Why is Section 230 widely criticised?

While the regulation has far reaching consequences for social media platforms such as Twitter and Facebook, its critics are quick to point out that it was passed before social media existed in its present form. Political leaders and internet activists have long called for the law to be updated.

More conservative critics of the regulation argue that it effectively permits big tech to participate in politically partisan activity. Republican lawmakers, including Trump, have alleged that platforms like Twitter and Facebook exhibit a clear bias against conservative voices and often abuse Section 230 of the Communications Decency Act to censor right-leaning users.

On the other hand, some argue that the law permits websites like 4chan and Parler — used by many right wing extremists — to refrain from moderating hate speech and violent content, regardless of how derogatory or vile it may be.

In an interview with the New York Times last year, President-elect Joe Biden called for the regulation to be "revoked, immediately" as it helped tech companies propagate "falsehoods they know to be false". "I, for one, think we should be considering taking away [Facebook's] exemption that they cannot be sued for knowingly engaged on, in promoting something that's not true," he said in an earlier interview with CNN.

Websites have also faced backlash for the content that they do choose to moderate. For instance, in 2014, Facebook was widely criticised for its inconsistent nudity rules when it took down a photograph of a mother breastfeeding her premature baby.

Has Trump tried to change the law?

In May 2020, President Trump issued an executive order that targeted the legal protection offered to tech companies under Section 230. He took this step after Twitter started labelling his tweets about voting by mail as misinformation. In response, the President alleged that the social media platforms were selectively censoring content as part of a wider conspiracy to "rig the election" against him.

Trump's order called for regulators to reassess the definition of Section 230 and directed agencies to collect complaints of political bias on social media platforms that could help revoke their legal immunity.

After Biden's victory in the 2020 presidential election, he went a step further and called for the regulation to be completely revoked. Last month, he threatened to veto the National Defense Authorisation Act (NDAA), an annual defence bill authorising billions in military spending, unless Congress agreed to repeal Section 23 completely.

"Section 230, which is a liability shielding gift from the U.S. to "Big Tech" (the only companies in America that have it – corporate welfare!), is a serious threat to our National Security & Election Integrity. Our Country can never be safe & secure if we allow it to stand…," Trump tweeted late last month. He added that if the "very dangerous & unfair Section 230 is not completely terminated as part of the [NDAA], I will be forced to unequivocally VETO the Bill when sent to the very beautiful Resolute desk."

Trump claimed Section 230 facilitated the spread of foreign disinformation online. However, members of Congress were quick to clap back at Trump, saying the NDAA had little to do with social media companies.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/donald-trump-twitter-section-230-7146371/

Sneak Peek:

No. of words: 1817 words

Note: In this article, the author has critically analyzed the recent Allahabad High Court Judgment in case of Safiya Sultana v. State of U.P., where Court strikes down provisions of the Special Marriage Act, 1954 that make it mandatory for couples to publish a 30-day public notice of their intent to marry. Further, the author has also discussed the impact of this judgment on recent Anti-Conversion ordinance by UP government. A must read for every law aspirant. Enjoy this article!

Article: 5

Allahabad HC Verdict Comes as Saviour for Inter-Religious Couples Caught Between Special Marriage Act & UP Anti-Conversion Ordinance

The landmark verdict delivered by the Allahabad High Court to remove the mandatory publication of notice under the Special Marriage Act 1954(SMA) makes a mention of the problematic Uttar Pradesh Ordinance which criminalizes religious conversion for marriage.

Coming amid a surcharged atmosphere created by rampant arrests under the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, the judgment, which makes it easier for couples to register marriage under the secular law, is highly significant.

There are anecdotes shared in public by many inter-faith couples that they opted the route of marriage under personal law after religious conversion so as to escape the mandatory publication under the Special Marriage Act, which exposes them to harassment and intimidation at the instance of their hostile families(read here, here, here, here and here).

"Couples marrying without the consent of their parents frequently opt for temple-weddings, AryaSamaji weddings, or weddings after conversion to Islam. Although far from ideal, conversion in reality has emerged as the practical way to cohabit as a couple, in a country where neither inter-faith, inter-caste nor living-in couples can earn societal approval", researcher SaumyaSaxena wrote in The Wire.

A research article written by NamitaBhandare and SurbhiKarwa in 'Article 14' shared different accounts to show how SMA was energizing vigilante groups and aiding police intervention to kill inter-faith love.

"Reports have shown that the mandatory 30-day notice period to raise objections to a proposed marriage under the Act allows the harassment of the couple by family members or even goons, who are opposed to their marriage. To avoid such harassment, couples may have opted to convert to their partner's religion to get married without the 30-day waiting period. For some individuals, the choice of their partner is much more important his/her religion", legal scholar AnuragBhaskar wrote.

There are vigilante groups who interfere with the relationship between consenting adults after gaining information about their intended marriage from the public notices at registrar's offices.

So, the Special Marriage Act (SMA), a secular law, was acting as a tool for harassment - in an unintended manner - at the hands of vested interests seeking to prevent inter-religious marriages.

High Court took note of ground realities and practical problems

The judgment of the High Court(SafiyaSulthana v State of UP), which came in a habeas corpus petition filed by a couple, makes a note of this unintended consequence of the procedure under the SMA.

The petition sought a writ of habeas corpus against the illegal detention of the wife by her father. The wife, originally a Muslim, had married a Hindu man as per Hindu rituals after converting to Hinduism. Despite such marriage, the wife was kept under confinement by her father. In such circumstances, the couple petitioned the High Court seeking its intervention to allow them to live together as a married couple.

The High Court directed for the presence of the wife and her father. After interactions with the court, the father accepted the right of his daughter to marry a person of her choice.

During the interactions, the couple told the bench that they had thought of registering marriage under the Special Marriage Act but backed off in view of the mandatory requirement of 30 days prior notice. They said that "such notice would be an invasion in their privacy and would have definitely caused unnecessary social pressure/interference in their free choice with regard to their marriage".

They also informed the bench that they opted for religious marriage after conversion as personal law does not impose any such condition of mandatory notice. The court recorded their submission that there are many similarly situated persons like them who face hassles due to the the process under the SMA. The petitioner's counsel also told the court that the situation might become more 'critical' with the notification of the UP Ordinance as the same prohibits conversion of religion by marriage to be unlawful.

The judgment authored by Justice VivekChaudhury records their submissions as follows :

"...while interacting with the Court on their personal appearance, the young couple expressed that they could have solemnized their marriage under the Special Marriage Act, 1954 but the said Act requires a 30 days notice to be published and objections to be invited from the public at large. They expressed that any such notice would be an invasion in their privacy and would have definitely caused unnecessary social pressure/interference in their free choice with regard to their marriage.

The personal laws do not impose any such condition of publication of notice, inviting and deciding objections before solemnizing any marriage. They further state that such a challenge is being faced by a large number of similarly situated persons who desire to build a life with a partner of their own choice. Learned counsel for petitioners also stated that the situation may become more critical with notification of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, as the same prohibits conversion of religion by marriage to be unlawful".

It was in this backdrop that the High Court decided to revisit the provisions of the Act. Since the issues raised by the petitioners involve right of life and liberty of a large number of persons, the court said it is "duty bound to consider their submissions".

The UP Ordinance has troublesome provisions to criminalize conversion by marriage and to invalidate conversion for marriage and marriage for conversion.

So, the effect of the Ordinance is to shut the door of personal law marriage for couples who feel terrorized by the hostile procedure under the Special Marriage Act. Mixed couples are now caught between the devil and the sea : if they convert, they will invite police arrest under the UP Ordinance; opting for special marriage will invite external interference.

'Cruel and unethical to force present generation to follow 150 year old process'

The judgment notes that it is only the marriage under the secular law which has the process of prior notice and inviting of public objections before the marriage registration. Under the personal law, there is no such process and marriages are solemnized by priests acting on the words of the parties. Such marriages as per religious rituals take place without any interference from any corner, the court noted.

The Court said that there was "no apparent reasonable purpose achieved" by notice process under the Special Marriage Act when there is no such process in personal law, under which majority of the marriages take place. This amounts to discrimination violating the fundamental rights of the class of people who opt to get married under the SMA.

The Court said that the provisions of the SMA needs to be read down in the light of the new developments in the constitutional law such as the declaration of right to privacy as a fundamental right under Article 21 as per the Puttaswamy judgment. It said that the provisions need to be given an interpretation "that would uphold the fundamental rights and not violate the same". Even if marriage is registered on false representations or suppression of material facts, there are options under law to take action, the court noted.

Justice VivekChaudhary's judgment emphasized on the right to freedom of marriage "without interference from both state and non-state actors" while ruling against mandatory publication of notice.

Also, after tracing the history of the Special Marriage Act 1954, the court noted that the process is more or less the continuation of the British law, the Special Marriage Act 1872.

"The procedure of publishing a notice and inviting objections from public at large, as was provided under Act of 1872 was, thus, also adopted by the Act of 1954 with minor variations", the Court noted.

Taking note of this aspect, the Court made a striking observation:

"In view of the changed social circumstances and progress in laws noted and proposed by the Law Commission as well as law declared by the judgments of the Supreme Court, it would be cruel and unethical to force the present generation living with its current needs and expectations to follow the customs and traditions adopted by a generation living nearly 150 years back for its social needs and circumstance"

The effect of the judgment on the UP Ordinance

The paradox of personal law acting as a refuge for inter-faith couples and the secular law turning out to be a source of harassment for them is reflected in the judgment.

In this context, it is pertinent to refer to a curious argument made by the the UP Government, in its affidavit filed in response to cases challenging the 2020 Ordinance on conversions. It has argued that conversion for marriages are done due to compulsions of personal law and therefore such conversions cannot be termed as an exercise of free choice. The Ordinance was meant to protect such individuals who forsake their faith under pressure from personal law, claimed the affidavit of the UP government.

The affidavit stated :

"...wherever the personal law comes into play and the individual exercises the right of personal liberty but the personal law of the community to which the individual wants to enter upon by changing his (gender neutral) religion or religious practice causes issue of complexities as the dignity of the individual, gets compromised and the individual is not assured the equality of status. Thus what happens is that the individual while exercising the right of personal liberty loses his dignity and equality of status to the religion which he does not

adopt but is trying to take benefit of some-sort by being in the society of the member of the other religion. In such situation the individual even though has not changed his religion but has only exercised the right of liberty/choice to be in association with member of other religion but is deprived of the benefits as the benefit of the new religion will not be available unless and until a conversion takes place This conversion will be against the choice of the individual who wants to remain in the society with the member of other religion but does not want to leave his faith. Thus there is a conflict of interest which is an issue addressed by means of the instant legislation wherein the inter fundamental right of the individual are safeguarded".

However, the ground realities are different, as shown by the judgment. Inter-religious couples consider religious marriages a safer option due to the hassles under the Special Marriage Act. The effect of the UP Ordinance was to make that option also unsafe by criminalizing conversion for marriage.

Now that the High Court has ironed out the creases under the Special Marriage Act, inter-faith couples can hope to have a safe and smooth marriage registration process, without risking the wrath of the UP Ordinance.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/allahabad-high-courtc-inter-religious-couples-special-marriage-act-up-anti-conversion-ordinance-168383

Sneak Peek:

No. of words: 947 words

Note: In this article, the author has critically examined the Farm laws from the constitutional law perspective with the help of various decisions of apex court i.e. Supreme Court of India. It will help you to enhance your legal acumen. It is suggested to do follow it.

Article: 6

Centre's farm laws transgress Constitution's federal structure

The Constitution of India is a "fundamental document", as declared by B R Ambedkar on September 17, 1949 during the Constituent Assembly debates. To him, this document defined the powers and functions of the three organs of the state — the legislature, executive and judiciary: "…in fact, the purpose of a Constitution is not merely to create the organs of the State but to limit their authority because if no limitation was imposed upon the authority of organs, there will be complete tyranny and oppression… it would result in utter chaos."

The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020 (Act 20 of 2020), Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020 (Act 21 of 2020) and the Essential Commodities (Amendment) Act (ECA), 2020 (No. 22 of 2020), have been enacted by Parliament, and seemingly step beyond its authority, creating chaos.

Let us examine them from a constitutional perspective. The Supreme Court (SC) has consistently held agriculture to be a state subject. A constitution bench in ITC Ltd. v. Agricultural Produce Market Committee (2002) held: "The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy," holding that Parliament is incompetent to legislate on agriculture.

By Act 22, Parliament has virtually made the ECA, 1955, redundant. Central and state governments can now control the supply and price of essential commodities only in exceptional circumstances. Far from sub-serving the "interests of the general public", interests of large businesses will be served.

Act No. 20 and 21 of 2020, enacted by Parliament are clearly referable to Entry 14 and Entry 28 of List II, which include "agriculture" and "markets". The Constitution distributes in Schedule VII, subjects or matters to be legislated thus: List I for Parliament, List II for state legislatures, and List III for concurrent exercise by both, subject to limitations. Clearly, the Constitution-framers wanted states to deal exclusively with matters relating to agriculture.

T TKrishnamachari, member of the Drafting Committee, made the following pertinent point in the Constituent Assembly on June 14, 1949: "I am one of those who believes, and believes very firmly, that wherever we assign a field to the provinces in which they can act we must leave that province in sole charge of that field…"

ShibanlalSaxena moved an amendment seeking "…that agriculture and land revenue systems all over India should be amenable to planning on an all-India scale". This amendment was not accepted by Krishnamachari and was rejected. Brajeshwar Prasad proposed an amendment arguing that "agriculture is a vital subject… but here I am only saying that the power to legislate on this subject must remain exclusively in the hands of the Centre." Krishnamachari rejected this saying, that "agriculture happens to be the principal industry in this

country, and practically one of the main functions of the State, and beyond taking certain powers for the purpose of co-ordination, I do not think the Centre is at all capable of handling this vast problem…"

The two farm laws, ostensibly meant to create an ecosystem where farmers and traders enjoy the freedom of choice relating to the sale and purchase of farmers' produce, contain extraordinary provisions opposed to the regulation of markets by states for the sale and purchase of agricultural produce. In M.C. V. S. ArunachalaNadarEtcvs The State Of Madras & Others, the SC, speaking through J SubbaRao, asserted "that cultivators suffer from many handicaps: to begin with he is illiterate and in general ignorant of prevailing market prices especially in regard to commercial crops… The establishment of regulated markets must form an essential part of any ordered plan of agricultural development in this country." The Court observed: "The aforesaid observations describe the pitiable dependence of the middle-class and poor ryots on the middlemen and petty traders, with the result that the cultivators are not able to find markets for their produce wherein they can expect reasonable price for them."

The new farm laws, far from providing regulated markets, purport to leave cultivators to the mercy of the free market. A farming agreement for one or five years, providing for various facets of the supply of produce, including time, standards and price and other related matters, the power of inspection and rejection can create serious hurdles for the illiterate and ignorant cultivator. State laws do not apply once a farming agreement has been entered into and no stock limit applies to quantities of farming produce purchased thereunder, notwithstanding the ECA. The freedom to carry on inter-state or intra-sate trade and commerce in farm produce is now absolute. No levy or fee can be levied under the state APMC Act or any other law of the state.

The farm laws are clearly aimed at creating trading giants in agricultural produce who can control agricultural activity. These laws create "super middlemen" to replace the existing smaller middlemen, hurting the cultivators even more. The availability of regulated markets and the hope for fair prices stand shattered. Farm laws run counter to the state's policy, inter-alia, to distribute material resources to sub-serve common good, a Directive Principle.

In its 2019 election manifesto, the BJP had made 12 promises to farmers declaring, "at the very beginning of our current term, Prime Minister Modi embarked on a mission to double farmers' income. We will make all efforts to achieve this goal by 2022." So, what made it take a complete U-Turn? And why is the PM not willing to keep up his promise? We will never know.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/for-super-middlemen-farm-laws-farmer-protests-7156464/

Sneak Peek:

No. of words: 945 words

Note: In this article, the author has criticized the decision of the government to discard the winter session of parliament. Here, the author raises concerns over the said decision. As a CLAT aspirant, it is a must read article. Further it is suggested to make your own short notes on Types of Parliamentary session and types of questions which can be raised to elicit information on matters of public importance within the special cognizance of the Ministers concerned.

Article: 7

Doing Away with Winter Session of Parliament is a Fraud on the Constitution!

The present Indian government is a regime of seemingly infinite paradoxes. While laying the foundation stone and BhoomiPujan of the new Parliament building, PM ShriNarendraModi invoked Guru Nanak and reminded the people about his great message: "Jab taksansarrahe, tab taksamvadrahe", and stressed on the need for dialogue to preserve the 'soul of democracy.' But this does not mirror in the actual functioning of the government. The government earlier in Monsoon Session not only suspended the Question Hour but also reduced the duration of Zero Hour to 30 minutes. Now, government's decision to scrap the winter session of Parliament in the guise of the Covid-19 pandemic once again exhibits difference between precept and practice.

The Modi government has cultured the art of changing or evading important democratic discourses. Government's tactic to scrap winter session of the Parliament is part of this strategy. The government fears that the opposition parties might raise farmer's issue loudly in Parliament's winter session along with issues like decomposing economy, mishandling of Covid-19 pandemic, vaccination plan, deteriorating Centre-State relations, misuse of CBI by the centre etc. Populace may form a negative image of the government particularly the peasantry. Opposition in winter session may also create an adverse public opinion against the ruling party which is crazy to win the forthcoming Assembly elections in some states particularly in West Bengal where many of its stalwarts are working day and night to ensure the victory. The ruling regime is always in election mood and instead of focusing on governance, their sole agenda is to win more and more elections in the country be it assembly, municipality or village panchayat.

The rising numbers of BJP in the Upper house along with partisan outlook and approach of presiding officers have shockingly strengthened government's ability to pass crucial bills without proper debate and scrutiny. There is progressively a sense of deep cynicism with the very process of parliamentary debates or at least the way it is being captivated by the executive at this moment. Many important issues touching upon the lives of people require to be discussed in Parliament urgently. Many people are suffering badly due to the Covid crisis and many have lost their lives and livelihoods. Thousands of farmers are protesting on the Delhi borders against the three farm laws which were passed in Parliament in haste without a discussion during the Monsoon session. These farmers are demanding a total repeal of the three farm laws but the government is not ready to repeal these laws though indicated to make some amendments in the laws. Now the matter has also reached the Supreme Court and the Court has issued notice to the government as well as the farmers' bodies to have an amicable solution to the issue.

Undisputedly, the Covid-19 is a very difficult time when the entire humanity is fighting against this invisible deadly virus. We are not alone in this global war against coronavirus. The health concerns raised by the government are genuine but there are ways to deal with this situation. Skipping a full session does not seem appropriate. It is well-known that even during this time many political events have been organized in different parts of the country. We have witnessed an assembly election in Bihar and many by-polls were also held across states during this pandemic. No election was postponed due to Covid-19 situation. This shows that the pandemic cannot stop the legislative business in the country if there is a strong will power to organize things properly by following the prescribed norms. Many countries are holding sessions of their legislatures through digital platforms during this corona crisis. We also have sufficient resources to hold such discussions digitally, if not physically. In the Budget session, the entire focus will be on the Budget and it will be very difficult for the opposition parties to raise other issues of public importance in Parliament during that session.

Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion, and persuasion are, therefore, the means and essence of the democratic process. During the debates, the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter…….. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines." [KihotoHollohan v. Zachillu and Others, 1992, SR(1) 686].

The manner in which government is functioning seriously undermines the concept of 'parliamentary democracy where the executive is accountable by the legislature. This is not only the hallmark of parliamentary democracy but a component of the basic structure of the Constitution of India. Scrapping the Question Hour in Monsoon Session and now scrapping entire winter session are not only against the spirit of the Parliamentary democracy but also beyond the powers of the executive and therefore unconstitutional. The executive has no power to unilaterally decide to dispense with the question hour or scrapping entire session without the sanction of the whole House. The House has to expressly sanction it through a resolution. The members of the Parliament must understand that their constitutional right is being taken away by the executive. All opposition parties must come forward for initiating a constructive dialogue in a constructive manner using constructive means.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/parliament-winter-session-constitution-narendra-modi-covid19-democracy-168048

Sneak Peek:

No. of words: 1263 words

Note: In this article, the author has analyzed the constitutional validity with the help of various provision of law. It will help you to enhance your legal acumen. As a CLAT aspirant, it is a suggested to have a fair idea about the same.

Article: 8

Farm laws, their constitutional validity, and hope

In the event of further judicial intervention, there are grounds and an opportunity for the government to revisit the laws

With the Supreme Court of India staying the operation of the farm laws and setting up a committee of experts to negotiate with the government and the farmers, the agitation being carried on by the farmers is entering a new phase. The farmers' unions have not reacted favourably to the formation of the experts' committee. As it happens, the committee does not comprise entirely impartial experts. Most of them are well known and strong defenders of the farm laws, and are critical of the agitation.

The situation now

For conducting negotiations with both the government and the farmers, the members of the committee ought to and should be known to have an open mind on the core issues, which alone will create a necessary confidence in the parties concerned. The farmers have, however, made it clear that they will not agree to anything less than the repeal of these laws. This would mean that the present agitation is likely to continue indefinitely. It is not yet clear what impact the report of this committee will have on the final decision of the Supreme Court on the question of the constitutional validity of the farm laws. That is the real issue before the Supreme Court. So whatever the experts' committee recommends, the question of the constitutional validity of the farm laws can be decided only after a proper hearing of the matter before the Court. The most curious thing about a decision on this issue by the Supreme Court is that if the Court upholds the validity of the laws, the agitation will not stop because the farmers' demand is for the repeal of the laws.

But the government of India seems to have taken a maximalist approach, particularly on the question of a repeal of the farm laws. While the repeal of a law is a simple legislative act, having to repeal a law in which the government has invested a lot of its prestige is not so easy especially for a government which is extremely proud of its numerical majority in the LokSabha, which has generated a great deal of hubris. On the other hand, the farmers are unyielding on the demand for a repeal.

Not in accordance with rules

The constitutional validity of the farm laws has been challenged in the Supreme Court mainly on the ground that Parliament has no legislative competence to enact these laws, the subject matter of which is essentially in the State list. But there is a more fundamental reason to challenge these enactments which will be examined now.

It is a universally acknowledged fact that the voting on the Farm Bills in the RajyaSabha was not done in accordance with the rules of the House. These rules require the Chair to order the recording of votes (division) by members even when one member demands it. The Deputy Chairman of the House, who was conducting the proceedings at that time, did not order division although a few members openly and loudly demanded it. It is true that there was disorder in the House but it could have been controlled and a proper voting could have been conducted. Disorder was not taking place for the first time in the House. Thus, there was a violation of the rules of the House in passing the Bills by voice vote when there was a demand for division.

Voice vote is unrecognised

But the matter goes beyond the violation of the House rules. It involves the violation of the Constitution itself. Article 100 says that all questions at any sitting of either House shall be determined by a majority of votes of the members present and voting. Majority can be determined only in terms of number, and therefore what this Article requires is that all questions in the House should be determined by recording the votes of the members present and voting. Majority cannot be determined through voice vote. In fact the Constitution does not recognise voice vote to determine majority in a legislature. However, deciding a question by voice vote is a practice prevailing in all legislatures. This was devised for the sake of convenience and there is always an assumption that since the government of the day has a majority, any proposal before the House has the support of the majority. But that assumption goes when a member demands voting in the House and the Chair has, then, no option but to order the actual voting. Since this was not done and the Bills were all passed by voice vote, there is a violation of the rules as well as the Constitution.

Options before the judiciary

It is true that Article 122 of the Constitution protects the proceedings of the House from judicial review. But this protection is available only when the proceedings are challenged on irregularity of procedure. Violation of the Constitution is not a mere irregularity of procedure. The Supreme Court in Raja Ram Pal's case had clarified that the proceedings can be challenged on substantive grounds like violation of the Constitutional provisions. Therefore, the Farm Bills were passed in the RajyaSabha in violation of Article 100 of the Constitution and can be challenged in the Supreme Court on that ground.

Now what are the options before the Supreme Court if and when such a challenge is made? The Court can strike down the whole laws as the requirement of Article 107 has not been fulfilled. This Article says that a Bill shall not be deemed to have been passed unless it has been agreed to by both Houses. As has been explained above, the Bills have not in fact been passed by the RajyaSabha because the majority had not been determined in accordance with Article 100. It would mean that the three Bills did not become laws.

The Court may also invalidate the proceedings of the RajyaSabha and send the three 'Acts' back to that House for further proceedings in accordance with the constitutional provisions. If this happens, it may provide a good opportunity to the government to revisit these laws. These can then be referred to a Select Committee of the RajyaSabha which can invite the farmers and all other stakeholders and finally produce better Bills. Such an opportunity is invaluable in the present circumstances when the government is facing virtually a no-win situation. If, on the other hand, the government decides to withdraw the Bills after these are sent back to the RajyaSabha on the ground that it wants to bring fresh Bills with altered proposals, it will have that option too under the rules of the House. The possibility of these options can be creatively considered for finding a solution to this problem.

Centrality of Parliament

We may not forget that the issue that needs to be settled by the top court is only the constitutional validity of the laws. In resolving a problem like the agitation by farmers against the laws, the centrality of Parliament in the legislative process in all its dimensions should not be lost sight of. Once the Court decides the legality or constitutionality of a law, the political and legislative aspects of the issue will have to be dealt with only by Parliament. Parliament and its systems alone can produce a satisfactory solution. The only condition is that the government which is accountable to Parliament should genuinely demonstrate its faith in those systems.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/farm-laws-their-constitutional-validity-and-hope/article33570985.ece

Sneak Peek:

No. of words: 1091 words

Note: In this article, the author has raised concern over farm laws and the committee which is constituted to settle the matter of the same. Here the author has appreciated the steps taken by the Apex Court for constituting the committee for resolving the issue. As a CLAT aspirant, it is a must read article.

Article: 9

Mediating the farmers' protests is difficult terrain

If the top court does find itself mandated by a higher public duty to intervene, then it must observe some essentials.

For nearly half a hundred days, the farmers of North India protesting against the recent farm laws have been at the capital's outskirts, braving the bitter cold, and growing in numbers. They have mostly kept the peace and their dignity, and their communities seem ready to support them for as long as need be. If the authorities had any hopes of the protest petering out by dissonant voices claiming to represent farmers, or labelling them as anti-national and fuelled by pro-Khalistan elements, these do not look like carrying much weight. New Delhi's mandarins have a first class headache, brought on principally by the way in which they hustled through legislation which affects the lifeline of India's agrarian sector.

Central issue is about trust

One thing stands out clearly, and that is the lack of trust the farmers have developed about the designs of the government; the laws, they say, will leave them at the mercy of corporates. Given the imputed closeness of the ruling elite with corporate houses which have ascended to commanding heights of the economy in multiple key sectors, this is not a charge easily to discount. The farmers' focus is on retention of the MSP, the minimum support price mainly for wheat and rice, and the need to provide a statutory backing for this, in the absence of which a corporate with ready cash will tap into farms in need. And the necessity of continuing with the mandi system which provides the wherewithal for open trade. On its part, the government offers assurances but these fall short of binding legal mandates, in other words asking the farmer to accept on trust that all will be well — and that brings us back to the central problem of lack of trust in the central government.

Another thing that stands out clearly is the fact that the Prime Minister and the top leadership have been absent from dialogues with the farmers' representatives, these being helmed by junior Ministers out of the decision-making range. The earnestness of the government in finding a fair solution would have been well demonstrated if its heads lent a willing ear to those who toil on the ground to keep us well fed. For the essence of a hearing is that it may well open out your mind and give you a better perspective. And it brings comfort and confidence to those who are agitating to have their concerns redressed.

Committee and its mandate

In the encrusted stalemate now comes pitchforked the appointment of a committee by the Supreme Court, before which were petitions calling for removal of protesters and challenging the farm laws, accompanied by a stay of implementation of the laws with observations to the effect that the protesters need not continue on site.

This is problematic for several reasons. Staying a law on legal grounds of prima facie force in the constitutional challenge is one thing, holding it in abeyance to facilitate the committee's work and dispersal of protesters is another. Another is the mandate itself — the committee is supposedly made up of experts to give its recommendations to the Court on the laws; where exactly does a court come into the picture in what seems to be a legislative and executive exercise? It is another matter for a court to undertake legal examination and on finding provisions to be ultra vires, strike them down or declare the entire law void.

The body has not been termed a mediation committee nor formally tasked with conducting a mediation, but the Court does mention a role in assisting the negotiations between the farmers and the government, and in public discourse this is being talked about. A structured mediation would be approached differently. First, and this is of the essence, all necessary parties must consent to it; mediation's strength lies in its voluntary aspect. Here, prominent farmer unions held back, perhaps because they perceive that growing public support dictates the choice of the political battleground rather than the mediation table; if so, the Court should be circumspect before entering the arena. The other reason for rejection has to do with the second basic requirement for mediation, that the mediators must be fair and neutral, and seen and perceived by all parties to be such. Appointing persons who have publicly taken strong stands on the merits of the matter is asking for a non-starter.

The pathway to take

It is a tricky situation and caution would forbear a Court from wading into a political minefield. However, it has repeatedly been said by the Chief Justice of India that the negotiations seem to be going nowhere, and something urgent needs to be done. In times gone by, the Court has utilised its reservoir of public trust to mandate and structure a mediation in public disputes. This is being occasioned because increasingly, current day politicians seem to have lost the willingness and capacity to reach out and build bridges and find solutions. But if the Court does find itself mandated by a higher public duty to intervene, then it must observe some essentials. The first is to offer a committee of such composition that its neutrality, calibre and gravitas command respect and persuade doubters to give the process a try. There are some, but not many, former Chief Justices of the Supreme Court of India who will qualify to serve. The second is to obtain from the government the assurance that its highest level will meet the committee and participate in the proceedings. With this on offer, the consent of all parties may be secured.

Once discussions start and are properly guided, solutions are possible. It may well be that once the important elements get focused upon and the key concerns expressed, approaches will open up which will secure legitimate interests to the maximum extent possible. Right now, parties are log jammed on the demand for immediate repeal, and the counter of focusing on amendments. The Supreme Court order may relegate this obstacle to the background. With all aspects on the table, it may be possible to get agreement and then put forward a law for repeal and reenactment, a known legislative device. All this is however possible if it is mediation on accepted principles and lines, which is not the case now. The Court needs to be careful about further continuance; its reservoir of public trust should not further be diminished.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/mediating-the-farmers-protests-is-difficult-terrain/article33570989.ece.

Sneak Peek:

No. of words: 1280 words

Note: The article talks about Central Vista case tracing the history of the case and importance of the same. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 10

Central Vista, executive's caprice, and rule of law

Constitutional tradition requires the state's decisions to be just, fair and reasonable and adhere to procedure

There is a pattern that emerges out of the contemporary Supreme Court of India's most notable judgments. These rulings invariably begin with an homage to the ideas of the rule of law. But the opening tributes are left by the wayside when it comes time for the Court to apply those ideas to the case at hand. The invariable upshot: the executive government's caprice trumps due process, and the rule of law survives only in name. The judgment delivered on January 5 in Rajeev Suri v. Delhi Development Authority, in which a 2:1 majority of the Court granted its imprimatur to the proposed redevelopment of the Central Vista in the national capital, fits the trend.

Right to public participation

The majority's ruling begins in now-customary fashion. It holds that in a republic governed by the rule of law, the government's actions, "howsoever laudable" they might be, must stand the test of the Constitution. But when you read on from there, a shudder of déjà vu soon sets in. The early paeans to the "high principles of democratic values" are enfeebled by the Court's refusal to acknowledge the existence of a right to public participation, a right, which ought to be seen as fundamental in a democracy, properly understood. What is more, a repudiation of basic environmental norms is condoned, because, according to the Court, "the principle of sustainable development and precautionary principle need to be understood in a proper context", one in which "competing public interests" must be harmonised and balanced. As we know only too well, every time the Court uses the language of harmony and balance, development eclipses every other concern.

A state-people link

Delhi's Central Vista, originally conceived by Edwin Lutyens, stretches from India Gate to RashtrapatiBhavan. Littered with sprawling parks and lawns, it houses not only an ensemble of landmark government buildings — from Parliament House to the Secretariats on the North and South Block — but also a number of other important public structures: among others, the National Archives of India, the National Museum and the National War Memorial. Its open spaces and the easy physical access that it affords to seats of power also mean that it has served in many ways as a link between the state and its people.

In 2009, the Central Vista was considered important enough to be designated, after extensive public consultation, as a Grade-I heritage precinct. This meant that any development inside the area had to be "regulated and controlled" in a manner that would leave its grandeur unscathed. But the proposal today, which portends enormous costs, is not any simple act of development within the boundaries of the area.

Instead, it seeks to remake the space. A new Parliament house will be erected next to the existing heritage building — it has been suggested, the central hall, where Nehru made his "Tryst with Destiny" speech, where the Constitution was adopted, would be converted into a "museum of democracy". A new secretariat and a new residence for the Prime Minister will be built, and a number of post-Independence buildings, including the National Museum, will be taken down.

Petitions and claims

Petitions originally filed in the Delhi High Court, and transferred later to the Supreme Court, alleged that the government had failed to follow due process in approving the project. Two claims stand out: first, that the state had sanctioned an alteration to the existing land use permitted under law without sufficient public consultation; second, that the environmental clearance for the project is unreasoned, and was, in any event, obtained by illegitimately carving the project into two.

In his judgment for the majority, Justice A.M. Khanwilkar, writing on behalf of himself and Justice Dinesh Maheshwari, holds that the project required no special judicial scrutiny. According to the Court, the petitioners' case was not predicated on the violation of any fundamental right, but only on the rigours prescribed by statute, in this case, the Delhi Development Act, 1957. That law, though, as Justice SanjivKhanna's dissenting opinion notes, does, in fact, mandate, among other things, the granting of an opportunity to the public to place on record its objections, and for those objections to be considered by hearing the objectors.

Here, although objections were invited from the public, a mere three-days' notice was given for the hearing on those complaints. The majority rules that the law does not make personal hearings mandatory, and, therefore, it was irrelevant whether sufficient time was granted or not. There are, at least, two problems with this finding: one, the Court has consistently held in the past that arbitrary state action violates fundamental rights, in particular the equality clause of Article 14. This would mean that in a project such as this, where a transformational change is brought about to the Master Plan framed under the 1957 Act, the public ought to have been accorded a sufficient chance to place on record all its objections, and a sufficient chance to be heard personally on those complaints.

Two, any civic participation can be productive only if complete information is placed in the public domain. In this case, the Board of Enquiry and Hearing (BoEH) which was appointed to consider the objections raised on the change in the land use, recognised the merit in the objectors' plea that the full details of the project were not made available. "Among the respondents, majority of whom are Planners/Architects, there appears to be a feeling that authentic technical information on this iconic project of Central Vista is not available in public domain, which is leading to avoidable misgivings....," its report noted. Moreover, it also recommended that "impact assessment studies on traffic, environment and heritage" ought to be commissioned at the earliest. But despite these findings the Delhi Development Authority sanctioned the proposal.

Need for adequate disclosures

According to the majority, it was sufficient that the authority had the power to do so. The absence of a reasoned order overriding the BoEH's specific concerns was found to be of no value. As a result, the Court had effectively determined that the Constitution guarantees no independent right to public participation. But, as the dissenting judgment shows us, the most basic principles of procedural fairness — doctrines that flow from an array of constitutional promises — require the state to make adequate and intelligible disclosures. This is especially so in this case, because, as Justice Khanna identifies, the project, when executed, will have permanent and irreversible consequences.

Environmental scrutiny

The nature of the project ought to have also led to a more careful scrutiny on the environmental clearance granted to it by the Expert Appraisal Committee. Clearance had been sought not for the redevelopment of the Central Vista but only for the construction of a new Parliament building. This meant that the application was considered simply as a "Building and Construction Project" rather than as a "Township and Area Development Project", which would have enhanced the level of inspection. Again, as the dissent observes, the Expert Appraisal Committee's order granting sanction does not so much as render a finding on why the project was sliced into two.

These concerns over procedure, and over the denial of adequate public participation, might not strike us intuitively as matters of grave importance. But if the rule of law must mean something, we must regard the basic goals of our constitutional tradition with respect. That tradition, more than anything else, requires decisions made by the state to be just, fair and reasonable, both in its substance, and, however tedious it might be, in its adherence to procedure.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/central-vista-executives-caprice-and-rule-of-law/article33545045.ece

Sneak Peek:

No. of words: 1149 words

Note: This article gains prominence as it alleges for the amount of Environmental Relief Fund (ERF) which has not been utilized in the direction in which it was intended.

Article: 11

Under utilisation of Environmental Relief Fund defeats the "Polluter Pays" principle

In the nearly 30 years of its existence, it has become doubtful if the Fund has been achieving its purpose as accounts of under utilisation and indifference by the authorities keep surfacing.

It was recently reported that a massive amount of over Rs 800 crore meant for environmental restoration and compensating victims of hazardous substances is lying unutilised in the Environmental Relief Fund (ERF). Given the significance the Fund holds in giving substance to environmental law principles like "polluter pays" and ensuring environmental restoration, it is important to identify structural and practical shortfalls in its administration.

The ERF was established under the Public Liability Insurance Act, 1991 in the wake of the Bhopal Gas tragedy to ensure immediate compensation to the victims of industrial accidents. Under the Act, every person who owns or has control over any hazardous substances is mandated to take out insurance and deposit its premium in the Fund, which is then used by the Collector to award immediate relief to the claimants. The Fund also draws its authority from the National Green Tribunal (NGT) Act, 2010 (and its predecessor, the National Environment Tribunal Act, 1995), under Section 24 of which the amount of damages or relief awarded by the NGT is to be remitted to the Fund.

The UPA government notified the Environment Relief Scheme in 2008 under which the United India Insurance Company Limited was appointed the fund manager for administering and managing the Fund. The fund manager is responsible for investing the amount in the Fund, making claim settlements as per the Collector's order and maintaining account statements. These account statements along with the audit reports are to be submitted annually to the Ministry of Environment, Forest and Climate Change.

The Fund is born out of the "no fault liability" principle as it compels industry owners to compensate victims of hazardous substances even if no responsibility can be attributed to the owner. It is also the spine of sustainability as NGT can award damages under the polluters pay principle to ensure that environmental concerns are not traded off in the name of development. Therefore, the money in the Fund is intended to support the recovery of damages by the victim and the restoration of the environment to undo industrial or urban damage.

However, in the nearly 30 years of its existence, it has become doubtful if the Fund has been achieving its purpose as accounts of underutilisation and indifference by the authorities keep surfacing.

In December 2018, I filed an RTI application with the Ministry of Environment, seeking a statement of accounts pertaining to the compensation deposited in the Fund in compliance with NGT orders between the years 2010-2018. The Ministry transferred the application to the NGT which, in turn, denied having the information on account of being a quasi-judicial body and not a regulatory authority. Ultimately, I ended up filing a second appeal with the Central Information Commission and the final order in the case was issued in October 2020.

The CIC allowed the appeal, directing the Ministry to share the information within 15 days or file an affidavit confirming that the information is not available with the Ministry. In its order, the CIC observed that the Ministry should be maintaining this public record especially given the specific provision to this effect in the Environmental Relief Scheme 2008.

It is interesting that despite the Scheme mandating that consolidated statements of accounts be sent to the central government annually, the Ministry had to source the records for all years from the fund manager during the 15-day period to comply with the CIC order. The fact that it took two years and a CIC order for the Ministry to obtain the statements from the fund manager clearly indicates that proper records are not being maintained by the Ministry.

On perusing the statements of eight years, I found only one instance where a deposit of compensation award of the NGT was recorded. This information is hard to swallow considering there are numerous NGT orders where specific direction has been given to the polluter to deposit the compensation amount in the Fund. Moreover, the receipt was recorded under the overarching head of "Others" as opposed to a separate account head meant specifically for the NGT as is required under Rule 35(4) of NGT (Practice and Procedure) Rules, 2011. Is it the case that the polluters are not complying with the NGT orders and not depositing the compensation in the Fund? And if such deposits are indeed being made, then are the records being improperly maintained? These questions raise serious issues with regard to the management of the Fund and should be looked into by the Ministry or the Comptroller and Auditor General (CAG).

The NGT in its order dated November 20, 2020, decided a plea alleging that over Rs 800 crore was lying unutilized in the Fund. Not surprisingly, the Tribunal found that there was no information available with the Ministry on the utilisation of the Fund and called it a 'travesty of justice' that the welfare legislation was not achieving its purpose in bringing relief to the victims.

This is not the first time that the issue of enormous amounts of environmental compensation lying unutilised has come to the fore. In 2013, in a landmark move, the Supreme Court imposed a fine of Rs 100 crore on Sterlite Industries with the hope of having a deterrent effect on the polluter. The Apex Court directed the amount to be deposited with the Collector who would then, in turn, invest the sum and use the interest for improving the environment near Sterlite's plant. However, in 2018 it was reported that only Rs 7 crore from this amount had been spent by the Collector.

The fact that the Court did not invoke the mechanism of the Fund but instead ordered the Collector to directly receive the money (which was then deposited in a State Bank of India branch) is perhaps another issue. Even if it is argued that the Court was not operating within the framework for PLIA and the NGT Act in its judgment, it stands to reason that when a Fund already exists for the specific purpose of environmental relief, then it must be resorted to in such cases.

The environmental jurisprudence in the country has evolved to be sympathetic to the environmental costs of development. It has attended to the victims, and gone beyond reparation to award punitive damages. However, the law can be of only so much use in the books if the relief is not reaching the victim and the environment not being actively restored. Right from the Central Government to the local Collector, the authorities need to be held accountable for their inaction. Attention needs to be drawn to the effective monitoring of large volumes of public money lying untouched in the Fund.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/environmental-relief-fund-pollution-india-7142247/

Sneak Peek:

No. of words: 669 words

Note: This article talks about Shakti Bill which was recently approved by the Maharashtra Cabinet. This bill relates to making changes to existing laws on violence against women and children. As a CLAT aspirants, do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 12

Punitive responses to sexual violence need rethink, given perverse consequences

Tackling crimes against women and children requires broader social reforms, sustained governance efforts and strengthening investigative and reporting mechanisms, instead of merely enhancing punishment.

The new standard of consent poses the serious risk of reinforcing myths, including regressive notions about "ideal" rape victim.

On Human Rights Day 2020, the Maharashtra cabinet approved the Shakti Bill, enlarging the scope of harsher and mandatory sentences — including the death penalty — for non-homicidal rape, to purportedly deter sexual offences. The Bill also introduces a problematic standard of consent and allows decision-makers to presume consent from the conduct and circumstances surrounding the incident. Harsher sentences have had perverse consequences on the already low rates of rape convictions. Besides, the new standard of consent poses the serious risk of reinforcing myths, including regressive notions about "ideal" rape victim.

The Shakti Bill comes amid the recent legislative trend to invoke the death penalty for sexual offences, beginning with the introduction of the death penalty for child rape in 2018. In 2020, the Andhra Pradesh government passed the Disha Bill, pending presidential assent, that provides the death penalty for the rape of adult women.

The death penalty is the last phase of a criminal trial while rape survivors face serious obstacles much earlier, especially at the time of registration of the complaint. The most severe gaps in the justice delivery system are related to reporting a police complaint. The focus of the criminal justice system, therefore, needs to shift from sentencing and punishment to the stages of reporting, investigation and victim-support mechanisms. The bill does not address these concerns.

Second, harsh penalties often have the consequence of reducing the rate of conviction for the offence. For instance, a study by one of us published in the Indian Law Review based on rape judgments in Delhi shows a lower rate of conviction after the removal of judicial discretion in 2013. Introducing harsher penalties does not remove systemic prejudices from the minds of judges and the police, who might refuse to register complaints, or acquit offenders in cases they do not consider as "serious" enough to warrant a mandatory minimum.

Third, studies on child sexual abuse have shown that in the few cases of convictions, the minimum sentence was the norm and the award of the maximum punishment was an exception. Moreover, crime data from the National Crime Records Bureau shows that in 93.6 per cent of these cases, the perpetrators were known to the victims. Introducing capital punishment would deter complainants from registering complaints. The Shakti Bill ignores crucial empirical evidence on these cases.

The other anti-women assertion in the bill is the move away from the standard of affirmative consent in cases involving adult victims and offenders. Significant advocacy from the women's movement led to the introduction of an affirmative standard of consent, rooted in unequivocal voluntary agreement by women through words, gestures or any form of verbal or non-verbal communication. In a sharp departure, the bill stipulates that valid consent can be presumed from the "conduct of the parties" and the "circumstances surrounding it". Rape trials continue to be guided by misogynistic notions, expecting survivors to necessarily resist the act, suffer injuries and appear visibly distressed. The vaguely worded explanation in the bill holds dangerous possibilities of expecting survivors to respond only in a certain manner, thus creating the stereotype of an "ideal" victim. It also overlooks the fact that perpetrators are known to the survivors in nearly 94 per cent of rapes, which often do not involve any brutal violence.

The Shakti Bill, while serving the populist agenda of making the public believe that the state is doing "something", does not achieve more than that. Tackling crimes against women and children requires broader social reforms, sustained governance efforts and strengthening investigative and reporting mechanisms, instead of merely enhancing punishment. Punitive responses to sexual violence need serious rethinking, given the multitude of perverse consequences and their negligible role in addressing the actual needs of rape survivors.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/maharashtra-shakti-bill-rape-offence-disha-bill-maharashtra-cabinet-7135848/

Sneak Peek:

No. of words: 1053 words

Note: In this article, the author has critically analyzed the Personal Data Protection Bill 2019 in the light of contemporary developments. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 13

Personal Data Protection Bill 2019 needs to be debated thoroughly

It provides an opportunity for India to forge an agenda that will act as a standard-setter in national data protection legislation.

In recent years, the question of privacy has loomed large over the global legal, political, and commercial imagination, and India is no exception.

As per Puttuswamy v India (2017), privacy is a fundamental right. This was an important development. When previous cases on privacy had come before the Supreme Court, most notably MP Sharma v. Satish Chandra (1954) and Kharak Singh v. Uttar Pradesh (1962), the judges had declared that while in certain circumstances the privacy of individuals was to be protected, there was no constitutional right to privacy in and of itself.

But a Supreme Court ruling is certainly not enough. The relentless march of global technology and the implementation of the Aadhaar biometric programme, in particular, have created the need to take a new look at the legal position of privacy in India.

The main battleground of privacy today, as demonstrated by Aadhaar and many others cases, is data, an intangible product that now forms the basis of much of the world economy and carries staggering political capital. The rising importance of data has pushed over 80 countries to pass national laws protecting the collection and use of their citizens' data by companies and the government. Sometime in the near future, India will join them as the Personal Data Protection Bill 2019 (DPB) is currently under consideration by a parliamentary committee.

The DPB will have huge commercial and political consequences for India. According to Ernst and Young, emerging technologies in India will create $1 trillion in economic value by 2025. Much of this value will be founded on the creation, use, and sale of data, and the DPB will have immense implications as firms scramble to meet new privacy regulations.

The bill establishes a number of conditions for companies to follow, and for large international tech firms that wish to operate in Indian territory. For one, it would require digital firms to obtain permission from users before collecting their data. It also declares that users who provide data are, in effect, the owners of their own data. This has major implications, suggesting that users are able to control the data their online selves produce, and may request firms to delete it, just as European internet-users are able to exercise a "right to be forgotten" and have evidence of their online presence removed.

But the bill does not protect individuals against the Indian government as effectively. It stipulates that "critical" or "sensitive" personal data, related to information such as religion, or to matters of national

security, must be accessible to the government if needed to protect national interest. Critics have suggested that such open-ended access could lead to misuse. Even B N Srikrishna, who chaired the committee that drafted the original bill, warned that government-access exemptions risk creating an "Orwellian state".

There is enough reason to worry indeed. The bill outlines the establishment of a Data Protection Authority (DPA), which will be charged with managing data collected by the Aadhaarprogramme. It will be led by a chairperson and six committee members, appointed by the central government on the recommendation of a selection committee. But this committee will be composed of senior civil servants, including the Cabinet Secretary, raising questions about the board's independence. The government's power to appoint and remove members at its discretion also stokes fears about its ability to influence this ostensibly independent agency. Unlike similar institutions, such as the Reserve Bank of India or the Securities and Exchange Board, the DPA will not have an independent expert or member of the judiciary on its governing committee. The UIDAI, for its part, has a chairperson appointed by the central government and reporting directly to the Centre.

The need to protect individual freedom is particularly acute as recent developments have suggested that India was acquiring some features of a surveillance state. For instance, the government of India has resorted increasingly to facial recognition whereas using this technique violates privacy rights. After the anti-CAA protests and the Delhi riots, Home Minister Amit Shah declared, "Police have identified 1,100 people through facial recognition technology. Nearly 300 people came from Uttar Pradesh. It was a planned conspiracy." How could the police know? It seems that the footage procured from CCTV, media persons and the public was matched with photographs stored in the database of Election Commission and e-Vahan, a pan-India database of vehicle registration maintained by the Ministry of Road Transport and Highways.

Aside from the controversy surrounding the Aadhaarprogramme, the most recent indication of the Indian government's casual treatment of its citizens' privacy was the backlash to the AarogyaSetu contact-tracing app, developed to track the spread of the COVID-19 pandemic. The government first made the app mandatory, but reactions from opposition parties and civil-society groups forced it into backtracking. Technology experts criticised the app for its apparently wanton data collection and its lack of adequate data protection measures. Where are these data stored and who has access to them remain open questions.

These developments do not augur well for the Indian government's responsibility when it comes to mass data collection and protection. This is why the privacy bill is such an important piece of legislation. The DPB is a unique opportunity for India, a country with some 740 million internet users, to forge a pathbreaking agenda that will act as a standard-setter in the still-developing field of national data protection legislation. Strangely enough, it will not be discussed by the parliamentary committee on Information Technology chaired by ShashiTharoor, but by a Joint Parliamentary Committee (JPC) of 30 MPs, 15 of whom are from the BJP, that is headed by MeenakshiLekhi. Tharoor has argued that his IT committee holds the mandate to examine the DPB, and has called the government's decision to refer it to the JPC a "wilful exercise of undermining the House" that shows a "brazen disregard for the Standing Committee". Will a transparent debate take place in the JPC and then in Parliament for promoting transparency? Such a debate would make Parliament an important power centre again, after the cancellation of the winter session, and the cancellation of the question hours in the previous session.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/personal-data-protection-bill-2019-privacy-laws-7135832/

Sneak Peek:

No. of words: 1849 words

Note: In this article, the author has discussed the pivotal clauses in the new Whatsapp privacy policy and highlights the need for Data Protection law in India. It is very informative text to understand the legal position about the subject. As a CLAT aspirant, it is a must read article.

Article: 14

The buzz around the WhatsApp privacy policy and a possible antidote

Data collection is indispensable and not the problem. The problem is the lack of safeguards and guidelines on how this data can be used.

Recently, WhatsApp directed its users to accept its revised privacy policy, failing which they would not be able to use the app. Already, much damage is occurring to the large user base of WhatsApp due to concerns being raised on its privacy policy. In this scenario, it becomes important to have a close look at the key clauses in the WhatsApp User Agreement.

We also look at how legislation passed by California can be used as a template to safeguard data privacy in India.

But first, a passing reference to the Third Party Doctrine.

Third Party Doctrine - Smith v. Maryland

As propounded by the United States Supreme Court, the third party doctrine in practical terms means that a person has no right of privacy over data that is voluntarily given up and is held by a company. The individual loses sole-propriety over such data.

Forty-two years down the road, the precedent still holds good and is frequently cited before courts around the globe by law enforcement agencies. It is because of such judicial trends that the collection, retention, use and sharing of personal data by companies like WhatsApp gains significance. Let's look at the key terms contained in the WhatsApp User Agreement and how they play out.

Key Terms in WhatsApp Privacy Policy

1. Messages: The policy provides that the messages sent and received by users are not retained on WhatsApp servers in the usual course once they are delivered to their destination. These messages are stored locally on the sender's and receiver's mobile devices. However, when users back up their messages on cloud services like Apple's iCloud or Google Drive, the messages are forwarded from the mobile device's local storage to these cloud service providers and their use of this data is governed by their own privacy policies which need to be studied separately.

The non-retention of messages by WhatsApp on its servers appears to be a genuine step towards securing its users' privacy inasmuch as law enforcement agencies cannot ask WhatsApp for disclosure of messages to them for the simple reason of non-availability of messages with the company. Messages, if obtained by anybody from the device's local memory or cloud storage, are not attributable to WhatsApp. While WhatsApp

is doing its level best at averting warrants to disclose messages by not storing them at all, iCloud and Google Drive obviously have to save this data on their servers as an inherent feature of the cloud technology.

Here, it is not the privacy policy of these companies but the local laws of the countries where the data is stored that decide whether disclosure of such data can be sought by law enforcement agencies or not. Therefore, greater sensitization amongst lawmakers globally is required to uphold privacy on this front.

2. Account information, connections, status information, location, transactions and payments data: All of this data including how users use WhatsApp, with whom and for how long they communicate, their geo-location, model and distinctive identifiers of the device and connection used, etc. are some pieces of personal information that are stored by WhatsApp for various purposes. The retention and use by WhatsApp of these pieces of information is necessary for operation of various basic features of the app. For example, when a user tries to share a picture from their phone's gallery over WhatsApp, the app shows the most frequently contacted person at the top of the list. There is no way that this feature can work without collection and retention of usage and log information.

When better-than-ever-before features are always expected by users, the collection and retention of an even wider platter of data is a sine qua non for making it possible. Similarly, the sharing of this data with group companies is aimed at providing an overall better experience to each user by customising the app interface to the user's personal liking. Sure, there is a risk of excessive disclosure of information for improper considerations, but for that, separate safeguards can be put in place.

Unlike messages, when all this information is collected and retained by WhatsApp, its disclosure (if at all required) becomes subject of the local laws of the countries where data is stored. The privacy policy on this front clearly reads:

"We access, preserve, and share your information described in the "Information We Collect" section of this Privacy Policy above if we have a good-faith belief that it is necessary to: (a) respond pursuant to applicable law or regulations, legal process, or government requests; (b) enforce our Terms and any other applicable terms and policies, including for investigations of potential violations; (c) detect, investigate, prevent, or address fraud and other illegal activity or security and technical issues; or (d) protect the rights, property, and safety of our users, WhatsApp, the other Facebook Companies, or others, including to prevent death or imminent bodily harm."

Even if it was not explicitly stated in the privacy policy, the requests for disclosure of retained information cannot be averted if the local laws of the countries where data is stored mandates disclosure of data on direction of law enforcement agencies.

3. Sharing of chats with business accounts: The storage of chats with business accounts and sharing of these chats with group companies is being assailed as the most gross violation of privacy of the users. But is it really that big an issue? Next time you visit a website for the first time, do note how quickly your finger hovers over and taps the 'accept cookies' button. A basic component of the modern internet, the sole function of these 'cookies', is to track your online activity and share that data with business and advertisement analysts and strategists. This data is in turn used to display content that you are likely to find interesting and engage in premised on your recorded behaviour. This is how YouTube recommends the most interesting videos and how you see an ad for the grey running shoes that your searched on Amazon the previous day.

WhatsApp seeks to do the same thing (but by being honest about it). In fact, Justice SanjeevSachdeva justly commented while hearing a writ petition challenging WhatsApp's privacy policy that it is a private app and users may choose to delete it if they feel that it compromises their privacy.

The present unrest among users is primarily due to the possibility of breach of their privacy by sharing of their personal data amongst corporate players for iniquitous considerations. What steps could be taken to tighten the noose on this front? Inspiration from a foreign law discussed below may hold the redeeming power.

Steps towards the solution

The foremost thing to realize is that we are beyond the point where we can agitate about collection and storage of personal data by businesses like WhatsApp after this fact is disclosed in their privacy policies. Data collection and storage is indispensable for development of technology. In these circumstances, greater emphasis must be supplied on regulating the ways in which data can be utilised by them. To start with, a clue can be found in WhatsApp's own privacy policy. It makes a reference to the California Consumer Privacy Act of 2018 (CCPA).

CCPA is a recent legislation which came into effect on January 1, 2020 in the US State of California. It is a sweeping legislation which mandates that businesses like WhatsApp tell customers what data they gather about them. The users have the right to seek information on the commercial purpose behind collection and sharing of their data, whether their personal data is sold or disclosed, and if so, to whom. The specific pieces of information so sold/disclosed can also be sought. Users can also place requests for deletion of data and give instructions to stop further sale/disclosure of their data to third parties.

The Act contains provisions which ensure that the users who exercise rights under the Act are not discriminated against or subjected to any form of retaliation by the businesses. Further, the Act provides for the establishment of the California Privacy Protection Agency, which is vested with full administrative power, authority, and jurisdiction to implement and enforce the Act. Any business, service provider, contractor, or other person who violates the provision of the Act can be served with injunctions and made liable to pay civil penalty of not more than $2,500 for each violation and $7,500 for each intentional violation.

More than anything, the legislation is a concerted effort towards making the big tech companies conscious of what data they collect, how they collect it, how they use it and with whom they share it. This is surely going to have a sobering effect on companies who in some cases have been found to be rampantly sharing personal data of billions of users for iniquitous purposes. What happened in the case of Cambridge Analytica is a classic example. In Section 2 of the Bill which was ultimately passed, the legislature had declared:

"(e) Many businesses collect personal information from California consumers. They may know where a consumer lives and how many children a consumer has, how fast a consumer drives, a consumer's personality, sleep habits, biometric and health information, financial information, precise geolocation information, and social networks, to name a few categories.

(f) The unauthorized disclosure of personal information and the loss of privacy can have devastating effects for individuals, ranging from financial fraud, identity theft, and unnecessary costs to personal time and finances, to destruction of property, harassment, reputational damage, emotional stress, and even potential physical harm.

(h) People desire privacy and more control over their information. California consumers should be able to exercise control over their personal information, and they want to be certain that there are safeguards against misuse of their personal information. It is possible for businesses both to respect consumers' privacy and provide a high level transparency to their business practices."

The challenges concerning violation of privacy are almost similar across all jurisdictions. Therefore, it becomes necessary that such safeguards are put in place by the legislature in India as well. At the cost of

repetition, data collection is indispensable and not the problem. The problem is the lack of safeguards and guidelines on how this data can be used.

Instead of writing letters to WhatsApp and requesting it to withdraw its privacy policy, the government should work towards rectifying the lacunae in the Personal Data Protection Bill, 2019 and get it enacted before it is too late. Though the Personal Data Protection Bill, 2019 removed various shortcomings of the 2018 Bill like diluting the requirement of data localization, yet the provisions which empower the government to exempt government agencies from provisions of the Bill have still been retained and can defeat its purpose. Data needs to be protected not only from the businesses but also from the so-called custodians of our democracy. It is time to tighten the noose.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/the-buzz-around-the-whatsapp-privacy-policy-and-a-possible-antidote

Sneak Peek:

No. of words: 1569 words

Note: In this article, the author has critically analyzed the concept - Is social media chats as piece of evidence is admissible? Here, the author analyzed the recent incident leak of Whatsapp chats of Arnab Goswami and former BARC CEO Partho Das Gupta.

Article: 15

Are WhatsApp Chats Admissible In Evidence?

The social media is abuzz with the details from alleged Whatsapp chats between Republic TV anchor ArnabGoswami and former BARC CEO Partho Das Gupta. The 500-page long Whatsapp conversations between Goswami and Das Gupta found their way into social media after Mumbai Police annexed it in its supplementary charge filed in the TRP rigging case.

In this backdrop, several users raised questions regarding admissibility of Whatsapp chats as evidence. Let us discuss this issue.

The first thing we have to keep in mind is that an "electronic record" is also included in the definition of "evidence" under Section 3 of the Indian Evidence Act. It is treated as 'documentary evidence'.

According to Section 2(1) (t) of the Information Technology Act, an electronic record is "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche".

The Evidence Act allows giving of evidence in respect of facts in issue and relevant facts. So, an electronic record can be an evidence in a trial if it relates to a fact in issue or a relevant facts of a case.

However, there is a catch with respect to electronic records. The nature of evidence in the case of online conversations like Whatsapp chats will mostly be secondary in nature. In other words, the evidence produced in the court with respect to online chats will be print outs of the backup documents saved in the server or of the screen-shots of the chats, unless the device itself is produced.

The normal rule of evidence is that a document must be proved by primary evidence by proving the document itself. Oral evidence about the contents of the documents is barred by the Evidence Act(Section 92). Section 64 of the Evidence Act says that "documents must be proved by primary evidence" except in the circumstances mentioned in Section 65.

Proving of documents through secondary evidence(such as certified copies, photocopies etc) is permitted only in exceptional circumstances which are detailed under Section 65 of the Evidence Act. We have already seen how electronic records as regarded as documents under the Evidence Act).

Realizing the advent of information technology, the legislature incorporated a special provision in 2000 to admit electronic evidence in secondary form - Section 65B.

Section 65B says that any information contained in an electronic record which is :

printed on a paper(such as print outs) ,

stored, recorded or copied in optical or magnetic data produced by a computer(such as CDs, DVDs)

will be deemed to be a document.

But for such records to be admissible as evidence, the certain conditions have to be fulfilled.

Such conditions are :

the computer that produced it must have been used regularly at the time of production of such electronic documents;

the kind of information contained in the computer must be such that it is regularly and normally supplied to the electronic device;

the computer should be in proper condition and must work properly at time of creation of electronic record; and,

the duplicate copy must be a reproduction of the original electronic record.

To admit the electronic record as evidence, it must be accompanied with a certificate from a person who produced the copy certifying that the same fulfills the above-said four conditions. Section 65B(4) speaks of this certificate.

There was a judicial confusion as to whether Section 65B(4) was a mandatory condition. Last year, a 3-judge bench of the Supreme Court settled conflicting decisions on the point to authoritatively rule that at Certificate under Section 65B is a condition precedent to the admissibility of evidence by way of electronic record(ArjunPanditRao v. KailashKushanrao)

The Supreme Court also stated that Section 65B (1) differentiates between:

(i) 'original document' - which is the original electronic record contained in the computer in which the original information is first stored; and

(ii) the computer output containing such information, which then may be treated as evidence of the contents of the 'original document'.

The Supreme Court clarified that Certificate is not necessary if the 'original document' itself is produced (as a primary evidence). This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. However, in all other cases, proof of such electronic record can be through in accordance with Section 65B (1) together with production of the requisite Certificate under Section 65B (4) of the Act.

The judgment authored by Justice RF Narimanstated :

"Section 65B(1) clearly differentiates between the"original" document - which would be the original "electronic record"contained in the "computer" in which the original information is first stored -and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom –the former being primary evidence, and the latter being secondary evidence.

Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...". This may more appropriately be read without the words "under Section 62 of the Evidence Act,...".

Decisions

There are certain decisions which have observed that Whatsapp chats can be admitted in evidence provided they fulfill the conditions under Section 65B of the Evidence Act.

In Ambalal Sarabhai Enterprise Ltd v KS Infraspace LLP Limited and Another, the Supreme Court, while hearing a petition challenging an injunction order, made a reference to the Whatsapp chats produced as evidence in the case.

"The WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidence - in - chief and cross examination. The e - mails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not", the Court observed in the judgment delivered on January 6, 2020.

This means that the Whatsapp chats can be admitted to evidence in trial.

In a recent case, the Punjab and Haryana High Court, while deciding a bail application in an NDPS case, granted liberty to the Narcotics Control Bureau to rely upon the Whatsapp messages of the accused after due compliance of provisions of Section 65-B of the Indian Evidence(Rakesh Kumar Singlavs Union Of India).

There is a recent order of the Gujarat High Court as well, which referred to Whatsapp conversations to form a prima facie opinion regarding grant of bail(ChiragDipakbhaiSulekhavs State Of Gujarat)

There is an instance of a Commercial Court in Delhi relying on Whatsapp chats, which were proved in accordance with Section 65B, to decree a suit. There are reports of family court lawyers increasingly relying on Whatsapp chats as evidence in divorce cases.

Whatsapp Forward without original cannot be evidence

The Delhi High Court in a case has held that a Whatsapp forward message, without an unknown source, cannot be treated as evidence(National Lawyers Campaign for Judicial Transparency and Reforms v Union of India). The Court held that such a forwarded message, without its original, cannot be regarded as 'document' under the Evidence Act.

"What they believe to be information is a post circulated on WhatsApp platform or an alleged translation in a website. The alleged information is not claimed to be true to their knowledge. It is not even stated in the petition as to how the petitioners have formed a reasonable belief that the alleged post or the translation could be true or have any basis".

Annexure - A(Whatsapp forward) does not even qualify as a document in terms of the Evidence Act, 1872, in as much as, neither the original nor the copy of the original has been produced. It is an admitted position that the petitioners have not seen original and have had no occasion to even compare Annexure - A with the original", a bench of Justice SanjeevSachdeva observed in the case.

There are cases where courts have treated the "blue tick" in Whatsapp as proof of service of summons.

The upshot of the discussion is that law does not bar receiving Whatsapp chats as evidence, provided it complies with the requirements of electronic evidence under Section 65B of the Evidence Act.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/know-the-law/whatsapp-chats-admissible-evidence-admissibility-arnab-goswami-chats-168460?infinitescroll=1

Sneak Peek:

No. of words: 1021 words

Note: In this article, the author has analyzed the NEP facets on regulatory bodies in higher education and its impact on Education system. It will help you to enhance your legal acumen. It is suggested to do follow it.

Article: 16

NEP's regulatory architecture is too monolithic for higher education in a diverse country

Concerned with the dubious effects of the multiplicity of regulatory bodies in higher education, nearly all advisory panels appointed since 2005 have been pitching for a single regulator. The National Education Policy (NEP 2020) announced a few months ago, too, has endorsed the idea by providing for a common single regulator for the entire higher education system, with the exception of medical and law education. If recent developments in the field of medical education are any indication, the number of regulatory bodies in higher education is only set to soar.

Regulatory bodies came up essentially in response to the rapid growth of private participation since the 1980s. Procedures of regulation became increasingly complex even as practices they were meant to control got bolder and brazen. Finding higher education "over-regulated and under-governed", the National Knowledge Commission (NKC) concluded in 2007 that the plethora of agencies attempting to control entry, operation, intake, price, size, output and exit had rendered the regulation of higher education ineffectual. The NKC recommended the setting up of an overarching Independent Regulatory Authority in Higher Education (IRAHE). The Yash Pal Committee in its 2009 report also felt that the existence of multiple regulatory bodies had become an impediment to the pursuit of excellence. The committee's key concern was compartmentalisation of academia, with little scope for dialogue across disciplines. To promote such a dialogue, the Yash Pal committee recommended the creation of an apex body called the National Commission for Higher Education and Research (NCHER). It was meant to serve as a platform for academic exchange and dialogue across disciplines and professions rather than as a controlling machine.

In 2016, a committee chaired by TSR Subramanian proposed a National Higher Education Promotion and Management Act for setting up an Indian Regulatory Authority for Higher Education (IRAHE) to subsume all existing regulatory bodies in higher education. Media reports in 2017 hinted at the possibility of a new regulatory body, tentatively titled Higher Education Empowerment Regulation Agency (HEERA), to dissolve all existing regulatory bodies in higher education. The draft national policy presented by the Kasturirangan Committee in 2019 commended "a common regulatory regime for the entire higher education sector to eliminate isolation and disjunction" and proposed a National Higher Education Regulatory Authority (NHERA) as a sole regulator for all higher education. The existing regulatory bodies, including MCI, were to become professional standard setting bodies. Additionally, the committee also recommended the setting up of three other independent agencies to oversee accreditation by multiple accrediting institutions (AIs).

With so many independent institutions responsible for regulating various facets of higher education, the draft NEP 2020 proposed a RashtriyaShikshaAayog (RSA) to coordinate, direct and address inter-

institutional overlaps and conflicts. The idea of a common single regulator had, thus, morphed into a complex regulatory structure comprising an authority, three councils and a national commission with existing regulatory bodies and professional councils to continue to exist, albeit as professional standard setting bodies.

While the draft policy was still being finalised, the National Medical Commission of India (NMCI) Bill originally introduced in 2017 was reintroduced and passed by the Parliament in 2019 thereby repealing the Indian Medical Council Act 1956, dissolving the Medical Council of India (MCI) and vesting the regulation of medical education in the newly created National Medical Commission of India (NMCI).

Reviling the regulatory regimes for being "too heavy-handed", NEP 2020 has now posited for a "light but tight" system under a single regulator for all higher education barring medical and law education. It envisages an overarching Higher Education Commission of India (HECI), with four independent verticals comprising the National Higher Education Regulatory Council (NHERC), the National Accreditation Council (NAC), the Higher Education Grants Council (HEGC) and the General Education Council (GEC). Under the new schema of things, the University Grants Commission (UGC) is to become HEGC while the other regulatory bodies will become professional standard setters. Thankfully, the five independent institutions recommended in draft NEP 2019 now stand collapsed into one which will function with existing, re-defined bodies.

While NEP-2020 is content with separate regulation for medical education, it envisions healthcare education as an integrative system offering allopathic medicine students "a basic understanding of Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homeopathy (AYUSH) and vice versa". The idea of making medical education inter-disciplinary might be easier to enforce if all medical education were to be regulated in a coordinated manner by a single regulatory body. With the enactment of the National Commission for Homoeopathy (NCH) and the National Commission for Indian System of Medicine (NCISM) and continuation of the Dental Council of India (DCI), Pharmacy Council of India (PCI) and the Indian Nursing Council (INC), it looks certain that medical education shall continue to be regulated in a fragmented manner.

It may well be argued that it is well high impossible to design a single regulatory framework to take care of the domain-specific needs of disparate disciplines and professions even within healthcare education. But if accepted as a principle, it has the potential to delay, if not derail, the idea of a single regulator to cater to the diverse disciplines of general, professional and technical higher education. And should that actually happen, the idea of reining in the regulators might mean drowning higher education under permanent heavy rain.

The story of regulation is nicely captured by the saying, "marzbarhatagayajyonjyondavaki (the disease got worse with the medication)". The regulatory architecture proposed in the NEP is far too monolithic for a system of higher education serving a geographically, culturally and politically diverse country like ours. Even in the matter of privatisation, one notices enormous diversity of players and practices. Historically too, private participation in the running of colleges has not followed a single pattern. To imagine that a uniform structure called Board of Governors can serve all different kinds of institutions across the country is to entertain a fantasy in place of a serious vision of reform. Such a vision calls for better appreciation of what exists, no matter how worrisome a condition it is in.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/national-education-policy-nep-2020-higher-education-7129261/

Sneak Peek:

No. of words: 304 words

Note: This article talks about recent sensory heritage law passed by the French government to protect the sound and smell of its countryside. Do follow this new development of law.

Article: 17

The village song

The jolting cry of a cockerel, the comforting smell of manure and the rumbling of tractors — the idyllic sensory landscape of rural France has been the source of much civil strife in recent years. An increasing number of city slickers have vacation homes in rural areas, to enjoy peace and serenity. As it turns out, rural life is full of activity, and at least in France, not amenable to change for the comfort of strangers. There have been several complaints about the noise and smells from animals and churches in the last few years. Maurice, the rooster, became a symbol for this conflict when his neighbours went to court against his owners in 2019, chagrined at being woken up by the cockerel's cry at dawn. French legislators have finally put the matter to rest by passing a law to protect the countryside's "sensory heritage".

To be fair, there is something gnawing about being woken up when it's still dark outside by the shrill crowing of a rooster. But the entitlement to comforts the wealthy thought money can buy at their weekend chalets, are at odds with the choices of empowered rural residents. Unlike the luxury stores at the Champs-Élysées, rural France has refused to serve the interests of tourists. France — both culturally and economically — is still strongly agricultural. The campaign for the law was based on the principle that the countryside is more than a scenic landscape, and living there means accepting that fact.

Their "sensory heritage" safeguarded, French country folk must not get complacent. Soundscapes are fragile things, as Indians are well aware. A loudspeaker and an upcoming election can drown out the sounds of a homestead a lot faster than the complaints of bratty neighbours. But in the meanwhile, at least, the Maurices of France are free to make a morning racket.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/editorials/france-rural-villages-maurice-7162855/

Sneak Peek:

No. of words: 1638 words

Note: This article talks about the expectation of 2021 Budget of India in the light of the pandemic. As a CLAT, aspirant it is a suggested to have a fair idea about it.

Article: 18

A Budget blueprint for difficult times

Alarming inequality, failing health care and border tensions loom large and the economic situation needs full attention

As the country prepares to enter a new financial year after an ominous and gloomy 2020-21, there are great expectations about green shoots and the shape of the economic recovery. The havoc wreaked by the novel coronavirus pandemic on people's lives and livelihoods is deep and enormous. The impact of the COVID-19 induced lockdown cannot be understood merely through headline macro-economic numbers of Gross Domestic Product (GDP), stock market indices, industrial activity indices or any such measure. COVID-19 has destroyed lives and incomes; it has also ruptured our social fabric. It has exacerbated the inequality between the haves and the have-nots, which can turn into a permanent scar if not remedied urgently. It is in this context that we must assess the current state of the economy and evaluate further action for the immediate future.

Missed opportunities

The sudden onslaught and rapid spread of COVID-19 have devastated most nations. Yet, we believe India could have done better. A better planned lockdown by being sensitive to India's unique conditions of a large migrant and informal workforce could have reduced the deep distress in the labour market. A responsible and generous fiscal aid package would have soothed millions of struggling families, brought food to starving homes and contained widening inequality. The Reserve Bank of India's actions to supply enough liquidity were laudable, but they were inadequate.

Lockdown displaces lakhs of migrants

One of the most telling signs of the economic desperation of Indian families was — and is — the demand for work under the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) programme. After being mocked by the Prime Minister, MGNREGA, by providing work at minimum wages to anyone that asked, has proved to be the only safety net for hundreds of millions of Indian households during these times of severe distress. Nearly 120 million people have asked for work under MGNREGA this financial year, the highest in the history of the programme. Total work demanded under MGNREGA in 2020-21 is 53% higher than last year. The optimism about headline economic recovery in the last few months seems hollow when we realise that nearly 35 million people have requested MGNREGA work in the months of December and January, the highest in the last six months. Such continued high demand for MGNREGA work at subsistence wages is a clear sign that there is no true economic recovery, let alone a 'V' or any other letter shaped.

Even as hundreds of millions of Indians were struggling with loss of jobs and MGNREGA work, India's stock markets were exuberant and reached record levels. India's stock market indices are at the highest levels ever.

The top 50 companies increased their market wealth by nearly ₹3,00,000crore ($40 billion) during this time. The excess liquidity pumped in by central banks is finding its way to asset markets, including India's stock markets, driving it to unreasonable highs. If the stock market exuberance were to benefit the broader economy and most Indians, then it is welcome. Alas, the benefits of rising stock markets have accrued only to a minuscule few. The curative economic measures of governments in response to the COVID-19 pandemic may have unintentionally caused one of the worst phases of economic disparity between the rich and the poor in most nations.

Threats and weaknesses

Soaring asset prices and supply shocks have also led to a rise in consumer price inflation. Rising inflation will inevitably force the RBI to tighten interest rates or at least pause the lowering of rates. A tighter monetary policy carries the risk of slowing down private investment, with the consequential effect of lacklustre growth in jobs and wages. India's macro economy is, thus, precariously poised and needs deft handling.

The external sector could be a potential saviour of India's economy as global trade grows from its post-COVID-19 lows. Unfortunately, however, the government has shot itself in the foot by reversing its trade policy suddenly and turned inwards toward import substitution, quantitative restrictions, non-tariff barriers and shunning trade alliances. Over the past three decades, a surge in labour intensive exports has been the predominant driver of growth in jobs and wages for millions of high- and low-skilled Indians. The slowdown in exports and the misplaced aversion to two-way external trade will further harm the livelihoods of many Indians.

India's fiscal policy response to the COVID-19 shock has been underwhelming. The lack of a basic minimum income safety net to cope with the shock has plunged millions of families into poverty. As of December, 12 million adult Indians have dropped out of the labour force compared to last year when, given India's demographic profile, there should have been a net addition to the labour force. Unemployment in the formal sector too is very high. Most supply-side measures such as the government's corporate tax cuts, loan moratoriums, and guaranteed credit schemes seem to have helped corporates to boost their profits and reduce their debt. They have hardly been used to make new investments or create jobs or increase wages.

Besides, in continuation of previous policy catastrophes (demonetisation, muddled Goods and Services Tax), the government has sought to thrust ill-thought policies such as the controversial farm laws on the nation, with no consultation or discussions. As a result, the lone bright spot in the economy thus far — agriculture — has also been wrecked with rising anger among farmers, confusion over farm produce procurement, doubts over the continuation of Minimum Support Price, and a loss of trust between farmers and the government.

The other fiscal measure to aid the needy is to embark on a large-scale public investment programme that can stimulate economic activity, create jobs and revive demand.

However, the government's fiscal situation is bleak. The government had budgeted to collect tax revenues of Rs.16-lakh crore in 2020-21. Eight months into the year, the government has been able to collect only Rs.7-lakh crore in tax revenues at the end of November 2020. In contrast, the government had budgeted to spend Rs.30-lakh crore this financial year and is on track to fulfilling, and even possibly exceeding, its expenditure budget. We believe that the government was right to not cut back on expenditure despite falling revenues during a time of unprecedented crisis, though we may differ on the priorities of expenditure. Therefore, India's fiscal deficit is bound to rise significantly. We can live with it provided there are smart responses to inflation and future borrowing.

The non-negotiables

The government's task is cut out. Given the reality of an unequal economic recovery, a misconceived trade policy and a perilous fiscal situation, the government will have to unveil its economic plan for the next financial year and the two remaining years of its term. There are some non-negotiables in economic planning for the next year.

The COVID-19 pandemic has exposed the multiple lacunae in India's public health infrastructure and served a stern warning that nothing is more important than increasing health-care expenditure and ramping up the health infrastructure. The central government's Ministry of Health and Family Welfare's budget has to increase from the current levels of roughly Rs.70,000 crore (2% of total expenditure in 2020-21) to at least Rs.1,00,000crore.

Since May 2020, India's borders have been under threat by the Chinese. Any weakness will invite a war. India must immediately shore up its defence preparedness and be ready to defend its borders. India's defence expenditure as a share of GDP has been falling. The government must increase defence expenditure from the current level of 1.6% of nominal GDP to 3% of nominal GDP in the next year, keeping in mind that the GDP will be lower than the level attained in 2019-20.

There is no credible evidence yet that bankers are willing to lend and borrowers — especially corporates — are willing to make fresh investments. A rising interest rate environment, a financial sector choked with record non-performing loans and weak consumption demand implies that a pick up in private investment cannot be assured. Hence, public investment must step in to do the heavy lifting and pull the economy from its current dismal state. Expanded public investment can provide jobs and stimulate demand, the two most pressing needs of the country today. The central government's capital expenditure must be increased significantly from the level of Rs.4 lakh crore (14% of total expenditure) in 2020-21 to at least 20%-25% of total expenditure.

A basic income safety net

Any increase in the government's public investment will take time to translate into jobs and incomes for large numbers of the labour force. So, there is an immediate need for a basic income safety net for the bottom half of India's families for a six-month period, similar to the Congress party's NYAY (or NyuntamAayYojana/Minimum Income Support Programme) idea. We believe that an unconditional monthly cash transfer to the needier segments of the population will be the most efficient way to alleviate their miseries fastest.

The Budget that will be presented on Monday should be evaluated in this context and not as another routine Budget. Fiscal deficit and the threat of international ratings cannot dictate India's economic policy in current times of deep distress when lives, livelihoods and the nation's security are at stake. The situation is so grim that it is not the time to experiment or play loose. Given the dire situation and the government's penchant for rash policy announcements without a due consultative process, it is best to self-impose a moratorium on new laws, ordinances or bills for the next one year. We simply cannot afford to get distracted when the economic situation needs full and exclusive attention. For the sake of the nation's future, we hope the government will embark on steering the economy in the right direction.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/a-budget-blueprint-for-difficult-times/article33699220.ece

Sneak Peek:

No. of words: 1175 words

Note: In this article, the author has critically analyzed the contemporary incidents of Beef Ban and Love jihad in the light of the Constitutional principle of fraternity. A must read for every law aspirant. Enjoy this article!!

Article: 19

Beef ban, 'love jihad' laws, degrading of protesters undermine the idea and promise of fraternity

The Constitution embodies the idea of India — it enshrines liberty, equality, justice and fraternity. It was B R Ambedkar who insisted for the inclusion of "fraternity" in the document. The Preamble to the Constitution obliges us to promote amongst all citizens fraternity as the means of "assuring the dignity of the individual and the unity and integrity of the Nation". That is a powerful message but one we have ignored.

The idea of fraternity as a unifying force is not new. The ancient concept of bandhuta is that we are all bound together. The 7th rock edict of Ashoka the Great proclaimed, "All religions reside everywhere". Swami Vivekananda warned of the dangers of turning away from pluralism and of sectarianism, bigotry and "its horrible descendant, fanaticism". Rabindranath Tagore, too, despaired of narrow domestic walls. Beethoven and John Lennon imagined a world without borders.

When hatred trumps fraternity, democracy is imperilled. The storming of the Capitol in the US by a mob driven by the big lie that the election had been "stolen", and incited by the then US President Donald Trump, carries a great lesson for us. Frenzied mobs are rarely spontaneous — their fire is stoked by unseen hands and by a lie drilled into them.

The hallmark of great leadership is promoting fraternity to build unity. This is akin to a conductor who must inspire harmony from the diversity of a hundred instruments in the orchestra, not allowing any one section to drown out others. The whole is then larger than the sum of its parts.

During Partition, both Mahatma Gandhi and Jawaharlal Nehru confronted, at great personal risk and unpopularity, rampaging and violent mobs, to urge them to stand down. Sadly, their legacy is now vilified. But they understood that India's future depended on preserving the diversity of its civilisation and that once torn, the fragile fabric of fraternity would be impossible to stitch together again. Try squeezing toothpaste back into the tube!

Yet, in today's India, life for comedians is considerably more complicated than it is for bigots. The bile spewed by some on Twitter and by politicians in Delhi's elections last year, is proof that the virus of hatred has infected us.

The abominable "love jihad" laws police love by criminalising conversion for "marriage", as a result of "allurement" or "inducement" which is defined to include "… gift, gratification, easy money or material benefit …. better lifestyle, divine displeasure or otherwise" in addition to force, coercion and the like. The laws are deliberately vague and over broad. They induce a chilling effect. Who would take the risk of religious conversion in order to marry when that might morph an act of love into a crime?

These laws expose two primal traits that afflict us — exclusion and fear. First, the conjuring of a lynch mob (physical or virtual) to whip up hatred and violence (and sometimes death) against various minorities. It is the exclusion of the target that is the reason for the mob, not its evinced (and usually bogus) purpose. The target is somehow not Indian and is to be ghettoised away from mainstream society.

The second trait is deadlier — fear in the majority who are chilled into being silent accomplices. The public banners put up by the Lucknow administration with photographs and names of those accused of vandalism during the anti-CAA protests endangered these protesters. "Do not protest" was the subliminal message, reminiscent of the unspoken threat to unleash packs of lynching Red Guards upon publicly named "capitalist roaders" (read dissenters).

Kashmir is the current laboratory for de-fraternisation: Mass arrests and detention, some with no charge other than disturbing public order, deportations, suppression of protest, denial of internet access and a new media policy to reward newspapers for repeatedly reporting "a genuinely positive image of the government based on performance" and to deny state advertising to those carrying "fake" or "anti-national" news. Despite the populist 2019 extension of the entire Constitution to Jammu and Kashmir (without the concurrence of any elected body of the erstwhile state), subsequent measures have actually denied basic constitutional rights to Kashmiris, who we seem to forget are all citizens of India. This is a master class in excoriating fraternity, and it is not wise.

The beef ban, "love jihad" laws and the degrading of protestors mark a new and sinister trend of state policy of de-fraternisation. The politics of majoritarianism is built on de-fraternisation of minority sections of society —Muslim, Dalit, liberated women, activists, socialists and intellectuals. Opponents are marginalised by characterising them as "anti-national" (that old favourite) or "Khalistanis", "tukde-tukde gang" and "Maoists" or with the "my way or highway to Pakistan" ultimatum. Electoral ground is seized by the feint that the majority (deftly equated with Indian) way of life is under siege.

The methods are old. The Nazis brainwashed the Germans with propaganda adopting Joseph Goebbels's doctrine of the "Big Lie". They recalibrated the truth and history, demonised the Jews (as being neither German nor human) and accused the Weimar Republic of "appeasement" (yes, that very word). The Germans cravenly allowed themselves to become indoctrinated pawns. The contrived narrative pandered to their prejudices. Even after the Nuremberg citizenship laws were enacted, few in Germany, could forecast where this was leading to. Ultimately, the politics of hate wrought havoc on every German.

With electronic media, the danger of the Big Lie is vastly magnified. And when reporting loses objectivity, it is reduced to propaganda. Viewers, too, cannot shirk responsibility. Those with the strongest opinions usually get their news from a single source and their history and conviction from social media. We don't question what is fed to us in easy sound bites as long as it feeds our phobias. We do not wish to even listen to, much less comprehend, views that we hate. In an era of unprecedented access to information, there is little thirst for knowledge. That enables the Big Lie.

Many of the real problems threatening humankind such as poverty, global warming, diminishing water resources and pandemics require global solutions, not national, sectarian or local ones. Fracturing communal, national and global fraternities will rebound to harm each one of us. Crafting coalitions and fraternities based on principles, not politics, is the way forward. Build bridges not walls. Vaccine diplomacy might be less popular but may work better than pre-emptive strikes.

The irrepressible spirit of the Indian cricket team that forged a victory at the Gabba is an example of the power of unity in diversity. Drawn from all parts of India and all sections of society, and despite insult and intimidation, they formed a team that triumphed against all odds. On the other hand, the politics of hate would

exclude talent. We would also do well to heed the words of US senator, Ben Sasse: “Don’t let the screamers who monetise hate have the final word.”

A house divided cannot stand. The very idea of India and the legacy we leave our children is at stake.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/beef-ban-love-jihad-law-modi-govt-secularism-7161476/

Sneak Peek:

No. of words: 1060 words

Note: In this article, the author has analyzed the impact of Digital Service Tax by Indian government on U.S. commerce. As a CLAT aspirant, it is a suggested to have a fair idea about it

Article: 20

Digital Services Tax: Not about India vs US

Washington must realise that Digital Services Tax is a temporary mechanism until a multilateral solution to taxing the digital economy emerges.

On January 6, the office of the United States Trade Representative (USTR) published a report concluding that the 2 per cent digital services tax (DST) introduced by the Indian government vide the 2020 Finance Act discriminates against US businesses, contravenes settled principles of international tax law, and restricts US commerce. The report was published following an investigation conducted by USTR under section 301 of the US Trade Act, 1974, which authorises it to appropriately respond to a foreign country's action that is discriminatory and negatively affects US commerce.

India's 2 per cent DST is levied on revenues generated from digital services offered in India, including digital platform services, digital content sales, and data-related services. Pertinently, India was one of the first countries in the world to introduce a 6 per cent equalisation levy in 2016, but the levy was restricted to online advertisement services (commonly known as "digital advertising taxes" or "DATs"). The 2020 DST, however, is broader in scope and extends to all kinds of digital transactions.

Broadly, the USTR report finds the DST to be discriminatory on two counts. First, it states that the DST discriminates against US digital businesses because it specifically excludes from its ambit domestic (Indian) digital businesses. And second, according to the report, the DST does not extend to identical services provided by non-digital service providers. While both these findings may seem justified at first glance, they are wholly misplaced and disregard the background and context in which the DST was introduced.

The DST is aimed at ensuring that non-resident, digital service providers pay their fair share of tax on revenues generated in the Indian digital market. Currently, Indian double taxation avoidance agreements (tax treaties) with foreign jurisdictions do not permit the source-based taxation of business profits of non-resident companies in India in the absence of what is called a "permanent establishment" (PE). By definition, a PE is a fixed place of business through which the business activities of a non-resident company are carried on in India. Importantly, while non-resident, non-digital service providers pay Indian corporate tax on income attributed to a PE in India, business models employed by non-resident digital service providers obviate the need for a physical presence in India and profits attributed to the Indian market could easily escape the Indian income tax net.

The government indeed amended the Income Tax Act to provide for a "significant economic presence" (to supplement physical presence) as a nexus to tax business profits of a non-resident company. However, an amendment of this nature in the domestic tax law is ineffective for all practical purposes in the absence of a corresponding change to tax treaties. Tax treaties usually override provisions of the domestic tax law and

negotiating the inclusion of such a change, especially in tax treaties with countries such as the US, is next to impossible. No wonder, then, that the DST is a tax not on income, but revenue, and has been carefully devised to fall outside the scope of tax treaties.

At best, the US government can term the DST as inconvenient to US digital businesses because, in the present scheme of things, most large technology companies are US-based. Companies such as Google are second to none in the internet industry with a limited number of operators. It is true that Indian digital service providers will not pay the DST because of the explicit exemption in the law (of course, they are subject to Indian income tax), but even if the law did not provide for an exemption, only a handful of them would pay the DST in view of the revenue threshold (Rs 20 million in annual India-based digital services revenue). As per USTR's own analysis, only 119 companies in the world would likely be subject to the DST, of which 86 are US companies. The next most common nationalities are China and the United Kingdom with seven companies each, France with six companies, and Japan with five. Of course, there may be a meaningful discussion to be had when an Indian company gets as big in size and sales as Google in the future and yet falls outside the scope of the DST.

Section 301 allows the USTR to take all appropriate and feasible action to obtain the elimination of the DST, including the imposition of duties, fees, or other import restrictions on Indian goods or services. Let us, for the sake of argument, concede that the DST is ex facie discriminatory. Even then, retaliation by the US government in the form of imposition of tariffs on Indian goods is not the solution. There are legal ways and mechanisms to settle this kind of a trade or a tax dispute and unilateral imposition of tariffs do good to none.

In fact, a retaliatory tariff could be counter-productive in many ways. How can we rule out the possibility of the Indian government (or other governments facing section 301 investigations) responding with a counter-retaliatory measure? If that happens, most US businesses — and not just US digital businesses — would be impacted. Research by US-based The Tax Foundation indicates that the total impact of imposed and announced tariffs will reduce long-run GDP in the US by 0.5 per cent, which means lower wages and fewer jobs.

The US government must remind itself that the DST has been adopted as an interim measure to cope with the challenges posed by the digital economy, while a multilateral solution at the level of the OECD is underway. A prudent solution, therefore, is not for the US government to flex its muscles but to participate in these global talks and protect the interests of US commerce by entering to dialogues with hundreds of countries who are trying hard to reach a global consensus on the issue of digital economy taxation.

What the US government should be worried about the most is that the threat of retaliatory tariffs seems to not have worked so far because over two dozen countries have either adopted or are considering adopting, a DST or a DAT. The tax challenges posed by the digital economy is not an India versus US problem. It is a global problem. The sooner Washington realises this, the better.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/digital-services-tax-not-about-india-vs-us-7161267/

Sneak Peek:

No. of words: 1163 words

Note: This article talks about the recent Bombay High Court judgment famously known as "Skin-to-Skin Contact" judgment. In this article, the author has discussed about the case and analyzed the said Judgment. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 21

In Bombay HC verdict on sexual assault, issue of mandatory minimum sentencing

The ruling drew criticism for its restricted interpretation of the offence.

The Bombay High Court has acquitted a man of sexual assault charges under the Prevention of Children from Sexual Offences (POCSO) Act for groping a child, and instead convicted him under the Indian Penal Code (IPC) for a lesser offence. Justice Pushpa V Ganediwala said the allegation was not serious enough for the greater punishment prescribed under the law. The ruling, which drew criticism for its restricted interpretation of the offence, spotlights the concept of mandatory minimum sentencing in legislation, including POCSO.

What was this case about?

The Nagpur Bench of the Bombay High Court reversed the decision of a sessions court which had convicted 39-year-old BanduRagde under Section 8 of the POCSO Act, and sentenced him to three years in jail. Section 8 prescribes the punishment for the offence of sexual assault defined in Section 7 of the Act.

The convict was accused of luring the 12-year old prosecutrix to his house on the pretext of giving her a guava, and pressing her breast and attempting to remove her salwar.

The High Court upheld the conviction under sections that carry a lesser minimum sentence of one year under the Indian Penal Code, including outraging the modesty of a woman.

Why did the High Court acquit the man of charges under the POSCO Act?

The court reasoned that since the offence under POCSO carried a higher punishment, a conviction would require a higher standard of proof, and allegations that were more serious.

Section 7 of the Act says "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent…"

The court said that since the convict groped the prosecutrix over her clothes, this indirect contact would not constitute sexual assault.

Is such a reading of the law unusual?

Such restrictive reading is not uncommon, especially in POCSO cases.

In State v Bijender (2014), a Delhi court acquitted a man under the POCSO Act and instead convicted him of IPC offences. A seven-year-old girl had testified that the convict took her into the bathroom by force, slapped

her, and tore her jeans. The Special Court held that the act of tearing the clothes of the victim did not constitute physical contact even if sexual intent was present.

This was despite the recognition of "any other act with sexual intent which involves physical contact without penetration" to be sexual assault under Section 7 of POCSO. The judge reasoned that since the accused did not touch the vagina, anus or breasts of the child, the latter part of the section could not be invoked. The court restrictively interpreted the lack of physical contact with sexual organs to mean that there was no physical contact.

What is a mandatory minimum sentence?

Section 8 of the POCSO Act carries a sentence of rigorous imprisonment of three to five years. However, imposing the minimum sentence is mandatory. Where a statute has prescribed a minimum sentence, courts do not have the discretion to pass lighter sentences irrespective of any specific circumstances that the case or the convict might present.

Minimum sentences have been prescribed for all sexual offences under the POCSO Act barring the offence of sexual harassment. In a 2001 ruling, the Supreme Court held that where the mandate of the law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute. "The mitigating circumstances in a case, if established, would authorise the court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment," the court said in State of J&K v Vinay Nanda.

Why do some legislation prescribe a mandatory minimum sentence?

A mandatory sentence is prescribed to underline the seriousness of the offence, and is often claimed to act as a deterrent to crime. In 2013, criminal law reforms introduced in the aftermath of the 2012 Delhi gangrape prescribed mandatory minimum sentences for criminal use of force and outraging the modesty of a woman, among other charges.

Mandatory minimum sentences are also prescribed in some cases to remove the scope for arbitrariness by judges using their discretion. For example, the punishment for a crime under IPC Section 124A (Sedition) is "imprisonment for life, to which fine may be added, or…imprisonment which may extend to three years, to which fine may be added, or…fine", which leaves room for vast discretion with judges.

What are the criticisms of mandatory sentencing?

Studies have shown that mandatory sentencing in laws lead to fewer convictions, because when judges perceive that the punishment for the offence is harsh, they might prefer to acquit the accused instead.

After conviction, a separate hearing is conducted to award sentence, in which aspects such as the accused being a first-time offender with potential for reformation or being the sole breadwinner of the family, or the accused's age and social background, or the seriousness of the offence, etc., are considered. The absence of the opportunity to consider such factors, and instead prescribe a mandatory sentence, pushes judges in some cases towards acquitting the accused.

A 2016 report on the 'Study on the Working of Special Courts under the POCSO Act in Delhi' by the Centre for Child Law at the National Law School of India University, Bengaluru, has highlighted the reluctance of courts in convicting under sections that carry a mandatory minimum sentence.

The study noted: "Some within the legal fraternity were of the view that minimum sentences under the POCSO Act are very high. As an example, one respondent shared that the minimum punishment for sexual assault and aggravated sexual assault is high. "Should a 21 year-old be imprisoned for three years for forcibly kissing a girl? He will become a criminal in jail. No point in packing our jail with adolescents." Another respondent was of the view that probation should be used in cases of statutory rape where the accused is between 18-22 years. One respondent also felt that the Act should provide sentencing discretion to judges."

In his 2016 book Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India, MrinalSatish, professor of Law at NLSIU, argued that when mandatory sentencing regimes are put in place to remove judicial discretion, the discretion merely shifts within the system to the police, but is not removed.

So what is the way forward?

Legal experts have argued that mandatory sentences are counterproductive to the aim of reducing crime or acting as a deterrent. Instead of harsher punishment, they recommend judicial reform that makes the sentencing process more accountable and transparent. This would include holding transparent proceedings for sentencing, recording specific reasons for punishment in rulings, etc.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/in-bombay-high-court-verdict-on-sexual-assault-the-issue-of-mandatory-minimum-sentencing-7162861/

Sneak Peek:

No. of words: 1762 words

Note: In this article, the author has critically analyzed the recent decision of Bombay High Court related to sexual assault on child. Here the author has analyzed the said judgments with the help of various provisions of law. It will help you to explore the journey of the legal development as well.

Article: 22.

Two Tales of Judicial Indiscretion: Recent Controversial POCSO Decisions of Bombay High Court

In January 2021, within a span of less than a week, the Nagpur Bench of Bombay High Court delivered two judgments in separate cases of child sexual abuse, Libnus v. State of Maharashtra (hereinafter Libnus case) and Satish v. State of Maharashtra (hereinafter Satish case), that have been severely criticized by almost all and sundry as being bad in law. In fact, Satish case caused such outrage that the rights bodies, National Commission for Women and National Commission for Protection of Child Rights, wrote to the Maharashtra Government to take steps to challenge the judgment in the Supreme Court. On Wednesday January 27, 2021, the Supreme Court stayed the operation of the controversial judgment upon Attorney General's mention.

What did the judge say?

In Satish case, the Single Bench of Justice Pushpa V. Ganediwala acquitted a 32-years old man of the charges under Sections 7/8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) reasoning that as there was no "skin-to-skin" contact, therefore, the offence of sexual assault is not made out. Section 7 of the POCSO defines sexual assault as any non-penetrative contact with the victim with sexual intent. The minimum punishment for the offence of sexual assault is imprisonment for three years. The Court, however, maintained the conviction of the appellant under Section 354 of the India Penal Code, 1860 (IPC), which carries a minimum prison term of one year. Prior to the post- Nirbhaya amendments made to the criminal laws in the country, Section 354 prescribed two years as maximum punishment with no statutory minimum. The allegations against the accused-appellant in this case were that he had "pressed the breast" of the 12-year old prosecutrix, which fact was duly proved by the prosecution by adducing evidence, both circumstantial and direct. The Court noted that requirements of Section 7 are not met, as the survivor's clothes were not removed and the appellant was also not able to remove her knickers, because when he tried to do so she shouted and he left the room, bolting it from outside. The Court said that the act of the appellant would at best be an act of "outraging modesty of a woman" as defined in Section 354 of IPC. The judge also said that the punishment under Section 8 of POCSO, for the offence defined in Section 7 is "disproportionate" to the seriousness of the act and, therefore, affirmed the conviction only under Section 354, IPC.

In Libnus case, the same Bench acquitted a 50-year old man who was convicted by the Special POCSO Court for his act of holding the hand of a 5-year old girl, with his pant's zip open. The survivor had also told her mother, the PW-1, that the appellant had taken her penis out of his pants and asked her to sleep with him. The appellant in this case was convicted for the aggravated sexual assault under Section 10 of POCSO as well as Section 12 of POCSO in addition to Sections 354A and 448 of IPC. Aggravated sexual assault has the ingredients of Section 7 but because the act is committed in certain "aggravating circumstances", inter alia,more tender age of the victim or relation of trust and confidence between the victim and the abuser. Section 10 carries a minimum prison term of five years. Section 11 of POCSO defines and Section 12

punishes the offence of sexual harassment. The ingredients of Section 11 of POCSO do not strictly overlap with the ingredients of Section 354A, IPC although both the offences share a common name. The Bombay High Court set aside the conviction of the appellant under Sections 10 and 12 of the POCSO and instead convicted him under Section 354A of IPC. In this case as well, the judge noted the severe minimum mandatory punishment prescribed in Section 10 of POCSO and chose to convict under Section 354A (3) of IPC which carries a maximum prison term of three with no statutory minimum sentence stipulated thereof. While disposing of the appeal, the Court also noted that the appellant had already served five months imprisonment which was "sufficient" in view of the nature of his act and ordered his release.

Meaning of non-penetrative sexual assault:

The title of Section 7 of POCSO is "sexual assault". As the phrase "assault" has not been defined in the POCSO, it must derive its meaning from Section 351 of the IPC, which indicates that for the offence of assault, no physical contact is required - leave aside "skin-to-skin" contact. The essence of the term assault lies in the apprehension of use of criminal force and the definition of "force" in Section 349 of IPC,only requires some physical contact with the another's "body" or even "with anything which that other is wearing……that such contact affects that other's sense of feeling…". Intentional use of force is criminal force "…in order to the committing of any offence", reads Section 350 of IPC. Interestingly, though the title of Section 7 uses the word "assault", the content of the provision, in fact, require physical contact with the victim, meaning thereby that force must be applied to bring the case within the ambit of this provision. Therefore, what is meant by Section 7 is use of criminal force, albeit the title uses the word "assault". In mis-interpreting Section 7 to require "skin-to-skin", the Court has done offence to both the statutory meaning of "force" and "criminal force" as well as to the long-established judicial understanding of these phrases. Looking at Section 7 of POCSO and Section 354 of IPC together, it is not possible to arrive at a logical conclusion that what is an offence under the latter is not covered under the former.

Similarly, Section 354A (1) (i) of IPC, the offence which the Court said is made out against the appellant in the Libnus case, explicitly requires "physical contact and advances involving unwelcome and explicit sexual overtures". Sexual overtures may be both verbal and non-verbal. Therefore, what is an offence under Section 354A (1) (i) is necessarily an offence as defined in Section 7 of POCSO. Moreover, going by the testimony of the PW-1, the mother of the survivor, that the appellant had showed his penis to her daughter, his act is covered under Section 11/12 of POCSO for which the appellant's conviction should have been sustained. Holding hand of a child with the zip of the pant open is clearly within the ambit of the definition of sexual assault (Section 7, POCSO) as well as sexual harassment (Section 354A (1) (i)).

More severe punishment under the POCSO:

In both the judgments, the Court seems to be reluctant to impose the more severe punishment prescribed under the POCSO, as it felt that the statutory minimum punishment under Section 8 (three years imprisonment) and Section 10 (minimum five years) is disproportionate to the gravity of the acts of the appellants. While the legality of minimum mandatory sentences are being challenged across the jurisdictions, a constitutional Court cannot escape from its liability to convict under appropriate provision of a penal statute without declaring the minimum mandatory sentence unconstitutional, cruel and degrading. Notably, Article 7 of the International Covenant on Civil and Political Rights (1966) declares that everyone has a right against cruel, degrading, and dehumanizing punishment. The Canadian Supreme Court in R v. Nur ([2015] 1 SCR 773), declared minimum mandatory sentence for firearms offences as unconstitutional.

Ignoring the reverse burden clauses of POCSO:

The POCSO, in Sections 29 and 30, raises presumption of both actusreus and mensrea, respectively, upon proof of "foundational facts". This effectively means that if the prosecution is able to show, by adducing cogent and credible evidence, prima facie existence of "foundational facts", the burden is on the accused to prove his innocence by showing absence of mensrea. Importantly, this reverse burden can only be discharged by meeting the standard of "proof beyond reasonable doubt", a standard that ordinarily rests on the prosecution. The Court's reasoning that "stricter proof" is required to sustain conviction under Section 7/8 of POCSO in Satish case as the offence carries more severe punishment falls flat on the face of the presumption of guilt envisaged under POCSO. In the Libnus case as well, there is a complete silence on the question of reverse onus.

Conclusion:

While desirability, utility and constitutionality of mandatory minimum prison terms are debatable, no Court can refuse to convict an accused for any offence whose case squarely falls within the four corners of statutory definition. In the Satish case, even if the Court was disinclined to award the more severe punishment under Section 8 of POCSO, it could have still maintained the conviction both under POCSO and IPC, while choosing the punishment under the latter. Interestingly, Section 42 of POCSO which enumerates IPC offences punishable, inter alia, under Sections 354A, 354B, 354C, 354D, does not include Section 354, thereby giving liberty and discretion to the Court to choose lesser of the two punishments. This discretion would not be available where the offence is punishable both under the POCSO and the IPC provisions as enumerated here, in which case the punishment greater in degree can only be awarded.

In the Libnus case also, the Court's indiscretion is profound in refusing to maintain the conviction under Sections9/10 and 11/12 of POCSO when the facts unequivocally establish the ingredients of the offence of aggravated sexual assault and sexual harassment. Imagine a situation where the victim is a male child. The dangerous implication of the two judgments is that in such a case the accused would not be punishable at all: firstly, because the Court thought that the POCSO provisions are not applicable and secondly, because Section 354 and 354A apply only in case of a female victim.

While it is comforting that the Supreme Court stayed the Satish case, but the message sent out by the Bombay High Court is still damaging. It is hoped that the State of Maharashtra shall appeal against the judgment given in the Libnus case as well. While a penal statute should be construed narrowly, no person who is clearly hit by the plain words of a penal statute should be allowed to go scot-free or punished with disproportionately meager punishment for extraneous considerations and misinterpretation of law. Decisions of High Courts shape and unshape the law of the land and this cannot be done with scant regard for statutory and case law. We, as a society certainly deserve better judgments, both legally and logically.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/two-tales-of-judicial-indiscretion-recent-controversial-pocso-decisions-of-bombay-high-court-169135

Sneak Peek:

No. of words: 1183 words

Note: In this article, the author has critically analyzed the various provision of POSCO in the light of the recent Skin-to-Skin Contact judgment by Bombay High Court. It is furtherance of your last article.

Article: 23

Artificial and Unreasonable Veil of Legal Protection- A Critic of Bombay High Court's POCSO Judgment

"I did not punch your stomach. I punched your t-shirt"- My brother, after punching my stomach.

In a cruel irony, the Bombay High Court chose the National Girl Child Day to deliver an absurd interpretation of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO'). One need not be trained in law to understand that physical contact with breasts would not be limited to 'skin to skin' contact. However, according to the Bombay High Court, grabbing a minor's breast would not constitute a sexual assault, "in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast…"

Section 7 of the POCSO Act, defines 'sexual assault' as-

"Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration, is said to commit sexual assault."

The necessary ingredients that constitute the offence are as follows. Firstly, there must be physical contact without penetration. Physical contact is when a person touches the vagina, penis, anus or breast of a child or makes the child touch the vagina, penis, anus or breast. Secondly, the physical contact must be made with sexual intent.

In this case, the accused in the pretext of giving the prosecutrix a guava took her to his house. He then proceeded to press her breast and attempted to disrobe her. These are not disputed facts. The only facts in dispute are whether the accused attempted to remove her salwar or knicker and whether the accused inserted his hand inside her salwar to press her breast. With regard to the analysis of Section 7, it is not in dispute that the prosecutrix started to scream once this 'assault' took place. Neither is the fact that the accused pressed his hand on her mouth to silence her nor the fact that the accused lied to the prosecutrix's mother about the whereabouts of her daughter in dispute.

The learned single judge believes that these facts do not demonstrate or meet the necessary ingredients of Section 7 of POCSO. According to the Court, "Considering the stringent nature of punishment provided for the offence, in the opinion of this Court, stricter proof and serious allegations are required."

Given this context, I argue that the Court erred in its judgment for the following reasons. Firstly, the POCSO Act casts a greater burden on the accused than on the prosecution. Secondly, the Act might be a stringent legislation, but it is also a protective and beneficial legislation. Therefore, it must be interpreted in a manner that protects the interest of children.

According to Section 29 of the POSCO Act, when a person is prosecuted under Section 7, it is presumed that the person has committed the offence. On the other hand, Section 30 presumes that the accused possessed a culpable mental state during the commission of the offence. Clearly, a joint reading of these provisions places

the burden of proof on the accused to prove that he is innocent. Moreover, Section 30(2) clarifies that the accused must rebut these presumptions 'beyond reasonable doubt' rather than on a 'preponderance of probabilities'.

Even for a moment if we consider the artificial distinction between skin to skin touching and groping over clothes to be a real distinction, then it is still the burden of the accused to prove beyond reasonable doubt that the skin-to-skin touch did not take place. As suggested earlier, it is undisputed that the accused has pressed the breast of the minor. It is alleged that he has tried to dis-robe her. In my opinion and with the knowledge of these limited facts, to then state that there was no skin-to-skin sexual assault, is to argue on the preponderance of probability. It does not fulfil the greater burden of disproving the assault beyond reasonable doubt. Given the fact, that the accused pressed the breast of the minor over her clothes with sexual intent and that the accused allegedly attempted to dis-robe the prosecutrix, it does leave a reasonable doubt in my mind that the accused might have indulged in physical 'skin-to-skin' sexual assault. This reasonable doubt is enough to convict the accused under the Act. However, I must admit that I am making this case only based on the facts presented in the judgment.

On the other hand, the more obvious reason to disagree with the judge is on her view that considering the stringent nature of the Act, "stricter proof and serious allegations are required". Apart from being a stringent legislation, the POCSO is also a protective legislation that has been enacted as a special provision pursuant to Article 15(3) of the Constitution. According to the Statement of objects and reasons and the Preamble, the POCSO Act is a self- contained comprehensive legislation that provides for protection of children from sexual assault, harassment, etc.

While, interpreting Section 2(d) of the POCSO Act, in Eera through ManjulaKrippendorf vs. State (Govt. of NCT of Delhi) and Ors [AIR 2017 SC 3457], Chief Justice Dipak Mishra held that "While interpreting a social welfare one has to be guided by the 'colour', 'content' and the context of statutes. The Judge had to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event, he should become a real creative constructionist Judge".

In this case, nobody expected the Bombay High Court to be a creative constructionist. The Court was only expected to serve the soul of legislative intention and not to chain itself to an artificial distinction. However, I urge you once again to assume for a moment that the Section 7 could be reasonably interpreted in a manner that differentiates between skin-to-skin and skin-to-clothes sexual assault. I believe, that even then, the Court has erred in its judgment. This is because, in the above judgment while analysing the provisions of the POCSO Act, the Supreme Court held that-

"When two constructions were reasonably possible, preference should go to one which helps to carry out the beneficent purpose of the Act; and that apart, the said interpretation should not unduly expand the scope of a provision. Thus, the Court had to be careful and cautious while adopting an alternative reasonable interpretation."

Lastly, even beyond the abovementioned reasons, the Court has erred by limiting 'physical contact' to only skin-to-skin contact. They have drawn an unreasonable distinction based on no justification or precedent to create an artificial difference between skin-to skin and skin-to-clothes sexual assault. In doing so, the Court has turned a blind eye to the realities of rampant child sexual abuse by arguing that a mere piece of cloth can protect a child from sexual assault, while the very same piece of cloth legally protects an abusive criminal!

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/bombay-high-court-pocso-judgment-section-7-sexual-assault-skin-to-skin-168922

Sneak Peek:

No. of words: 477 words

Note: This article talks about the recent incident of clash between Kerala state government and its Governor. As a CLAT aspirant, it is a suggested to have a fair idea about it.

Article: 24

Maximum Governor: On Governor's role

Governors should not exceed constitutional duties to serve as agents of the Centre

The misuse of the Governor's office to undermine duly elected State governments is a particularly mischievous disruption of federalism. Kerala Governor Arif Mohammad Khan's frequent use of his powerful oratory to defend the Centre and question the State on sensitive topics makes him partisan and undermines democratic processes. His refusal to convene a special session of the Kerala Assembly on December 23, as initially requested by the government, yet again proved this. He questioned the urgency of the special session, and thought the Assembly lacked "the jurisdiction to offer a solution" to the farmers' protest, an issue which the Assembly wanted to discuss. This is an encroachment upon the powers of the legislature and the elected government and an abuse of his authority as a nominal head under the Constitution. His conduct was comparable to that of his counterpart in Rajasthan who refused to convene a session of the Assembly in July last year as demanded by the Chief Minister. Kerala Chief Minister PinarayiVijayan wrote to Mr. Khan stating the Governor had no discretionary powers in the matter and that his actions were unconstitutional. This position was supported by the Opposition too. Thankfully, the government made an amended request for convening the session and the Governor accepted it. Mr. Khan had earlier questioned a resolution passed by the Kerala Assembly on the Citizenship (Amendment) Act, besides making public statements supporting the CAA and the farm laws. To assume that an Assembly is acting unconstitutionally if it disagrees with Parliament is disingenuous. By lending himself and his office to such partisan conflicts, Mr. Khan is also besmirching his personal reputation as a fiercely fair-minded public figure. Such conduct by a Governor can weaken federalism.

In the event, the controversy overshadowed the one-day session on December 31, which sought the repeal of the central laws that are at the heart of the ongoing farmer agitation. A resolution passed with the support of the ruling LDF and the opposition UDF, and unopposed by the lone BJP member, raised procedural and substantive questions related to these laws. The resolution pointed out that agriculture was a State subject and "as a matter that seriously affects the States, the Bills should have been discussed in a meeting of the inter-State council". The Bills were passed in haste without even referring them to the Standing Committee of the Parliament, which the Assembly termed "a serious matter." It has become habitual for the Centre to overlook regional concerns, and the making of the farm laws without consulting States was in line with this trend. The Council of States (RajyaSabha) has been systematically undermined by arbitrarily labelling bills as money bills. The use of central agencies to browbeat Opposition-ruled States is yet another strain on federalism.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/maximum-governor-on-governors-role/article33496044.ece

Sneak Peek:

No. of words: 1102 words

Note: In this article, the author has analyzed the recent amendment in the Patent Rules regarding dilution of patent working disclosure rules and raises the concern and its impact on public health as well.

Article: 25

An anti-disclosure amendment that hits public health

The dilution of patent working disclosure rules hampers the effectiveness of India's compulsory licensing regime

The central government recently published the Patent (Amendment) Rules, 2020, amending the format of a statement that patentees and licensees are required to annually submit to the Patent Office disclosing the extent to which they have commercially worked or made the patented inventions available to the public in the country. The amendment has significantly watered down the disclosure format, and this could hamper the effectiveness of India's compulsory licensing regime which depends on full disclosure of patent working information. This in turn could hinder access to vital inventions including life-saving medicines, thereby impacting public health.

Disclosure of information

In exchange of a 20-year patent monopoly granted to an inventor, India's patent law imposes a duty on the patentee to commercially work the invention in India to ensure that its benefits reach the public. In fact, the purpose of granting patents itself is to not only encourage innovation but also ensure that the inventions are worked in India and are made available to the public in sufficient quantity at reasonable prices.

A failure of this duty could trigger compulsory licensing or even subsequent revocation of the patent under the Patents Act, 1970. Further, courts have refused an interim injunction in cases alleging infringement of a patent which has not been worked in India. Thus, the information on the extent of the working of the invention in India is critical for the effectiveness of these public interest measures provided by law to check abuse of patent monopoly (e.g. excessive pricing or scare supply of the invention). Accordingly, section 146(2), a unique provision not found in patent laws of most other countries, requires every patentee and licensee to submit to the Patent Office an annual statement explaining the extent to which they have worked the invention in India. The disclosure is to be made in the Form 27 format as prescribed under the Patent Rules, 2003. This statement is meant to help the Patent Office, potential competitors, etc. to determine whether the patentee has worked the invention in India and made it sufficiently available to the public at reasonable prices.

Unfortunately, patentees and licensees as well as the Patent Office have blatantly disregarded this statutory requirement. Also, there has been significant pressure from multinational corporations and the United States government to do away with this requirement.

The PIL

The recent amendment to the form was made pursuant to a PIL filed by ShamnadBasheer before the Delhi High Court in 2015. The PIL brought to the Court's attention the rampant non-filing and defective filing of Form 27 by patentees/licensees and sought a direction to the government to strictly enforce the patent working

disclosure rules and take action against the violators. The PIL also called for a reform of Form 27, arguing that the information it sought was grossly insufficient to ascertain the extent of the working of the patent.

Dilution of disclosure

The government acknowledged that the Form 27 format was problematic and provided an undertaking to the court to effect appropriate amendments. The court accordingly disposed of the PIL in 2018, directing the government to complete the amendment process within the timelines mentioned in the undertaking. However, in non-compliance of the court's order, the government published the amended form recently after a delay of almost two years. More importantly, instead of strengthening the form, the amendment has significantly weakened it further, thereby defeating the entire purpose of the amendment exercise.

Instead of calling for more elaborate details of the information already sought in the Form as suggested in the PIL, the amended form has removed the requirement of submitting a lot of such important information altogether, thus damaging the core essence of the patent working requirement and the Form 27 format. The form now requires the patentees and licensees to provide only for the following information: whether the patent has been worked or not; if the invention has been worked, the revenue or value accrued in India from manufacturing and importing the invention into India; and if it has not been worked, reasons for the same and the steps being taken towards working. They are no longer required to provide any information in respect of the quantum of the invention manufactured/imported into India, the licenses and sub-licenses granted during the year and the meeting of public requirement at a reasonable price.

How will the data on merely the revenue/value accrued from manufacturing/importing the invention enable one to determine the extent to which it has been worked and its public requirement has been met? The most basic data required for this assessment is the quantum or the total units of the invention manufactured/imported in India. It is the disclosure of this data by Bayer in Form 27 that played a crucial role in grant of India's first compulsory license to Natco for the anti-cancer drug Sorafenib/Nexavar. The deletion of the requirement of its disclosure is thus shocking and defeats the very purpose of this Form.

The removal of the requirement of submitting any licensing information, including the disclosure of even the existence of licenses (instead of seeking further details such as names of licensees/sub-licensees and the broad terms of the licenses as suggested in the PIL), means that the patentees/licensees can just self-certify that they've worked the patent without having to support the claim with the data on how they've done so, including through licensing/sub-licensing the patent.

Further, the omission to mandate disclosure of details such as the price of the invention, its estimated demand, the extent to which the demand has been met, details of any special schemes or steps undertaken by the patentee to satisfy the demand, etc., as recommended in the PIL, makes it extremely difficult to ascertain whether the invention has been made available to the public in sufficient quantity and at an affordable price.

Impact on public interest

To conclude, the government has significantly weakened the critical duty imposed by the law on patentees/licensees to disclose patent working information, so much so that it has defeated the very purpose of it. The lack of this information could prevent invocation of compulsory licensing and other public interest measures in cases of patent abuse and make certain inventions inaccessible to the public. Such lack of accessibility in case of patented medicines could in turn have adverse consequences for public health of the country. Therefore, the government must reconsider its amendments to the form taking into account the PIL recommendations and re-amend it to restore as well as strengthen its spirit.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/an-anti-disclosure-amendment-that-hits-public-health/article33488183.ece

Sneak Peek:

No. of words: 1261 words

Note: In this article, the author has discussed the history of inter-faith marriages. As a CLAT aspirant, it is a suggested to have a fair idea about it.

Article: 26

The dark step of writing hate into law

The new marriage laws put state power and the law behind majoritarian communal biases, boosting regressive mores

ChaudharyCharan Singh, the former Prime Minister, made a proposal to Prime Minister Jawaharlal Nehru in 1954. As a Minister in the Uttar Pradesh government, he wanted Nehru to pass a law so that jobs as gazetted officers could only be for those who wanted to or had married outside their caste (https://bit.ly/3oc4ALv). Nehru turned the proposal down because this struck at the exercise of the free will of individual citizens in India.

Setting a precedent

It is an indicator of the distance travelled since; that Charan Singh's State (Uttar Pradesh) has an ordinance which criminalises inter-faith marriages. The U.P. government's focus is firmly on 'protecting' Hindu women from marrying Muslim men. It does this under the pretext of regulating religious conversions.

The law in U.P. has already set a precedent for other States ruled by the BharatiyaJanata Party (BJP) such as Madhya Pradesh. In another BJP-ruled State neighbouring U.P., namely Uttarakhand, a routine press release from the Social Welfare department highlighted a scheme incentivising inter-faith and inter-caste marriages. This threatened the communal world view being rapidly ushered in through a series of so-called 'Freedom of Religion' laws in BJP-ruled States. The press release was seen so out-of-step by the State government, that an inquiry was ordered by the Chief Minister.

In 1872, the colonial state drew up a law after it received petitions from Keshub Chandra Sen of the BrahmoSamaj demanding that people of different backgrounds be allowed to marry according to their 'rites of conscience'. The Special Marriage Act, in 1954, took this further in independent India by taking away the colonial law's requirement to renounce religion. However, it still allowed intrusion by the state, unlike under personal laws, by demanding notices to be put up in advance. This was done to ensure there were no living spouses or minors being married, but this clause was misused by communal social groups to stop such unions (https://bit.ly/3okStM4).

In BJP-ruled States, there are many other recent 'laws' — on slaughter of cattle, marriage, and religious conversions — which taken together, target Muslims, both by denying them shared social spaces and their rights as equal citizens of the republic. It also destroys the long-standing fraternity in everyday lives that has long defined India. The ordinance by U.P., the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, and the Madhya Pradesh Freedom of Religion Bill, 2020 are particularly vicious on at least four counts.

Fundamentally wrong

Under the Constitution, it is the individual citizen who has and exercises rights and obligations. But these new laws treat religious communities, instead of individual citizens, as basic entities. By taking away the agency that the Indian Constitution allows each individual to exercise, this fundamentally distorts the framework of our republic.

For those who argue that the Constitution does address communities when speaking of minority rights and untouchability, it is to only acknowledge and overcome social discrimination because that impedes the ability of those citizens to exercise their rights as individuals. By seeing the world as split between 'Hindus' and 'Muslims', a khap-ian universe, a fundamental modern characteristic of the guarantee of autonomy to all Indians as individuals is broken.

Violate privacy, choice rights

Second, these laws blatantly violate the Right to Privacy, which the Supreme Court of India in a much-lauded judgment in 2017, decreed to be fundamental. The level of state interference in a civil union, which is a solemnisation of a relationship between two individuals, breaches the basic structure of the Constitution.

Third, the provisions impede the exercise of an individual's right to choose her faith without seeking state sanction. Under these new laws, everyone — from the police, local administration and communal groups and families — are given ample time to interfere and deny the individual, without any locus to do so. In matters of change of profession, nationalities, electoral choices and even political parties, no such interference is brought into play. The ruling by the Supreme Court (1977), which upheld earlier restrictions to convert by the States of Madhya Pradesh and Odisha (https://bit.ly/394c4tv), said it did so to penalise "conversion by force, fraud or by allurement. The other element is that every person has a right to profess his own religion and to act according to it. Any interference with that right of the other person by resorting to conversion by force or allurement cannot, in our opinion, be said to contravene Article 25(1) of the Constitution of India, as the article guarantees religious freedom subject to public health (https://bit.ly/2LjX8zm)". By making "propagation" contentious, the 1977 ruling pushed back freedoms in Article 25, so the mass conversion of Dr. B.R. Ambedkar to Buddhism could invite a jail sentence! Instead of rescinding the 1977 ruling, these laws further criminalise an individual's choice of faith.

Fourth, the basis of the new law is deeply patriarchal. The nightmare that India traversed in the 1920s, with competitive communalism fanning charges of Hindu betis in North India being taken away like cattle, are being relived now. The pernicious myth of 'love jihad' where adult women are seen as property, is not just a pamphlet or WhatsApp message. It is now the law. We saw a brief preview in 2017 of the dark consequences of the 'Prohibition of Unlawful Conversion of Religion Ordinance, 2020' when the law confronted Hadiya, a 25-year-old health professional from Kerala, for her marital choice a year after converting to Islam. This law targets Muslim men, but is also a living hell for Hindu women.

Cost of inaction

It is with good reason that India is said to have effected a social transformation, thanks to the values spelt out and written into the law of the Republic. The Constitution offered high principles to aspire for, which Indians may never fully live up to. But that may have been the intention, to set high standards and ensure we were always jumping just a little bit, to be better. All laws should meet that brief. However, these new laws do the opposite; they put state power and the law itself behind majoritarian communal biases which empower regressive social mores governing marriage and fellowship. Inter-religious marriages may be less than 2.5%

of all marriages, but the promise they hold goes beyond numbers. They reaffirm the fundamental constitutional premise of all citizens being equal, besides promoting the ideals of freedom and fraternity.

It is diabolical

To fan rumours of 'love jihad' even as the government confirmed in Parliament that there was no evidence of it, is diabolical. But more than that, it is downright dangerous as it seeds mistrust, and changes fundamental and basic ground rules that all plural democracies must live by. It is for the court to suomotu strike these laws down if it wants to preserve the basic structure of the constitutional edifice.

In September 1935 when Hitler enacted the Nuremberg Race Laws, it was fear of the Mischling or the German-Jewish children of 'mixed' descent that haunted the Nazi mind obsessed with purity. At 50% Jew and 50% Aryan, they were a threat to Nazi ideas. Closely linked to preventing such marital and sexual unions was the Nazi belief in dodgy eugenics. The tragedy was that these laws were not protested enough when they were enacted. They ended up guiding Nazi racial policy for the remaining decade of the Reich (https://bit.ly/2JMo5LL).

We must never forget the price a society and a country pays for writing hate into law.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/the-dark-step-of-writing-hate-into-law/article33504245.ece

Sneak Peek:

No. of words: 1243 words

Note: In this article, the author has analyzed the U.P. ordinance on Unlawful Conversion of Religion with the help of various provisions of law. A must read for every law aspirant. Enjoy this article!!

Article: 27

An ill-conceived, overbroad and vague ordinance

The U.P. religious conversion ordinance is unconstitutional, vilifies inter-faith marriages and violates key rights

Article 213 (1) of the Constitution of India provides: "If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require: …" There are, therefore, three pre-conditions to be satisfied before the Governor promulgates an ordinance: first, the State Legislature should not be in session; circumstances should exist for promulgating an ordinance and importantly, those circumstances must warrant immediate action.

Circumstances, urgency

There is no established practice requiring the Governor (or the President under Article 123 of the Constitution) to state the circumstances for immediate action. Therefore, while the recent Commission for Air Quality Management Ordinance gave a four page justification for immediate action, the Farmer's Produce Trade and Commerce Ordinance merely stated in the preamble what the ordinance provides for, but did not disclose the circumstances and urgency for immediate action. I believe a healthy convention should develop and the preamble to any ordinance should state the immediacy for promulgating it when the Legislature is not in session. This would greatly enhance transparency in legislation, but, more importantly, enable legislators to understand why they are, in a sense, by-passed and why a debate and discussion in the Legislature could not be awaited.

The reason for immediate action is, as yet, not justiciable and it is unlikely that any court will delve into this arena. But the Supreme Court of India has held that the existence of circumstances leading to the satisfaction of the Governor can be inquired into. In other words, the court can inquire whether circumstances existed that enabled the Governor to be satisfied of the necessity of promulgating an ordinance. However, the court will not delve into the sufficiency of circumstances. Therefore, why not disclose the circumstances and reason for immediate action in the first instance rather than require people to go to court to find out? In the normal course, these are unlikely to be a state secret.

The U.P. ordinance

The preamble to the The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, commonly called the anti-love jihad ordinance, merely indicates what it provides for, namely, unlawful conversion from one religion to another by coercion, misrepresentation and so on "or by marriage". It then proceeds to record the satisfaction of the Governor of the existence of circumstances and the necessity for "him/her to take immediate action".

Let us try and imagine the circumstances requiring promulgation of the ordinance as far as marriage is concerned. If one fraudulent or coercive inter-faith marriage is taking place, the police can certainly prevent it, as they supposedly do in child marriages. An ordinance is not required for it. However, if more than one such fraudulent or coercive inter-faith marriage is expected to take place, the State government would have information of mass conversions for the purpose of marriage.

In the normal course, it is unlikely that these mass conversions would be in secret and almost simultaneous. A more realistic expectation would be specific information of some or many unwilling religious conversions likely to take place. Surely, these can also be prevented by an alert police force by invoking existing legal provisions. Assuming a somewhat unbelievable scenario does exist, how does one justify immediate action for promulgating an ordinance? It is not as if dozens or hundreds of inter-faith marriages were expected virtually overnight. However hard one might think about it, the need for immediate action is very difficult to understand.

Provisions and impact

Consider the consequences of some provisions of the ordinance, and we are actually witness to them. Section 3 prohibits conversion or attempt to convert any person from one religion to another by coercion or fraud etc. or by marriage. To the extent of conversion by coercion or fraud, etc. there is no problem and nobody supports it. What is conversion by marriage? Nobody gets converted by marriage. If a Hindu marries a Christian, who gets converted — the husband or wife or both or neither? One can understand conversion for marriage, but if an adult person desires to get converted to the religion of the other before marriage, what objection can anybody have?

Rights issues

The offence of attempting to convert poses a bigger rights issue. Section 7 provides that upon receiving information (it may be fake news) that a religious conversion is designed to take place, a police officer is authorised under the Criminal Procedure Code without orders from a Magistrate and without a warrant, to arrest the person so designing, if it appears that the commission of the offence cannot be otherwise prevented. The nature of information includes an allegation of allurement which includes an offer of any temptation in the form of a gift or gratification. So, if a boy and girl of different religions are seen talking together or eating out, it is easy for a so-called aggrieved person (who could be any stranger) to complain to the police that he overheard a conversation in which a temptation was offered to the girl, including a pizza, as has been recently reported. This could trigger the arrest of the boy offering the allurement, his friends and family (as conspirators) with no questions asked. Shotgun weddings were always an offence, but now even pizza-induced weddings are an offence.

Should someone genuinely desire to convert but not get married, that person would have to inform the District Magistrate (DM) two months in advance of the plan through a declaration, under Section 8. The DM requires the police to inquire the real purpose of conversion and file a report (in a sealed cover?) with the DM. What is the true purpose of the police inquiry? If the report concludes that the desire to convert is not for a good enough reason, can the DM refuse permission to convert? Is a pre-crime scenario contemplated?

Assuming conversion is not objected to, even thereafter the DM must be informed by the converted through a declaration under Section 9. Interestingly, the DM is expected to exhibit the declaration on the notice board of the office till the contents of the declaration are confirmed. Meanwhile, the ubiquitous aggrieved person has an opportunity to object to the conversion. What next — does the DM ‘cancel’ the bona fide conversion and have the converted arrested?

Finally, the burden of proof — Section 12 provides that the burden to prove the conversion was not on account of coercion, fraud, etc. or by marriage will be on the person who has caused the conversion. How is that person expected to know the mind of the converted? It is only the person converted who can answer that question and nobody else, as in Hadiya's case.

A danger

The ordinance is prone to abuse and we have seen its consequences — of intimidation, bullying, arbitrary arrests and the loss of a foetus. It is ill-conceived, overbroad and vague in many respects. It vilifies all inter-faith marriages and places unreasonable obstacles on consenting adults in exercising their personal choice of a partner, mocks the right to privacy and violates the right to life, liberty and dignity. In short, it is unconstitutional.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/an-ill-conceived-overbroad-and-vague-ordinance/article33475179.ece

Sneak Peek:

No. of words: 1304 words

Note: In this article, the author has critically analyzed the concept of Human liberty and the role of the Courts in the light of the recent rulings by the same. It will help you to enhance your legal acumen.

Article: 28

A plaintive lament on liberty that rings hollow

As examples show, the judiciary's callous attitude at every level towards human liberty is destructive of the rule of law

In early November 2020, after the overnight listing of a defective petition, the Supreme Court of India granted bail to the television anchor, Arnab Goswami. In a section of the judgment, delivered later on November 27 and titled "Human Liberty and the role of courts", the top court noted that "human liberty is a precious constitutional value"; that "the writ of liberty runs through the fabric of the Constitution"; that it was important for courts across the spectrum to ensure that "criminal law does not become a weapon for the selective harassment of citizens"; that the courts remained "the first line of defence against the deprivation of the liberty of citizens"; that "the remedy of bail is the solemn expression of the humaneness of the justice system", and, most poignantly, that "deprivation of liberty even for a single day is one day too many" (https://bit.ly/3quEFiX).

The reality for many

Observers of the Indian judiciary would no doubt have been bemused by this eloquent encomium to human liberty. At the time of the Supreme Court's judgment, social activists incarcerated in the BhimaKoregaon case had been in jail for more than two years, with the trial yet to start, and with multiple bail applications having been rejected by the courts (they still remain in jail). In the aftermath of the Delhi riots in February 2020, students had been jailed for months (again without trial), with bail having been refused on specious grounds such as a court telling an accused who was not even present at the scene of a riot that "if you play with embers you cannot complain when there is a fire" (most of them still remain in jail).

After the effective abrogation of Article 370 on August 5, 2019, thousands of Kashmiris had been locked up for months, with their habeas corpus petitions going unheard, or dismissed with absurd invocations to the mythical Greek King Menelaus (whose accomplishments included a 10-year war of destruction to retrieve a wife).

The same Supreme Court that on November 27 sung paeans to personal liberty had, a year before, in 2019, told the daughter of a detained politician, in a habeas corpus petition, "why do you want to go to Srinagar when it is so cold there?"

Indeed, the same Supreme Court had, earlier in the year, in 2020, suspended the Karnataka High Court's decision releasing certain Citizenship (Amendment) Act protesters on bail, and had kept that decision suspended for six months — leading to six months in jail, when, apparently, "a day" was "a day too many".

In this background, the Supreme Court's solicitude about human liberty appeared no more than a cruel joke. But perhaps, one could bring oneself to believe these words were implicit acknowledgement of past mistakes, and a promise to do better. Perhaps, one could bring oneself to believe that a judiciary that had visibly held human liberty in contempt over the previous few months would now turn over a new leaf. Perhaps habeas corpus would start to mean something again, as would bail.

But in the two months that have elapsed since the judgment in ArnabGoswami's case, it has become evident that the judicial hymn to personal liberty was not worth the paper it was written on.

Two glaring examples

After the horrific gangrape in Hathras (September), came the news of Kerala journalist SiddiqueKappan along with three others being arrested and incarcerated by the Uttar Pradesh police, in October, while en route to Hathras. When Mr. Kappan's lawyers approached the Supreme Court in a habeas corpus petition, it turned out that "deprivation of liberty even for a single day" was no big deal.

The Supreme Court adjourned the case on multiple occasions, harangued Mr. Kappan's lawyers for not going to the High Court (when, it turns out that under the Constitution, moving a habeas corpus petition before the Supreme Court is a matter of right, while an appeal from a High Court decision, as in Mr. Goswami's case, is only meant to be admitted in "special" circumstances). On one of the dates when the case was supposed to be heard, the Supreme Court did not take it up because it was hearing Tata Sons vs Cyrus Mistry for the third consecutive day. At the time of writing this piece, Mr. Kappan remains in jail.

At the turn of the year, a comedian named MunawarFaruqui, along with other individuals, was arrested and jailed while he was performing at a comedy show in Indore. The arrest took place on the apparent basis that Mr. Faruqui had "insulted Hindu gods" during his show. Leaving aside the larger point of what jailing comedians for cracking jokes about gods says about the present state of Indian democracy, it soon came out that Mr. Faruqui had not, as it turned out, made any jokes at all.

When this was pointed out to the Police, the Police responded by saying that that did not matter, as "he was going to make those jokes", bringing Indian policing firmly into the terrain of the film, "Minority Report". Despite this, the local court rejected Mr. Faruqui's bail application and, subsequently, the bail applications of his colleagues on the spurious basis that releasing him would be detrimental to law and order (who, one wonders, would have been responsible for disrupting law and order if these men had been released?).

The rejection of Mr. Faruqui's bail application was on January 5, 2021. His lawyers immediately moved the High Court. On January 15, the High Court "adjourned" the case because the Police had failed to bring their Police Diary along with them. However, as it has been noted, the police station was two minutes away from the courtroom, and that it would not take much time to bring the diary to the court. It turned out, however, that indeed, "a single day", or rather many days deprived of personal liberty were wholly irrelevant, and the case was "adjourned." At the time of writing, Mr. Faruqui remains in jail.

These two cases present simply the most glaring examples of how every level of the Indian judiciary, from the trial court to the Supreme Court, has treated the issue of human liberty, after the judgment in ArnabGoswami's case. Examples could be multiplied —after all, the social activists in the BhimaKoregaon case and the students in the Delhi riots case still remain in jail despite evidently specious prosecution cases against them, but these suffice.

Blow against rule of law

The rule of law in a society breaks down when the courts appear to be telling the citizenry, "show me the man and I'll show you the law". The rule of law in a society breaks down if the Supreme Court says, one day, that "a single day deprived of liberty is a day too many", while every other court including the Supreme Court itself rejects bail applications of people jailed for years and months without trial, and in Mr. Faruqui's case for something a man did not even do. And the rule of law breaks down when the Court declaims that "liberty is not for the few", but by its conduct, extends liberty only to a few, while the unfortunate many count the weeks and months in jail cells. The judiciary's undeniably callous attitude towards human liberty is deeply destructive of the rule of law; and in that context, its plaintive lament in ArnabGoswami's case, that deprivation of liberty for even one day is a day too many, is reminiscent of Macbeth plunging his hands into the basin and asking the world: "Will all great Neptune's ocean wash this blood/Clean from my hand?"

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/a-plaintive-lament-on-liberty-that-rings-hollow/article33612396.ece

Sneak Peek:

No. of words: 557 words

Note: In this article, the author has analyzed the recent Supreme Court judgments which upheld the constitutional validity of Sections 3, 4 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act 2020. As a CLAT aspirant, it is a must read article.

Article: 29

SC upholds IBC's Section 32A: Why is it important, what are the implications?

The Supreme Court on Tuesday held that the successful bidders for a corporate debtor under the Insolvency and Bankruptcy Code (IBC) would be immune from any investigations being conducted either by any investigating agencies such as the Enforcement Directorate (ED) or other statutory bodies such as Securities and Exchange Board of India (SEBI).

What did the Supreme Court say in its judgment?

In its judgment, the apex court, while upholding the validity of Section 32 A of IBC, said it was important for the IBC to attract bidders who would offer reasonable and fair value for the corporate debtor to ensure the timely completion of corporate insolvency resolution process (CIRP). Such bidders, however, must also be granted protection from any misdeeds of the past since they had nothing to do with it. Such protection, the court said, must also extend to the assets of a corporate debtor, which form a crucial attraction for potential bidders and helps them in assessing and placing a fair bid for the company, which, in turn, will help banks clean up their books of bad loans. "The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. As far as protection afforded to the property is concerned there is clearly a rationale behind it," it said.

The protection to successful bidders and the assets of a corporate debtor are provided by the rules under Section 32A of the IBC. The apex court has, however, also said that such immunity would be applicable only if there is an approved resolution plan, and a change in the management control of the corporate debtor.

"The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto," the apex court held.

Why is the SC upholding Section 32A important?

Since the IBC came into being in 2016, the implementation of resolution plan of several big ticket cases has been delayed because of various challenges mounted by its own agencies and regulators.

For example, consider the case of Bhushan Power and Steel. The debt-laden company, admitted into insolvency in 2017, owes more than Rs 47,000 crore to banks and other financial institutions, and another Rs 780 crore to its operational creditors. After a prolonged bidding battle, JSW Steel won the rights to take over Bhushan Power with a bid of Rs 19,700 crore. However, before the Sajjan Jindal-led company could move to take over Bhushan Power, the ED swooped in, and attached assets worth Rs 4,000 crore citing alleged fraud in a bank loan taken by the company's former owners and other cases under the Prevention of Money Laundering Act (PMLA).

With the Supreme Court upholding the validity of Section 32 A, the cases such as that of Bhushan Power are expected to be completed soon. Experts also said that this will give confidence to other bidders to proceed with confidence while bidding on such disputed companies and their assets.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/sc-upholds-ibcs-section-32a-why-is-it-important-what-are-the-implications-7154987/

Sneak Peek:

No. of words: 899 words

Note: In this article, the author has explained the recent amendments in Thailand Law related to abortion. It is suggested to have a fair idea about this subject and go for that Vidhigya 360 degree analysis of the Act.

Article: 30

What are the amendments in Thailand's abortion law?

On Monday, Thailand's Parliament voted to make abortion during the first 12 weeks of pregnancy legal. Before this, abortion was illegal in the country, regardless of the duration of the pregnancy and was allowed only in limited circumstances governed by the country's medical council.

This week, another country made an announcement dealing with abortion laws. On Wednesday, the right-wing Polish government said it will publish a court ruling that proposed a near-total ban on abortion in its journal. This ruling banned termination of pregnancies including of foetuses with defects. The government's sudden announcement has sparked countrywide protests in the country, where abortion laws were already very strict.

In India, the Union Cabinet cleared changes to the Medical Termination of Pregnancy Act, 1971 early last year. These changes raised the legally permissible limit for an abortion to 24 weeks from the previously legal 20 weeks. The change also accepted the failure of contraception as a valid reason for abortion, not just in married but in unmarried women as well.

Opposition to abortion in Thailand

The opposition to abortion comes mainly from Thailand's majority of conservative Theravada Buddhists who believe that abortion goes against the teachings of Buddhism.

This week, a Buddhist monk Phra Shine Waradhammo who is known for his support for LGBT+ rights sparked outrage among some conservatives after he supported decriminalisation of abortion, according to a Reuters report.

Even so, illegal abortions are not uncommon in Thailand before this. For instance, in 2010 dozens of white plastic bags were found on the grounds of a Buddhist temple. Each of these bags contained the remains of a foetus. At the time, Thai authorities found over 2000 remains in the temple's mortuary, where the remains had been hidden for over a year. The country's prime minister at the time, AbhisitVejjajiva was opposed to legalising abortions and maintained that more should be done to stop illegal abortions.

In the book titled, "Abortion, Sin and the State in Thailand", author Andrea Wittaker says that over 300,000 illegal abortions are performed in the country each year.

In the same year, the arrest of a 17-year-old girl after she attempted to perform an abortion on herself with drugs obtained over the internet reignited the debate on abortion in the country.

So, what changes for women in Thailand now?

In February last year, Thailand's constitutional court called the provision dealing with abortion, which is under the country's criminal code, unconstitutional. As per this provision, women who got an abortion could

be imprisoned for up to three years and those who performed them could be imprisoned for up to five years. Following this, the court gave the Thai government 360 days to change the laws dealing with abortion.

As per the new amendments, women can get an abortion if the age of the foetus is up to 12 weeks. But if a woman gets an abortion after 12 weeks, she can face being imprisoned for up to 6 months and will be liable to pay a fine of 10,000 baht or face both.

Significantly, abortions can be carried out after the completion of the first trimester, but only if they are in line with the criteria established by the Medical Council of Thailand (MCT). As per these criteria, a pregnancy can be terminated beyond the permitted period of time if it poses a threat to the mother's physical or emotional health, if the foetus is known to have abnormalities or if the pregnancy is the result of a sexual assault.

How are these amendments being interpreted in Thailand?

While the amendments signal some progress, pro-choice activists in Thailand are still not convinced and continue to demand the complete decriminalisation of abortion. Human Rights Watch has also called for complete decriminalisation of abortion so that women can fully exercise their reproductive rights.

One of the faces of the pro-choice movement in Thailand is the gender equality and LGBT rights activist Chumaporn "Waddao" Taengkliang, who is the co-founder of a group called Women for Freedom and Democracy.

She also joined the pro-democracy or anti-government protests last year that demanded that the monarchy be reformed and Prime Minister, Prayuth Chan-ocharesign. The protests were some of the biggest seen in recent times and while they were broadly against the monarchy, other groups joined them with demands including expanding LGBT and women's rights, reforms in education and the military, and improvements in the economy.

Taengkliang told The New York Times last year that "The male supremacy society has been growing since the coup". Taengkliang was referring to the way Chan-ocha came to power in 2014, which was through a coup. He is endorsed by the king and is alleged to have meddled with electoral laws during the 2019 elections, which has enabled him to remain in power. Thailand is a Buddhist-majority country of about 70 million and converted from an absolute monarchy to a constitutional monarchy in 1932. Following a coup in 1947, Thailand has been ruled by the military for the most part.

During the pro-democracy protests last year, many young women, many of whom were students dominated the protests. These women called for gender equality and endorsed issues specific to women, including abortion, taxes on menstrual products and school rules that "force girls to conform to an outdated version of feminity" a report in The New York Times said.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/explained-what-are-the-amendments-in-thailands-abortion-law-7166734/

Sneak Peek:

No. of words: 478 words

Note: In this article, the author has explained the recent amendment to CSR rules. As CLAT aspirants, you did not need to mug up the facts but just to have a fair idea about the changes on the said subject matter.

Article: 31

How CSR expenditure rules have changed for Indian companies

The Corporate Affairs Ministry has amended the rules for Corporate Social Responsibility (CSR) expenditure by India Inc to allow companies to undertake multi-year projects, and also require that all CSR implementing agencies be registered with the government. We look at some of the key changes.

How do the new rules enable corporations to undertake multi-year CSR projects?

All companies with a net worth of Rs 500 crore or more, a turnover of Rs 1,000 crore or more, or net profit of Rs 5 crore or more, are required to spend 2 per cent of their average profits of the previous three years on CSR activities every year. The amended CSR rules allow companies to set off CSR expenditure above the required 2 per cent expenditure in any fiscal year against required expenditure for up to three financial years. Experts do, however, note that there was ambiguity whether the rule would apply for expenditure undertaken prior to the amendment.

"The government may consider allowing corporates which have in good faith incurred excess CSR expenditure in the past to set it off against future CSR expenditure requirements," said Harish Kumar, partner at law firm L&L partners.

What are the changes required for implementing agencies?

A large number of companies conduct CSR expenditure through implementing agencies, but the new amendment restricts companies from authorising either a Section 8 company or a registered public charitable trust to conduct CSR projects on their behalf. A Section 8 company is a company registered with the purpose of promoting charitable causes, applies profits to promoting its objectives and is prohibited from distributing dividends to shareholders. Further, all such entities will have to be registered with the government by April 1.

Experts note that the change would impact CSR programmes of a number of large Indian companies that conduct projects through private trusts.

Kumar said the change would mean such private trusts would either have to be converted to registered public trusts, or stop acting as CSR implementing agencies "given that a sizeable amount of CSR is being contributed through their private trusts by many companies, including blue-chip companies."

An expert who did not wish to be quoted said private trusts such as the Reliance Foundation, Bharti Foundation and DLF Foundation, which handle a majority of CSR expenditure for affiliated companies, would be impacted by this change.

What are other key changes?

The amended rules require that any corporation with a CSR obligation of Rs 10 crore or more for the three preceding financial years would be required to hire an independent agency to conduct impact assessment of all

of their project with outlays of Rs 1 crore or more. Companies will be allowed to count 5 per cent of the CSR expenditure for the year up to Rs 50 lakh on impact assessment towards CSR expenditure.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/explained/corporate-social-responsibility-csr-rules-indian-companies-7163098/

Sneak Peek:

No. of words: 1153 words

Note: The author in this article has analyzed the amendments introduced by the government and its effect on Bilateral Investment Treaties (BITs). It will help you to enhance your legal acumen.

Article: 32

Suspension of Insolvency Proceedings and Its Effect on Bilateral Investment Treaties

Recently, the Government extended suspension of insolvency proceedings till 31st March, 2021. On 24th September, 2020, RajyaSabha passed The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020 by way of which it extended the suspension of Sections 7, 9 & 10 with a view to provide further relaxation period to companies adversely affected by COVID-19. The same was originally introduced by the government during March suspending the initiation of Corporate Insolvency Resolution Process for a period of 6 months with the objective of safeguarding Micro Small and Medium Enterprises. Now, the same has been further extended for another 3 months, and although the government's main aim is to provide a recovery period for the affected companies but this step taken by the Indian Government may have an adverse effect on foreign investors that are parties to the Bilateral Investment Treaties signed with India.

Effect on BITs:

Foreign investment is the most important component for the economic growth of any country as it is a source of foreign currency income and it provides a boost to the local economy. India has developed on the economic front due to increase in foreign investment over the past years. Reasons as to why India is considered as an attractive destination for foreign investors includes low wage rates, robust banking and the diverse market. But the most important factor that is considered by foreign investors while investing in any country is the aspect of protection of rights in that country. Special protection is needed to be provided to the foreign investors for the growth of economy. To safeguard such rights of foreign investors and to protect them from the arbitrary unilateral decisions of the host country in which they are investing, exist Bilateral Investment Treaties.

Bilateral Investment Treaties are written understandings which comprises of the terms and conditions for private investment by nationals and companies of one nation in another nation. Essential clauses covered under BITs are as follows:

Applicability

Fair and Equitable Treatment and Full Protection & Security

National Treatment and Most-favoured Nation Treatment

Expropriation

Dispute Settlement Mechanisms, both between States and between an Investor and a State.

India signed its first BIT with the United Kingdom in 1994 and subsequently went on to sign BITs with 86 countries. Much changed after the White Industries Australia Ltd v. The Republic of India dispute where the International Tribunal ordered India to pay 4.10 million Australian dollars to White Industries under the 1999

Indo-Australia BIT. This forced the Indian government to revisit its existing BITs. Simultaneously, India received notices under various BITs in relation to the retrospective tax amendments and cancellation of 2G licenses. Considering these incidents the Government in 2015 started drafting a new model BIT to replace the then existing model Bilateral Investment Promotion Agreement (2003). This Model was finalized in 2016. Now, as per the recent media reports India and Phillipines have begun negotiations for a new Bilateral Investment Treaty and have exchanged their model BITs. If this gets finalized then this will be India's fifth BIT that it has signed since the release of 2016 Model BIT.

Under BITs a foreign Investor is offered full protection and security and all the above mentioned clauses act as means to ensure effective assertion of right. Since the government has suspended the Insolvency proceedings under IBC it is likely that the rights of foreign investors will get substantially limited, leading to violation of promises that were made prior to investing in India. The amendments made to the Code may further lead the foreign investors to initiate action against India under the BITs for violation of FET clause, legitimate expectation and effective means rights.

Breach of Fair and Equitable treatment Clause:

At the time of enforcement of the Code, the government had promised to ensure great investment opportunities to foreign investors.Empathizing on the need to improve faith of foreign investors, the Supreme Court held in Macquarie bank v Shilpi Cable that it is of utmost importance that both foreign and domestic creditors are kept on equal footing. Recently, India has been entitled 63rd position in World Banks' Ease of Doing Business Index rising from the 142nd position in 2014 globally. On the basis of such promises made at that time the Foreign Investors can resort to allege a breach of FET clause ashighlighted by therecent cases of Cairn Energy Pvt. Ltd. and Vodafone Pvt. Ltd. where India lost the arbitration matters with both the companies unanimously because of the bilateral treaties India signed with United Kingdom (In case of Cairn Energy) and Netherlands (In case of Vodafone Pvt. Ltd.). In both these cases India lost owing to the fair and equitable treatment to be provided under the BITs it signed with Netherlands and United Kingdom. The disputes in both these cases arose owing to the retrospective change in tax laws in 2012 for making them effective from 1962. India demanded tax from Vodafone and Cairn Energy retrospectively. These Companies then approached Permanent Court of Arbitration to challenge these demands as a consequence of which the government lost both the cases.

In the matter of Tecmed v. Mexico in which the International Tribunal held that contracting state is duty bound to adhere to the expectations that were considered by the foreign investors during the time of making investment. FET clause as observed by the judges in the matter of MTD v. Chile states that FET clause has a magnitude importance for the foreign investors to be fully treated in a just and even-handed manner.

Amendments made to the Code can also be challenged on the grounds of limiting the investors to effectively assert their rights. In such a situation "White Industries" case becomes relevant wherein India paid 4.10 million dollars to White Industries as the tribunal held that "India had not provided effective means of asserting its claims and enforcing rights". In the present scenario the suspension for COVID-19 defaults is permanent due to which foreign investors have strong cause of action that effective means of asserting their rights has been disrupted.

In its defence India might contend that there is no permanent violation but only a mere postponement of effective means of asserting rights. However, various International Tribunals in such cases have held that foreign investors will still be entitled to raise a claim on the ground that although the measure taken by the destination country may be temporary but there is a chance that deprivation to their investment is not.

Concluding Remarks:

In the case of Swiss Ribbons Private Limited and Anr.vs. Union of India and Ors. The constitutional validity of the IBC, 2016 was challenged and the Apex Court while upholding the constitutional validity of the Code held:

"86…. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful place has been regained."

This indicates the objective with which the Code was enacted i.e. to save the creditors from a time consuming process of recovering the debts from the wilful defaulters. Although the Indian judiciary from time and again has safeguarded the rights of investors as witnessed in the judgments rendered by the Delhi High Court and Supreme Court with respect to the Vodafone Industries; but when it comes to policy making, the Government of India lags behind despite starting several initiatives such as Make in India, Stand up India etc. An essential factor which comes in the mind of a foreign investor before making investment in any country is the municipal law of that country. The insolvency law of any country also plays a crucial role. The legislative intent behind the enforcement of IBC was to boost India's economy by providing speedy debt recovery process to the creditors and it is for this reason that FDI inflows increased in India over the past year. However, by unilaterally suspending the insolvency proceeding, the Government has neglected the interests of foreign investors. If the foreign creditors are not allowed to recover their debts from the wilful defaulters then this will derogate India's reputation of having a better credit market.

Before taking any measures that can have an impact on foreign investors, the government should consider its obligations under the BITs as ignorance of these obligations would lead to India's defeat in cases on an international level as was seen in the case of Vodafone Pvt. Ltd. and most recently in the case of Cairn Energy Pvt. Ltd. There is a need for establishment of coordination between the Ministry and all other ministries to discuss the obligations of India under the BITs before taking a step which may potentially affect foreign investors.

By unilaterally making the amendments in The Insolvency and Bankruptcy Code, 2016 the Government of India has violated the above-mentioned clauses of BITs and has contradicted its vision of making India a good economy. India is on the path of becoming the investment hub. The goal to become investor friendly can only be achieved when decisions are taken for safeguarding the rights of investors instead of taking those decisions that are detrimental to them.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/insolvency-and-bankruptcy-code-covid-19-rajya-sabha-168204

Sneak Peek:

No. of words: 2748 words

Note: In this article, the author has critically analyzed the recent notification of Bar Council of India (BCI) which again ignited the debate of whether minimum practice at the Bar should be a pre-requisite for entry into judicial service. It will help you to enhance your legal acumen.

Article: 33

For Minimum Practice As Advocate For Judicial Service: Reigniting The Debate

"Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid; make decisions" - Professor Pannick, Judges

Recently, Rule 5(2)(a)(i) of the Andhra Pradesh State Judicial Service Rules of 2007 was challenged before the Supreme Court (SC). The rule laid down a pre-condition of three years of practice as an advocate to be eligible to write the Civil Judge exam in the State. On 2nd January, the Bar Council of India (BCI) said that it will file an impleadment application before the Apex Court seeking modification of the 2002 Supreme Court order in All India Judges' Association v Union of India (2002 AIJA case) where the court rejected the eligibility criteria of 3 year experience at the bar for giving state judicial service exam.

This BCI move reignited a dormant debate of whether minimum practice at the Bar should be a pre-requisite for entry into judicial service even at the lowest level i.e. subordinate judiciary. The issue holds prominence as subordinate judiciary is considered to be the foundation of the edifice of our judicial system. There is no denial of the fact that fresh law graduates lack practical experience. Their knowledge is restricted to theories, bare provisions and idealism which may not be sufficient to understand the working of law within court premises.

Caught up in dilemma

The debate on the minimum eligibility of judicial officers is a long one and is mostly dictated by the times in which decision/suggestions on it were made. The history of this debate has been traced in details by VIdhi Centre for Legal Policy in its report on "Schooling the Judges: The Selection and Training of Civil Judges and Judicial Magistrates".

In pre-constitution times, the issue of three year experience requirement was considered by the Rankin Commission in 1924 which observed that "The rule in force in certain provinces requiring candidates to have practice at the Bar for a period of three years or more furnishes no guarantee that the candidate has acquired any really useful experience."

After independence, Article 234 was adopted in our constitution which authorised recruitment of judicial officers below the district judge but this article was not substantively debated in the Constituent Assembly. However one of the qualifying criteria for Civil Judges and Judicial Magistrates in India has been a practice requirement of three years before a court of law, after graduation combined with an examination and an interview conducted by the State Public State Commission in consultation with the High Court that has jurisdiction over the state.

Law Commission of India (LCI) in its 14th Report followed the footmarks of Rankin commission when it observed that under the conditions prevailing in the legal profession it is virtually impossible for a person to acquire any meaningful experience or training in the period of three to five years. However, in its conclusion, the LCI leaned in favour of retention of the three year experience criteria as it provided some, though limited, experience to fresh law graduates and exposure to working of law in courts.

Next LCI came up with a series of recommendations in its report to revamp the sub-ordinate judiciary-

114th Law Commission of India report- Setting up Gram Nyayalayas

116th Law Commission of India report- Setting up an All India Judicial Services

117th Law Commission of India report- Setting up an Academy for Training Judicial officers at all levels

118th Law Commission of India report- Method of Appointments to Subordinate Courts/Subordinate judiciary

Both 116th and 118th Report emphasised how 2 to 3 years of practice didn't provide sufficient experience and hardly qualified an individual to be a better judge. However in conclusion 118th report agreed on retention of three year experience requirement.

These dilemmas remained unresolved and meanwhile respective state governments modified their judicial service rules to amend the eligibility criteria. Few states scrapped the requirement of three year experience requirement while few retained it. It was only when Supreme Court got involved in All India Judges' Assn v Union of India (1993 AIJA case) that an attempt was made to bring some uniformity. Apex Court asked state governments to reintroduce the three year experience requirement criteria because "..the recruitment of law graduates as judicial officers without any training or background of layering has not proved to be a successful experiment. Considering the fact that from the first day of his assuming office, the judge has to decide, among others, question of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable." (Para 20)

The Supreme Court also laid emphasis on uniformity characteristic and observed that since Judges of District Court, High Court and Supreme Court need minimum period of experience as an advocate to suffice eligibility criteria, the same should also be implemented in subordinate judiciary.

In 2002 Supreme Court taking cognisance of the Justice Shetty Commission report in 2002 AIJA case, reversed its earlier ruling of 1993 and asked for scrapping of minimum experience requirement. The rationale was based on the observation in Shetty Commission that because of this requirement, brilliant young minds are drifting away from the judicial services. The court failed to take cognisance of the revolutionary move introduced by Prof MadahavMenon in the form of integrated law degree and National Law Universities (NLUs). The legal education was just gaining traction and becoming more competitive with more young minds voluntary opting for the field.

No other major common law country has removed the criteria of minimum practice requirement. United Kingdom has a complex judicial structure as it is the by-product of 1,000 years of evolution. Different types of case are dealt with in specific courts: for example, all criminal cases will start in the magistrates' court, but the more serious criminal matters are sent to the Crown Court. Appeals from the Crown Court will go to the High Court, and potentially to the Court of Appeal or even the Supreme Court. Civil cases will sometimes be dealt with by magistrates, but might well go to a County Court. Again, appeals will go to the High Court and then to the Court of Appeal – although to different divisions of those courts.

Judicial Appointment Commission is responsible for appointment of judges in these magistrate courts. In its eligibility criteria for legally qualified candidates there is a statutory requirement for at least 5 or 7 years of post-qualification experience (PQE) for legally qualified posts.

In Australia different states have their own eligibility criteria, for instance in Western Australia a person is qualified to be appointed as a magistrate of the Court if he or she has had at least five years' legal experience, in South Australia for appointment to the Magistrates Court an appointee must have been a practitioner of at least five years standing, in Australian Capital Territory to be eligible to become a magistrate or special (acting) magistrate in the ACT.

Don't compare apple with oranges

The obvious contention raised against the BCI resolution will be by drawing parallel between judicial services and executive service more specifically services allotted by Union Public Service Commission. If a person can become an Indian Administrative Service officer then why can't a person become a judge at 21 years of age? The underlying presumption here is that both services are similarly situated in terms of nature of employment. A closer scrutiny is required to confirm this hypothesis.

Since the constitution provides detailed procedure of employment, eligibility and other requirements vis-à-vis Supreme Court and High Court judge, there is little doubt that these are constitutional positions and there is no requirement of further clarification. The issue of nature of employment arises in lower judiciary where all executive and judicial organs of state are involved in appointment and dictating service condition of judges. Article 236 of the Constitution defines the expression judicial services as "means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge."

Supreme Court in All India Judges' Association v Union of India (1993) specifically held that judicial service is not a service in the sense of employment and judges are not employees. Justice Sawant speaking for the court clarified in detail the underlying difference between the two. The paragraph is self-explanatory and is reproduced below:

"....The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the state-power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, legislators and the judges and not between the Judges and the administrative executive..... The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally." (Emphasis intended)

Law Commission of India in its 14th Report also emphasised the importance of judicial officers which denotes their different stature:

"...the great responsibility of the work which a judicial officer is called upon to discharge needs no emphasis….Judicial integrity is of the greatest importance....

..If the public is to give profound respect to the judges the judges should by their conduct try and observe it: not by word or deed should they give cause for the people that they do not deserve the pedestal on which we expect the public to place them."(Emphasis intended)

The role and duties discharged by the judges are in stark contrast to the administrative duties discharged by the lower executive. The duties and responsibility vested in judges in identical in the entire judicial setup only the jurisdiction differs. The SC, re-affirming the observation of 1993 AIJA case in High Court of Judicature at Bombay through its Registrar v. ShirishkumarRangraoPatil., highlighted the role of lower judiciary in following words:

"The trial judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the day-to-day proceedings in the Court. on him (/her) lies the responsibility to build a solemn atmosphere in the dispensation of justice, the personality, knowledge,, judicial restraint, capacity to maintain dignity, character, conduct...." (Para 13)

SC went so far to say, and rightly so, that if the rule of law is to function efficiently under the aegis of our democratic society, judges are expected to nurture an efficient and strong and enlightened judiciary.

Law is a means to an end and justice is that end. Judges are bestowed with the responsibility of dispensing justice to the people. SC in Supreme Court Advocates-On-Record Association v Union of India observed that "...the role of the Judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic polity thereunder shall not survive, the day the Judiciary fails to justify the said trust."(Para 329)

Many elephants in the room

Irrespective of how commendable the BCI resolution is, it is not devoid of flaws. Press release dictates only the proposal to re-introduce the 3 year experience eligibility. The details of the proposal can only be gauged after perusal of the detailed application filed by BCI or at the argument stage. However it is imperative to mention few pressing issues that should be taken into consideration by BCI otherwise the move will reverse the wheel of change in legal profession.

Judicial Services is usually the preferred choice of first generation lawyers because of its objective assessment of candidate's merit wherein you don't need to have "contact" in the legal fraternity. LCI in its 14th report observed : "It is only the exceptional young man, favourably situated and having the advantage of a senior member of the Bar interested in him, who gathers any experience at all at the Bar in so short a period of time. Such an exceptional person would naturally not care to be a competitor for entrance into the subordinate judicial service."

The reason why so many first generation lawyers opt for judiciary is the miniscule amount of salary paid to the fresh law graduates in lawyer's chamber. Vidhi Centre for Legal Research study showed that 79% of advocates with less than 2 years of experience earn less than Rs 10,000. There is a demand for minimum wages for junior advocates so that they are not subjected to hand-to-mouth existence.

The BCI also needs to address the concerns pointed out by Shetty Commission that "…In the initial three years of legal practice, the lawyers neither gain any experience nor earn anything in the absence of any work with them". The commission was right in pointing out that in absence of nay work the fresh law graduates

may be frustrated and drift away from the judicial services. BCI is also the regulator of legal profession and dictates the professional standard of advocates enrolled.

Additionally, BCI also mentioned that most of the judicial officers are impolite and impatience. BCI regulated legal education in India and has made Professional Ethics and Moot court/clinical trial a compulsory subject. These observations are an admission of the failure of such initiative to impart essential qualities. The BCI and the University Grant Commission (UGC) are the regulatory agencies in legal education in India. The UGC, determines the standards of legal education and it has set a panel on legal education, BCI is empowered to prescribe standards of professional legal education. Thus, on the one side, the BCI Trust specifically monitors the legal education and the entry of lawyers in the profession and the other side is the UGC, which also recognizes the degree awarded by the legal institutions especially relating to higher studies in law. However, there is lack of uniformity in the aims and objectives of legal education projected by these regulators and this multiple regulators dichotomy is not blamed for the sub-standard of legal education.

It should also be mentioned herein that the reason why many law students appear "impractical" is because they are not able to pursue internship as they are unpaid and hence cannot afford it[5]. A study that I conducted highlights that majority of the students don't get stipend and if they do it is minuscule sum. The synergetic effect of expensive legal education and unpaid internship lead to many students lacking the required practical experience as desired for being a judicial officer.

Few thoughts

The BCI is probably few of the those regulating agency which takes decision by being completely detached from the realities of law students. There is no direct link between law students and BCI nor is there any consultation mechanism before taking decisions.

Legal education in last two decades has seen tectonic shift. Observation made by the Shetty commission and the All India Judges' Assn decision (2002) surely need revisiting. However this re-visit should be made with a pinch of salt taking into consideration the new problem originating out of this tectonic shaft.

Lord Devlin, a great Law Lord with profound common sense had said sometime on the courts of England - and it would be interesting to narrate what he said - that

"if our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back".

To prevent ourselves from sliding into this intellectual bankruptcy BCI move provides some respite. Its enforcement is something we don't know until we know

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/need-for-minimum-practice-as-advocate-for-judicial-service-168112

Sneak Peek:

No. of words: 1229 words

Note: In this article, the author has analyzed the concept of grant of compulsory licensing in the light of the Vaccines for COVID19. A must read for every law aspirant. Enjoy this article!!

Article: 34

Should India Grant Compulsory Licences to Increase the Supply of Vaccines?

While there currently isn't a shortage of vaccines, compulsory licencing can be a powerful public health tool to work around concerns over insufficient supply of important pharmaceutical products.

India's drug regulator, the Central Drug Standards Control Organisation, approved two coronavirus vaccine candidates – Covishield and Covaxin – for "restricted use" in "emergency" situations. Covaxin is an indigenous vaccine candidate, developed by Bharat Biotech (Hyderabad), the Indian Council of Medical Research (Delhi) and the National Institute of Virology (Pune).

There are some important concerns about the safety and efficacy of Covaxin considering it was approved without the corresponding data from phase 3 clinical trials. In light of this, many independent experts have demanded that the government roll back Covaxin's approval and wait for efficacy data.

The other candidate, Covishield, has been derived from an original developed by the British-Swedish drugmaker AstraZeneca. It's phase 3 trials are currently underway in sites around the world. Preliminary reports from sites in the UK and Brazil have reported favourable results, but AstraZeneca has since been mired in multiple controversies over allegations that it has cherry-picked or fudged data to improve its market prospects.

AstraZeneca's candidate vaccine has been approved for emergency use in the UK, Argentina, Dominican Republic, El Salvador, Mexico and Morocco. The EU is yet to follow but has preordered 400 million doses ahead of approval. However, the EU-AstraZeneca talks have been highly tense, with the block demanding that the company explain its erratic supply.

Against this background, the governments of developing countries – including of India – should prepare to issue compulsory licences for the COVID-19 vaccines.

Production capacity

Now is the time for India's pharmaceutical industry to play a greater role in the global drug supply, pursuant to pharmaceutical security. India has already supplied lakhs of doses of Covishield as grants or gifts to Bhutan, Bangladesh, Maldives, Nepal, Myanmar, Seychelles, Sri Lanka and Morocco. Commercial exports are expected to follow soon.

At this point, India must of course consider how many vaccine doses it can produce, what its own requirements are and what it can do to negotiate potential shortages.

Serum Institute of India, the Pune-based drugmaker that has a deal with AstraZeneca to manufacture Covishield in India, said it already has over 50 million doses ready and can produce 500 million more by July

2021. The Indian government plans to vaccinate three crore frontline and healthcare workers by July. India's population is 1.38 billion and both Covaxin and Covishield are two-dose vaccine candidates. In addition, Serum Institute is a part of the WHO-backed Covax alliance set up to supply vaccines to low- and middle-income countries by the end of 2021, and has committed 100 million doses to this end, followed by 900 million more.

While Serum Institute's production capacity is promising, it will have a tough time meeting both its national and international obligations. Time is an important factor here: the faster people are vaccinated, the closer we get to exiting the pandemic. At this juncture, the government of India should consider compulsory licencing of COVID-19 vaccines under its patent laws.

An employee in personal protective equipment (PPE) removes vials of AstraZeneca's COVISHIELD, coronavirus disease (COVID-19) vaccine from a visual inspection machine inside a lab at Serum Institute of India, in Pune, India, November 30, 2020. Photo: Reuters/Francis Mascarenhas/File Photo

Compulsory licencing

Patents are a form of intellectual property rights granted to individuals or companies for an invention deemed to be novel in nature and of some utilitarian value. The legal lifetime for patent protection is usually 20 years. In this time, the investor enjoys exclusive rights to exploit the patent's intellectual contents while third parties are disallowed from doing so.

However, there is one way in which the controller general of the patent office can allow a third party to manufacture, use, sell and/or distribute a product that has been patented without having to obtain the consent of or a licence from the patent owner. The provisions for such an action, called compulsory licencing, are enshrined under chapter 16 of the Indian Patents Act 1970 and under section 31 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.

Pharmaceutical companies invest significant resources into researching, inventing and gaining approval for new medicines to treat known and emerging diseases. As such, the eventual prices of life-saving drugs can be quite high.

The University of Oxford, which developed the vaccine candidate that AstraZeneca has licenced in India under the name 'Covishield', has already patented the vaccine technology that Covishield uses. Last year, the university had also filed an application for another follow-on patent.

AstraZeneca and Serum Institute in turn entered into a licencing agreement to share the technology. Licencing agreements make for one way to commercialise intellectual property rights. From the point of view of the inventor, these agreements are collected under the term 'voluntary licencing'.

The concept of compulsory licencing complements this idea.

Under the Indian Patent Act, the government of India has the power to issue compulsory licences to any patents in force during a national emergency or to facilitate public non-commercial use. The government can also authorise specific companies to use an existing patent to save the state's purposes.

India granted the first such licence in 2011 to a company called NatcoPharma, over a compound called sorafenibtosylate. In this case, Bayer Corp. was the inventor company and it marketed sorafenibtosylate under the name 'Nexavar', to help treat liver cancer. Bayer subsequently challenged the compulsory licence before the Intellectual Property Appellate Board, the Bombay high court and finally the Supreme Court of India. All appeals were dismissed.

The ongoing novel coronavirus pandemic certainly qualifies as a national emergency under section 92 of the Patents Act.

Compulsory licencing can thus be a powerful public health tool to work around concerns over an insufficient supply of important pharmaceutical products. While India currently doesn't face a shortage of either of the two vaccine candidates, the government needs to be prepared nonetheless.

Men ride on a motorbike past a supply truck of India's Serum Institute, the world's largest maker of vaccines, in Pune, May 2020. Photo: Reuters/Euan Rocha

For example, a fire recently broke out at a Serum Institute facility in Maharashtra, killing five people and prompting a lot of questions over what might have happened had any Covishield doses been lost.

So should the need arise, the government can, under sections 92 and 92A, authorise leading pharmaceutical companies, other than Serum Institute, to produce Covishield and ensure India fulfils its national and international obligations as quickly as possible.

The way ahead

A compulsory licence may not be the best way to deal with a pandemic because governments need to issue one on a case-by-case basis, and each government has to do so as well. However, it could be a powerful way out of the patent impasse – at least until the World Trade Organisation accepts the proposal of India and eight other countries to exempt member states from enforcing patents and other intellectual property rights for a limited period of time, on substances related to the treatment and elimination of COVID-19.

It's notable that even the voluntary licences given to certain pharmaceutical companies are shrouded in secrecy, with opaque terms and conditions. Such exclusive licencing only encourages nationalism and does nothing to promote international collaboration – the need of the hour.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/health/india-patent-law-compulsory-licenses-covid-19-vaccines

Sneak Peek:

No. of words: 967 words

Note: In this article, the author has analyzed the laws related to Right to Disconnect, a facet of personal liberty which was recently passed by EU lawmakers. As a CLAT aspirant, it is a suggested to have a fair idea about it.

Article: 35

Is It Time for a Right to Disconnect?

The right to disconnect upholds the liberty of people to disconnect from work and work-related communications after normal working hours.

The right to disconnect has been a much debated issue.

Lately, echoes of the same resonated again when EU lawmakers passed a resolution arguing that individuals have a fundamental right to disconnect. The right to disconnect upholds the liberty of people to disconnect from work and work-related communications (e-mails, messages etc.) after normal working hours. It endorses the fact that workers should be allowed to be offline without apprehensions of employer retribution.

The pandemic has ushered in new forms of work with work from home becoming a norm. At least 98% of employees in IT majors in India like TCS, Infosys, Wipro are expected to continue working from home till March 2021. Further, TCS announced that 75% of its staff will permanently work from home by 2025. Developments like these herald a new era for job designs.

It is not wrong to say that most people love the flexibility that work from home offers. Working in a flexible environment can be liberating. It gives an employee a sense of ownership over one's schedule. However, excessive demands of work may impinge on personal time and push the otherwise relieved worker into a high-stress territory. Studies have pointed out that the initial euphoria that accompanied work from home is gradually waning. What started with a bang is mellowing into a whimper.

Staying connected round the clock has started taking a toll on workers. Research findings show that after months of homeworking, employees are now showing signs of fatigue, burnout, depression and health disorders. The boundary between work and home life has become blurred, leading to excessive encroachment in people's private lives. Employees are baffled with a 'stream of pings' overtaking their personal space. This has brought to the fore demands related to the right to disconnect.

Several countries in Europe already have some form of right to disconnect. France became a trendsetter when it introduced the "El Khomri" law, proposed by the then labour minister Myriam El Khomri, in support of the right to disconnect. Italy has incorporated a similar right regarding employee's obligation to communicate beyond office hours.

In Spain and Germany, companies are adopting disconnect policies. Lawmakers in UK too have mooted the idea of giving employees the right to disconnect. The demand is picking up steam in the US as well.

In 2018, the Right to Disconnect Bill was introduced by SupriyaSule, MP from NCP, in the LokSabha. The Bill proposed that no disciplinary action can be taken if an employee does not respond to work-related calls after working hours. The Bill could not be passed as it was a private member's bill, and no such bill has become an Act in India since 1970.

The loopholes

While the right to disconnect sounds logical in principle, there are inherent intricacies in implementing it. There may be issues with respect to jobs that require emergency services or where human lives are involved, like that of a medical practitioner. Any right to disconnect needs to consider that in case of MNCs, employees work across different temporal and spatial zones. Completely switching off may not be practical.

In several industries, work flow is tethered along a value chain that spans across geographies. Each entity in the value chain is cog in the wheel. If one entity is disconnected, it may lead to disturbance in seamless delivery of the product or service. This may leave customer or client expectations unattended leading to the possibility of customer drop-outs.

Exigencies at the workplace often require going beyond time frameworks. Any mishaps at the factory or plant cannot be addressed immediately if people disconnect. Often there is backlog of work due to which disconnecting may not be advisable. Further, since work from home allows flexibility, many feel that right to disconnect may not be needed at all.

In many cases, individuals have freedom to adjust work schedules, obviating the need to disconnect. One argument is that since nobody is usually penalised for not replying to calls or emails, it is fine to keep the lines a little hazy.

If the right to disconnect becomes a legal right, the big question for employers would be how to police the system. In case people take calls during the 'disconnect' time, will they be punished for non-compliance? Will the legal machinery initiate action? To adopt the right to disconnect, the basics need to be addressed first. Even after three years of the law being in effect in France, there are loopholes in its enforcement.

'Disconnect from work' policies

Several organisations have voluntarily put in place 'disconnect from work' policies. German companies like Volkswagen and Daimler have implemented policies to stop email servers from sending mails to employees during off hours. In Sweden, the average employee works only about six hours a day, compared to the global average of eight hours.

Reduced work hours and more leisure time have led to a marked reduction in absenteeism and improved health and productivity. Even companies in work-obsessed Japan are going against the tide and combating the "always on culture" by allowing employees to disconnect.

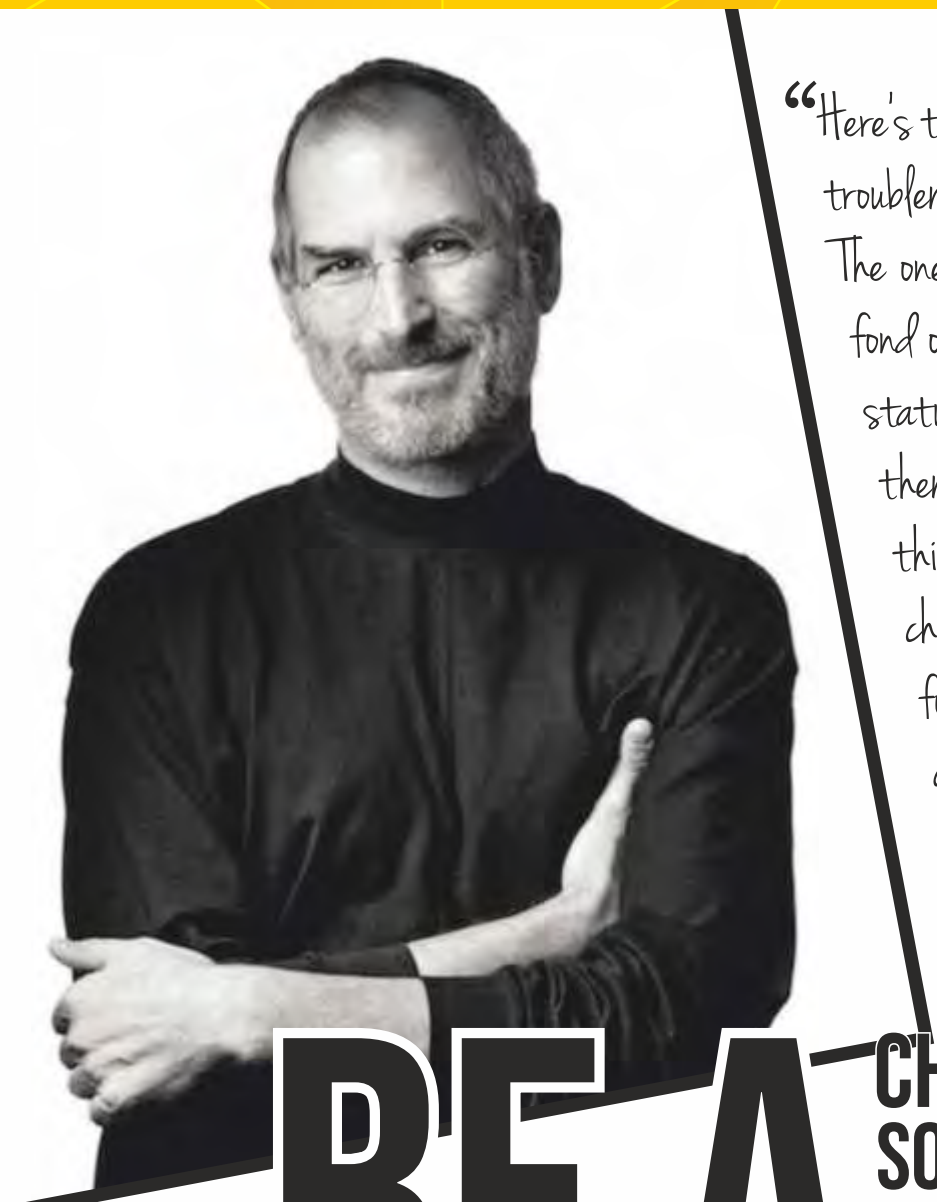
Implementing the right to disconnect will necessitate realistically reviewing employee workloads and rationalising schedules. There is a need to lay down clear working guidelines. Some companies in Japan have innovatively implemented a staggered 'disconnect framework' where one employee takes over the responsibility of another who has disconnected. Work time and leaves are scheduled in a way so that work flow remains unhampered.

With more and more employees expected to work on project-based assignments and with gig working becoming common, synchronising teams can be the Achilles' heel for management. To disconnect or not remains a dilemma.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/rights/is-it-time-for-a-right-to-disconnect

THINK BIG THINK DIFFERENT



"Here's to the crazy ones. The misfits. The rebels. The troublemakers. The round pegs in the square holes. The ones who see things differently. They're not fond of rules. And they have no respect for the status quo. You can quote them, disagree with them, glorify or vilify them. About the only thing you can't do is ignore them. Because they change things. They push the human race forward. And while some may see them as the crazy ones, we see genius. Because the people who are crazy enough to think they can change the world, are the ones who do."

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