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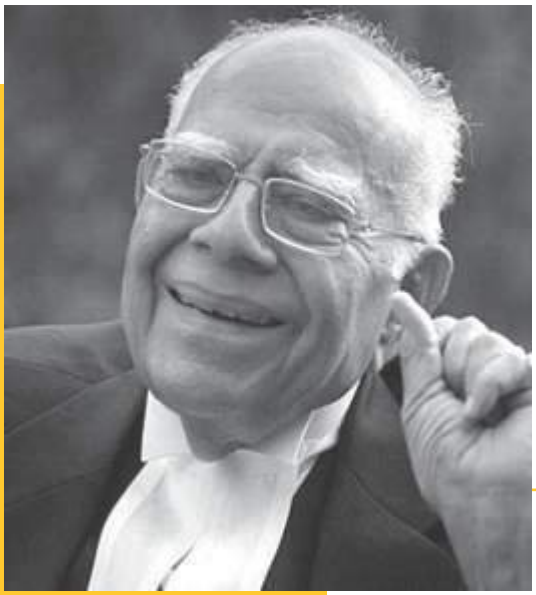

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Sneak Peek:

No. of words: 995 words

Note: In this article, the author discussed the rules of the Supreme Court of India with regard to the Contempt proceeding in the light of the recent incident of a Comedian Kunal Kamra. It is a very informative text to understand the legal position about the subject.

Article: 1

Kunal Kamra Contempt Case: What did the A-G Say? What Happens Now?

The person being accused of criminal contempt has to be given an opportunity to file their reply and affidavits.

Attorney General KK Venugopal, on Thursday, 12 November, gave his consent to initiate criminal contempt of court proceedings against comedian Kunal Kamra for his tweets about the Supreme Court.

The Attorney General's consent is needed for a contempt petition filed by a third party to proceed, under both the Supreme Court's Rules on contempt proceedings, as well as the Contempt of Courts Act 1971.

A-G KK Venugopal went through the list of tweets made by Kamra that had been listed in the request and found that two of them "are not only in bad taste but clearly cross the line between humour and contempt of the Court."

These two tweets read:

"Honour has left the building (Supreme Court) long back."

"The Supreme Court of this Country is the most Supreme joke of this country."

A third tweet that the A-G felt constituted criminal contempt was one where Kamra had shared an image of the Supreme Court building dressed in saffron colours with the BJP flag on top instead of the national flag. According to Venugopal:

"This is a gross insinuation against the entirety of the Supreme Court of India that the Supreme Court of India is not an independent and impartial institution and so too its judges, but on the other hand is a Court of the ruling party, the BJP, existing for the BJP's benefit."

While he found the other tweets to be "highly objectionable" as well, he left it to the apex court to decide whether they too amounted to criminal contempt.

The A-G concluded by pointing out that people today believe that they can condemn the Supreme Court and its judges by exercising their freedom of speech.

"But under the Constitution, the freedom of speech is subject to the law of contempt and I believe that it is time that people understand that attacking the Supreme Court of India unjustifiably and brazenly will attract punishment under the Contempt of Courts Act, 1972."

A-G Venugopal

What is Criminal Contempt & Who Takes Action?

According to The Contempt of Court Act, 1971, Criminal Contempt means the publication of any matter or the doing of any act which -

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

The Supreme Court has the power to take action where a person has committed contempt of it in several different circumstances.

The most obvious one is where a person commits contempt in view or presence or hearing of the apex court – in which case the court can take it up immediately.

The other circumstances are where someone commits contempt outside the court, whether through comments in the press, or on social media, at a public gathering or on television. In such cases the court can take up the issue suo motu (as in the Prashant Bhushan case), or after a petition filed by the Attorney General or the Solicitor General.

Additionally, a contempt case may also arise from a petition filed by any person with the court. Where this is an allegation of criminal contempt of court, then the Attorney General or Solicitor General has to give their consent in writing to the filing of the contempt petition.

Attorney General KK Venugopal recently refused to grant consent for initiation of criminal contempt proceedings against actress Swara Bhasker and journalist Rajdeep Sardesai, for comments about the Supreme Court. He also declined to grant consent for contempt proceedings against Andhra Pradesh chief minister YS Jagan Mohan Reddy, in connection with his letter to the Chief Justice of India, released publicly, which included allegations against a senior judge of the Supreme Court.

Next Steps Regarding Contempt Pleas

If consent is granted, however, as is the case with the complaints against Kunal Kamra, then the criminal contempt petitions by a 'third party' can be filed in the Supreme Court. These petitions have to be supported by an affidavit and copies of all the statements (including tweets or other social media posts) which disclose the alleged offence.

The person being accused of criminal contempt has to be given an opportunity to file their reply and affidavits, and then the matter can be heard, whenever listed by the Supreme Court. The Chief Justice of India, as always, will assign which judges will hear the case, even if the contemptuous statements reference them.

While the Supreme Court has its own Rules for the procedure and has significant discretion when it comes to contempt matters, it normally follows or at least is guided by certain provisions and guidelines set out in the Contempt of Courts Act 1972 (though it is not bound by this law). These include those under Section 13 of the Act, that:

the accused should be allowed to argue truth as a defence (if the court is satisfied this is a bona fide request)

the guideline that a sentence shall not be imposed on a person convicted of contempt "unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice"

Once the hearings are over, the court then decides whether or not to hold the alleged contemnor guilty of contempt of court.

If the person is convicted, then they can be sentenced to up to six months in prison (again, the SC can potentially give a higher sentence), or a fine, or both. The accused may be discharged or the punishment awarded remitted if the accused makes a bona fide apology to the satisfaction of the court.

Courtesy: 'The Quint' as extracted from:

https://www.thequint.com/news/law/kunal-kamra-contempt-of-court-details-what-is-next#read-more

Sneak Peek:

No. of words: 1954 words

Note: In this article, the author is criticizing the way contempt proceeding has been initiated against a stand-up comedian. The author is criticizing the way the administration is using the legal process as a tool to hold only selective people accountable for their actions. As a CLAT aspirant, it is a must-read article.

Article: 2

Kunal Kamra and the Elasticity of Justice

Far from reigning in the government's excesses, which is what its constitutional duty is, the higher judiciary appears to be encouraging it by its silence, selective orders and even acceptance of post retirement sinecures and appointments.

The question goes like this:

Question: What is contempt of court?

Answer: A joke.

That's literally true in the India of today: three jokes on the Supreme Court, posted on Twitter by stand up comedian Kunal Kamra, are likely to attract contempt of court proceedings against him. That in fact is the learned advice of the Attorney General who, just a couple of days earlier, had opined that accusing a sitting SC judge of favouritism and of trying to topple a state government did not amount to contempt. It should surprise no one, of course, that in this case, the worthy concerned was a chief minister allied to the BJP.

The elasticity of justice in this country is indeed astounding, and on the same footing as the economic principle of elasticity of demand. The latter states that the higher the price of a commodity, the lower its demand; the former provides that the more influential a person is, the more benevolent the law and its gatekeepers.

Kunal Kamra is a comedian, and a good one too. It is his job to crack jokes and pull people down a peg or two. It is his constitutional right to practice this profession, and he does a better job of it than most judges do of theirs. In fact, one writer has described him as the 'Laughing Gandhi', for his courage to hold a mirror to the powerful, albeit with a dash of caustic humour.

Why should their lordships get so infuriated by a couple of sallies targeting them – he spares no one, not even the prime minister or his pit bull anchor. Kamra belongs to a hoary tradition of court jesters – recollect Akbar and Birbal, Patch Sexton in the court of Henry VIII (who inspired Shakespeare's fool in King Lear) – whose job was not only to amuse the king but also to remind him of a few home truths. Comedians are important sounding boards for all rulers, and our legal czars would do well to revisit history, if not the constitution. Calling the Supreme Court a joke is just a joke, your honour, unless you feel in your heart of hearts that it is more than that – that it could be a terrible truth – in which case it is not the court's honour which is at work here, but a guilty conscience.

And, by the way, this is the Supreme Court we are talking of here, not King Arthur's court or Kublai Khan's court. This is a court of a democratic country, created by a constitution framed by we, the people, and paid for by the same citizenry who have no access to it. Criticism of this court, if there is no malice or ulterior intention

behind it, cannot be a ground for the Attorney General or judges to term the critic a contemnor. Pomposity and pride do not go well with honest and equal dispensation of justice. Humility might be a better substitute.

I am reminded here of another humorous incident. A senior justice of the US Supreme Court had gone to his old law university as a chief guest for a function. Meeting the dean, he remarked in a lighter vein: "Dean, do you still teach your students about the pomposity and bluster of judges?"

The dean smiled, and replied: "No, your honour, we let them find that out for themselves."

Are we now finding out for ourselves, with so much time and energy spent by the court in pandering to its aggrieved pride by hauling up alleged contemnors? Should this time (paid for by taxpayers) not be better spent in some introspection by our judges to try to find out why exactly is the ordinary citizen so incensed by the manner of the court's functioning of late, to honestly consider why social media is full of derision against them? To ruminate on whether praise from the likes of Arnab Goswami and BJP spokespersons are really the certificates of good conduct they prefer over the appreciation of millions of ordinary, law abiding, unconnected citizens?

It appears to be 'reigning contempt' these days, which of course is another joke, considering that important matters which have a bearing on our federalism, electoral funding, liberty of citizens, access to the internet and freedom of speech never find mention in the cause list. But if contempt is the flavour of the day, then one wonders: why is the court not initiating contempt against the chief secretary and DGP of Jammu and Kashmir, whose administration had sworn on oath that ex-MP Saifuddin Soz was not under detention, whereas the very next day the police were caught on video forcibly preventing him from leaving his house or talking to reporters? Does Kamra's tweet constitute a greater danger to the republic than the open defiance and illegal actions of the Jammu and Kashmir government?

As a common citizen owing no allegiance to any political party, I have much to be disturbed about our legal system, which appears to be getting more opaque, unaccountable and biased with each passing day. One which has abdicated its primary function – to act as a check on a powerful and majoritarian executive. The rule of law is getting replaced by the jurisprudence of the sealed cover, the fait accompli and the adjournment. It's not just about Arnab Goswami and his over-the-counter bail, when hundreds similarly placed with their bail petitions being repeatedly rejected or hearings postponed, have been behind bars for months.

It's not just about a judgment that denies public places to citizens protesting against a government. It's not even about an order that does not allow an opposition chief minister to take action against defectors from his party who are hell bent on toppling his government. These are symptoms of a creeping infection against which we, and not just Kamra, must speak out before it consumes the entire judicial framework. Before we descend into what Pratap Bhanu Mehta, in a November 18 article in the Indian Express, describes as " democratic and judicial barbarism".

Notwithstanding the honorifics attached to their names, our justices must realise that they are not celestial beings; the constitution does not give them their extraordinary privileges and protection because they embody some kind of divinity. It does so because they are expected to perform a difficult job – confront the government and hold it accountable whenever it crosses a constitutional red line. That is no longer happening since the last three CJIs at least, as Prashant Bhushan had pointed out in his now famous tweet. In a democracy there is no judicial teflon, and there is no "lese majesty" when there is no majesty left in an institution. Sriram Panchu, senior advocate in the Madras high court puts it devastatingly in a brilliant article in the Hindu on November 16:

"Power (of the Supreme Court) comes not from Articles 32 or 226 but from the public esteem and regard in which you are held, and that proceeds from the extent you act as our constitutional protector. In direct proportion. Sans that, there are only trappings."

Cases which may embarrass the government are not being heard for years, without any explanation. The collegium appears to have completely surrendered to the government in matters of appointment and transfer of judges (how can we forget the midnight transfer of Justice S. Muralidharan of the Delhi high court when his questioning of the Delhi police in the riots case threatened to expose their mischief?)

Application of the law has become so arbitrary, and capricious, that at times one wonders whether one is in a court or a casino. Goswami gets bail in one hearing, others are asked to approach high courts or trial courts. An 83-year-old priest, who suffers from Parkinsons disease and cannot hold a glass, applies for a sipper or straw: he is given a date three weeks later for hearing the case. An eminent academic and poet, who should never have been in a jail in the first place, suffers from COVID-19, dementia, incontinence and severe UTI; his bail applications are repeatedly rejected and he is shuttled from one hospital to another. Our courts are losing not only the sense of justice, but also that of simple humanitarianism. The law is supposed to be strict, not cruel and barbaric – how does one explain it to our judges?

Far from reigning in the government's excesses, which is what its constitutional duty is, the higher judiciary appears to be encouraging it by its silence, selective orders and even acceptance of post retirement sinecures and appointments. Many years ago, a Chief Justice, when told by the then prime minister that he looked forward to a "cordial" relationship with the Supreme Court, had the integrity to retort that the relationship between the executive and the judiciary should be "correct" and not cordial. It is impossible to even conceive of this kind of rectitude today. Such an amalgam of courage and principles, unfortunately, is to be found in the pages of history only, and that too only till the time the education minister revises the syllabus.

In the hands of the present government at the Centre and in some of the states, the law is running amok and the SC appears to be reluctant to stop this arbitrariness. Application of laws is no longer based on accepted general principles – as it should be – but is subject to individual interpretations. Even repeated rulings of the apex court are no longer binding on lower courts, it would appear. Examples are the laws on sedition, free speech, criminal defamation, abetment to suicide: despite the Supreme Court narrowing their scope and application to prevent their misuse, lower courts continue to throw people into jails or lock-ups just on the say so of the police, without even examining the evidence – or lack of it – before them. In fact, these laws have become major tools of persecution in the hands of the executive.

Similarly, the oft cited homily "bail is the rule, and jail the exception", is just that – a homily which it takes a lot of faith to believe, like the numerous high sounding, sanctimonious obiter dicta delivered by Justice D.Y. Chandrachud while overruling the Mumbai high court in the Arnab Goswami case. One would have expected that the SC, both as the superior court and the administrative head of the judiciary, would have done something to ensure that its rulings and decisions are observed and respected. It has not, and we are descending into some kind of legal wasteland.

And it is not only the likes of Kunal Kamra, who are increasingly giving expression to their misgivings and frustration at this state of affairs, concerns are being voiced by eminent retired judges of the SC and high courts, senior members of the legal fraternity, sections of the media which still retain a spine, retired government officers, academia, frustrated litigants and relatives of those trapped in this dystopian legal system. Even international organisations associated with human rights and the judiciary have openly criticised us and have called for reforms.

How many contempt petitions will you list, sirs? A joke repeated too often is no longer funny and loses its punch. Listen to Kamra, your Honours and the Attorney General. His is the voice of an increasing number of people. Like all comedians, he perhaps exaggerates a bit – but not by much, I can assure you.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/kunal-kamra-and-the-elasticity-of-justice

Sneak Peek:

No. of words: 1429 words

Note: In this article, the author is criticizing the way cases are prioritized in the apex court with the help of two famous cases pertaining to personal liberty. The author is critically analyzing both the cases with the help of Article 14 of The Constitution of India. It will help you to enhance your legal acumen. As a CLAT aspirant, it is a must-read article.

Article: 3

Arnab Goswami and Varavara Rao, Unequal Citizens before the Law

While Goswami could move three levels of courts in quick succession within a week to secure his release, Rao has languished in jail in a fabricated case for two years, without trial and without bail.

Article 14 of the Indian constitution that "we, the people of India" conferred upon ourselves proclaims that "the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

But it seems this proviso is only a lofty goal enshrined in the statute, to be adhered to selectively. A study in the contrasting treatment meted out to Republic TV owner-editor Arnab Goswami and the thousands of those accused and imprisoned in this country presents a bleak picture.

The cases of Goswami and Varavara Rao reveal some glaring differences. Varavara Rao was also a journalist who ran a literary monthly for about 25 years and was a newspaper columnist in addition to being a lecturer, writer and revolutionary poet. Rao was a public speaker for the last fifty years, though his voice is no match for Goswami's in decibel levels. Both of them were arrested and imprisoned, of course, for varying times. Here emerge the differences in the manner of arrest, as well as the response their arrests elicited from the political class, administration and judiciary.

Goswami's arrest on November 4 has already been highly publicised with a live video of the same available in the public domain. Politicians including Union cabinet ministers vociferously spoke out in support of him and denounced the arrest. Media reports alleged that the police or prison authorities had allowed Goswami to use a cell phone while in custody. Within a week of his arrest, petitions for his bail were heard by the sessions court, the high court and the Supreme Court on a priority basis. Even as the lower courts dismissed his pleas, the apex court granted him interim bail and released him.

In comparison, the manner in which Varavara Rao was arrested on August 28 was horrendous. After about 20 police officials from Pune, assisted by the Telangana police, barged into his house at around six in the morning, the first thing they did was seize cell phones from Rao and his wife and cut their landline connections. The elderly couple was then kept incommunicado for the next eight hours. Not only the corridor of his flat, but the entrance of the 180-flat apartment complex was barricaded.

The family's helpers and neighbours were also prevented from approaching their house whilst other flat owners were subjected to checks, questioning and threats. Inside Rao's house, his bookshelves were ransacked and documents and papers thrown out. The 78-year-old poet and his 70-year-old wife were harassed until 2.30 pm, after which Rao was taken away. During these eight hours, he was not allowed to make a call to his lawyer or doctor.

The Pune police also brought two additional warrants to search his daughters' houses, in case Rao was not available at his home. However, knowing very well that he was at his home by 6 am, the police continued to raid his daughters' houses till around 8 am. Spending about six hours in each of the houses, they seized the cell phones of both his daughters and sons-in-law and went as far as to also snatch Kindles, game consoles and electronic gadgets belonging to his grandchildren.

After 77 days of house arrest upon the direction of the Supreme Court, the Pune police again came to arrest him on the evening of November 17. This time around, the arrest was almost a public affair as Rao's house was packed with people by then. When the police were asked to display an arrest warrant, an official from Pune curtly replied by saying that they didn't need to show any warrant. When we insisted on a warrant, a local police official threatened to use force on us – the same official is now in jail, after having being caught red-handed taking a bribe and found to have accumulated disproportionate properties.

In stark contrast, Goswami's highly publicised arrest was telecast live. It was reported that he was asked to cooperate several times by policemen while he said that he was being physically assaulted and asked for an apology. Goswami also identified an "encounter specialist" and asked to allow him to call his lawyer and doctor. After some time he was physically lifted and dragged out of his house. This procedure of arrest was unquestionably neither legal nor civil and deserves to be condemned. But when examined alongside the arrest of many others and routine police behaviour, what happened to Goswami looks rather common. The moot point here is that Goswami has himself supported, abetted, encouraged and cheered this kind of illegal and uncivil behaviour by the police.

Varavara Rao's arrest was also not condemned by any politician, except by those from the Left parties, while the list of denouncers of Goswami's arrest is long, including the Union home minister.

Prisoner Raises Fresh Allegations of Torture against Nashik Jail Officials

The media also reported that Goswami was able to use a mobile phone while in judicial custody and was shifted to Taloja Jail as a consequence. Let alone a mobile phone, Varavara Rao and his co-accused had to make several appeals to the jail authorities and courts to be permitted access to ordinary things like a blanket, a pair of socks, a straw and even a sipper.

The police or jail administrations are not even allowing newspapers, magazines and books to reach Varavara Rao and the other Bhima-Koregaon co-accused. Exactly a day prior to Goswami's use of a mobile phone, Taloja jail refused to give Nobel laureate Gabriel Garcia Marquez's The Scandal of the Century, sent as a birthday gift, to Rao.

While Goswami could move the sessions court, the high court and the Supreme Court in quick succession within a week to secure his release, Varavara Rao has languished in jail in a fabricated case for the past two years, without trial and without bail. At least four bail petitions, in the sessions court and high court, both on merit and on health grounds (including testing positive for COVID-19) took almost 20 months to be ultimately rejected. When the Supreme Court was approached as the fifth bail petition was being procrastinated in the high court, the apex court simply asked Rao to go back to the lower court. Even after the high court was moved again with this direction from the Supreme Court, the delaying tactics continue.

No doubt an objection will be raised by some that the charges against Goswamai and Varavara Rao are different. The former is accused of abetment to suicide while the latter has been charged under the Unlawful Activities (Prevention) Act. This distinction is irrelevant as both are entitled to the presumption of innocence until found guilty. Regrettably, the bogey of 'terrorism' did not escape even the discriminating intellect of a judge like D.Y.

Chandrachud. 'Goswami is not a terrorist', he is reported to have said. But are all those charged with the insupportable cases under UAPA 'terrorists'? Is the presumption of innocence only for Goswami and his ilk?

The fact is that the Bhima Koregaon accused are chiefly those who had nothing to do with the incident and even less to do with any violence thereafter. Yet no court hears their bail, no institution is concerned with their liberty.

On November 18, the Bombay high court finally directed authorities to shift Rao from Taloja jail to Nanavati Hospital for 15 days, noting that it would further examine the case "after two weeks".

There is another difference: while the high-decibel prisoner is a 47-year old, in reasonably good health, the unequal citizen is an ailing 80-year old, suffering from post-COVID-19 ailments. In the meantime, electrolyte imbalance with low level of sodium and potassium and criminal negligence in the prison has led to a loss of memory, incoherence and near-dementia in Rao. While keeping a urinary catheter for over two weeks can lead to dangerous and life-threatening infections, a catheter on Varavara Rao's body – fixed on August 28, when he was discharged from Nanavati Hospital and sent back to jail – has not been removed even after ten weeks later.

Varavara Rao is only a symbol of hundreds, if not thousands of other prisoners languishing under a similar predicament. For one Arnab Goswami, there are hundreds of Varavara Raos, for whom equality before the law is a myth.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/rights/arnab-goswami-varavara-rao-arrest

Sneak Peek:

No. of words: 1446 words

Note: In this article, the author is critically analyzing a few judgments pertaining to personal liberty which was delivered by Justice Chandrachud and his selective approach while deciding cases of personal liberty. It will help you to enhance your legal acumen.

Article: 4

Five cases on personal liberty decided by Justice DY Chandrachud

From a reading of the previous orders and judgments passed by Justice Chandrachud, it appears he has more often than not batted in favour of personal liberty.

Supreme Court Bench headed by Justice DY Chandrachud, on November 11 granted bail to Republic TV Editor-in-Chief, Arnab Goswami in an abetment to suicide case against him.

The day long hearing was marked by certain observations by Justice Chandrachud on personal liberty and the obligation on Constitutional courts to safeguard the same.

If we don't interfere in this case today, we will walk on path of destruction. If left to me I won't watch the channel and you may differ in ideology but Constitutional courts will have to protect such freedoms..." he said.

When pointed out that Goswami had first moved a bail plea before Magistrate before it was withdrawn to approach a forum that suited him, Justice Chandrachud responded that Technicality, this cannot be a ground to deny someone personal liberty.

The Court has come under flak for enlarging Goswami on bail pointing out numerous other instances when bail has been denied to various other accused persons and activists.

But interestingly, Justice Chandrachud has more often than not batted in favour of personal liberty in his judicial pronouncements.

Below are a few cases in which Justice Chandrachud was confronted with issue of personal liberty/ bail.

Bhima -Koregaon arrests

The Supreme Court had, in September 2018, rejected a plea seeking constitution of Special Investigation Team to probe into the arrests of lawyers and activists made in connection with the Bhima Koregaon violence.

The judgment was delivered by a three-judge Bench headed by then Chief Justice of India (CJI), Dipak Misra. Justice AM Khanwilkar had written the majority opinion on behalf of himself and Justice Misra.

However, Justice Chandrachud who was the third judge on the Bench, penned a strong dissent. The petition had been filed by historian Romila Thapar and four other activists and the Maharashtra government had questioned its maintainability.

As with the case of Goswami, Justice Chandrachud J. opined that technicalities cannot be allowed to override substantive justice.

The judge also berated the Maharashtra police for what he termed as using electronic media selectively for shaping public opinion.

Referring to the press conference held by Pune Police immediately after an interim was order passed by Supreme Court, Chandrachud J. said that it was an attempt to selectively leak information and termed it “disconcerting”.

He added that the use of electronic media and police briefing by media has become a way of shaping public opinion.

Further, referring to the letter allegedly written by one of the accused Sudha Bhardwaj, Chandrachud J. noted that it was flashed on a TV channel and selective disclosure of probe details cast cloud on the fairness of the investigation.

He went so far as to raise doubt on whether Maharashtra police can carry out the investigation in a fair manner.

The judge concluded by ordering an SIT probe while stating that voices of opposition cannot be muzzled because it is unpopular.

Hadiya case

Another important judgment by Justice Chandrachud on personal liberty came in the Hadiya case. This was also decided by the same Bench which comprised then CJI Dipak Misra and Justice AM Khanwilkar. In this case, however, the judgment was unanimous with all the three judges ruling against Kerala High Court which had annulled the married between Hadiya and Shafin Jahan.

Hadiya, who was a Hindu, had converted to Islam and had married a Muslim Shafin Jahan. The Kerala High Court had annulled the marriage stating the same was not free from coercion. It had also ordered Hadiya to be place in the custody of her parents.

Justice Chandrachud, in his separate concurring judgment, wrote that the Kerala High Court, in the case, treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude, the judgment noted.

"The High Court was of the view that at twenty-four, Hadiya “is weak and vulnerable, capable of being exploited in many ways”. The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms,” the judgment said.

The court, therefore, ordered that Hadiya be released from her parents’ custody.

Against imposition of disproportionate bail conditions

In a very recent judgment, Justice Chandrachud held that conditions which a court imposes for the grant of bail have to balance the public interest in the enforcement of criminal justice with the rights of the accused.

This was a case of a US Green card holder who moved the court to relax his bail conditions so that he could travel to US. The accused, an Indian citizen was a resident of USA since 1985. He used to frequently visit India. He was arrested in February 2020 when he was on one his trips to India. The Bombay High Court released him on bail in May 2020 while ordering that his passport and green card be surrendered and that he should not leave jurisdiction of Thane Police Commissionerate without prior permission of the trial court.

He subsequently moved the High Court pointing out that he had to travel back to US for a short period to re-validate the Green card as prescribed under the US Immigration and Nationality Act 1952. He, therefore, sought relaxation of the bail conditions imposed in May but the plea was rejected.

The bench headed by Justice Chandrachud over turned this decision of Bombay High Court and allowed the accused to travel to US for a period of 8 weeks.

"The human right to dignity and the protection of constitutional safeguards should not become illusory by the imposition of conditions which are disproportionate to the need to secure the presence of the accused, the proper course of investigation and eventually to ensure a fair trial. The conditions which are imposed by the court must bear a proportional relationship to the purpose of imposing the conditions," he stated.

Interim bail to Sanjay Chandra to visit Covid positive parents but no regular bail

A bench headed by Justice Chandrachud granted interim bail for one month to Unitech promoter, Sanjay Chandra on July 7 taking into account the fact that both his parents were infected with Covid-19.

However, justice Chandrachud later also denied regular bail to Sanjay Chandra and his brother Ajay Chandra on the ground that the two brothers have not complied with the October 2017 order of the Supreme Court as per which Rs 750 crore was to be deposited with the registry of the court by December 31, 2017, to be eligible for bail.

"Since the conditions which were imposed in the order dated 30 October 2017 have not been complied with, we are unable to accept the submission that the applicants should be released from custody," the court said.

The two brothers had claimed in their bail application that they had deposited more than Rs 770 crore and were, therefore, eligible for bail.

The court, however, noted that the deposit was made after the deadline of December 31, 2017and that a part of the deposited with the court came from monetization of assets of Unitech Limited

Sanjay Chandra was arrested by the Economic Offices Wing of the Delhi police in March 2017. Investigating authorities have maintained that prima facie probe indicated that money which has been realised from the flat buyers has been siphoned off.

Bail to undertrial after 3 years in jail

A Bench headed by Justice Chandrachud on June 9, 2020 granted bail to a person who had been languishing in jail for over 3 years as an undertrial.

The person was accused of committing dacoity, kidnapping and causing voluntary hurt.

The court noted that the accused had already spent over 3 years in custody and charges had also not been framed yet.

"Having considered the rival submissions, we are of the view that it is fit and proper that the appellant be enlarged on bail, subject to such terms and conditions, as may be imposed by the trial Court," the court ruled.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/litigation-columns/justice-dy-chandrachud-personal-liberty-supreme-court

Sneak Peek:

No. of words: 1831 words

Note: In this article, the author is criticizing the way censorship is imposed on OTT. The author also discussed Law on censorship with the help of various Supreme Court decisions. It is a must-read article it will help you to increase your legal acumen.

Article: 5

Moral Policing of OTT Platforms Is Only the Latest Episode in India's Saga of Censorship

While the question of freedom of expression in India needs a nuanced approach, pre-censorship is arbitrary and chilling.

It seems that the Indian government just does not like us to have fun and personal choices. From the various bans on beef to a strong dislike of public displays of affection (PDA), the written and unwritten code of moral policing is growing long.

These bizarre bans are in "public interest", but who is to decide what is in public interest?

The new area of control being looked at is in the area of "over-the-top" or OTT services – the increasing popularity of streaming platforms like Netflix, Amazon Prime and Hotstar has not gone unnoticed.

In July, commerce and industry minister Piyush Goyal asked the entertainment industry to self-regulate their programs on OTT platforms, claiming that many of them portray India and Indian society poorly. If the minister was really concerned, there are hundreds of other real events taking place across the country which really portray Indian society as still living in a medieval era.

But matters have quickly gathered steam since then. Recently, after hearing a petition filed in public interest to regulate OTT platforms, the Supreme Court issued notice to the Centre and Internet and Mobile Association of India (IAMAI). And last week, a gazette notification brought all streaming platforms under the ambit of the ministry of information and broadcasting (I&B), sparking fears of a new censorship regime.

In particular, the ministry may try to justify that the existing laws to cope with objectionable content (particularly, under Section 67 of the Information Technology Act and the Indian Penal Code) are not adequate.

Law on censorship and its interpretation by courts

In India, the Central Board of Film Certification (Censor Board) was set up under the Cinematographic Act, 1952 (the Act). The Act along with Rules (1983) and guidelines (1991), set out the manner in which films are to be certified for exhibition in India by the Censor Board.

The Act states that "a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of, inter alia, decency". In addition, the guidelines stipulated that film certification must ensure that "artistic expression and creative freedom are not unduly curbed" and that "certification is responsive to social change".

India has exceptionally lively media on varied platforms – newspapers, periodicals, TV channels, online media, radio stations and more, in more than 20 languages. These platforms voice varied opinions that are protected by the constitution. The media jurisprudence has developed over a period of time through cases touching upon

press, arts, books, motion pictures, social media and advertisements. In these decisions, the court has struck a balance between the interest of freedom of expression and social interests.

The constitution of India promises the right to free speech and expression to all the citizens (Article 19(1)(a)). However, 'reasonable restriction' can be imposed on the enjoyment of this freedom by the state under Article 19(2) on certain grounds, particularly public order, decency or morality, the most frequently invoked. For censorship (under Article 19(2)), the standard of judging a film should be that of "an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man".

In 1970, the constitutionality of censorship under the 1952 Act was challenged for the first time before the Supreme Court in the case of K.A. Abbas v. Union of India. The apex court upheld the constitutionality within the ambit of Article 19(2) of the constitution and added that films have to be treated separately from other forms of art and expression because a motion picture is "able to stir up emotions more deeply than any other product of art". At the same time, it cautioned that it should be "in the interests of society".

While setting aside the ban on the movie Bandit Queen, which picturised the true story of a woman who was raped and brutalised before taking revenge on her attackers, the Supreme Court held that the screening of a film cannot be prohibited merely because it depicts obscene and graphic events. On producers seeking the reinstatement of the classification of the film as "adult only", the court held that the scenes featuring nudity and expletives served the purpose of telling the important story and that the producers' right to freedom of expression could not be restricted simply because of the content of the scenes.

The court referred to the Supreme Court's view (in Abbas v. Union of India) where the-then Chief Justice Mohammad Hidayatullah held that "the standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good".

In that case, the chief justice had noted that it would be an error to conflate sex and obscenity as "it is wrong to classify sex as essentially obscene or even indecent or immoral." He had noted that it was not the "elements of rape, leprosy, sexual immorality" that should be censored but rather that "how the theme is handled by the producer" determines the need for restriction.

Later Supreme Court decisions also emphasised that vulgar writing is not necessarily obscene and that consideration must be given to the writing as a whole, rather than isolated passages or scenes.

Accordingly, Bandit Queen was considered to be "a powerful human story" where "[r]ape and sex are not being glorified" but are used to focus on the "trauma and emotional turmoil of the victim to evoke sympathy for her and disgust for the rapist".

Legacy of bans – the pre-censorship debate

Looking back, how many films with a voice of dissent have not landed up in controversy?

Films like Water, Udta Punjab, Lipstick Under My Burkha, Deshdrohi are only a few amongst many that ran into troubled waters with the Censor Board, were restrained in the name of 'public interest'. Deshdrohi fought a battle of political censorship even after the Censor Board's approval.

The question of freedom of expression in India needs a nuanced approach rather than a simple 'for or against' conclusion. It is true that the government has had to deal with politically sensitive and inflammable situations with the history of oppression and religious divide in our country. However, is it possible to protect public order and promote respect for one and all without affecting art and scholarship?

As per the law, the court has criticised the state emphasising that freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. "It is the duty of the state to protect the freedom of expression since it is a liberty guaranteed against the state. The state cannot plead its inability to handle the hostile audience problem." (In case of a ban on the movie Aarakshan)

Speech that "merely" shocks, disturbs or offends should be dealt with in the civil-law courts. The same applies to speech that infringes on privacy, insults dignity or defames honour – whether committed by recklessly unprofessional journalists or producers of OTT content.

Pre-censorship vs Ex-post remedies

The desirability of pre-censorship or ex-ante regulation would really depend on how much we value a democratic system.

Would it not help if the need for censorship is led, or at least balanced, by a healthy public debate? Can we break the shackles of the past prejudices and move on to healthier and evolved debates?

For offensive and defamatory content, we already have ex-post remedies in civil courts in dealing with speech that infringes on privacy, insults dignity or defames honour.

Today, on OTT platforms, where private viewing is not considered as public exhibition, (recently decided by the Karnataka high court in the case of Padmanabh Shankar), it is difficult to see pre-censorship as anything but arbitrary and chilling. The Indian audience is not restricting their choice to domestic content and likewise, global citizens are watching Indian movies/TV series on OTT or Internet platforms. Can the government justify how it would be in "public interest" to shut our eyes to international TV series like Sex Education which is being aired even in Saudi Arabia?

What's the fine balance?

The stance of the government will truly reflect on whether we are a democracy to be proud of. What's the point in granting democratic rights for people who would be too harassed if they dare exercise them! Rights with lopsided restrictions on public expressions are of little value if the authorities use them as a pretext to silence political critique.

Would the government impose stricter standards of artistic freedom to be applied to the OTT platform, considering – unlike broadcasting programmes, the OTT viewer has complete control of what to watch, where and how to watch.

Thus, besides censorship standards, the convergence of regulation for different platforms is the need of today. How can media self-regulation be good for all stakeholders, be it the press, consumers or producers?

Some of the best practices followed by international media are:

Media self-regulation is an effort to lay down censorship standards, independent of political forces. It is also a transition from a state-controlled press to one owned and controlled by society.

It can help in promoting standards that advance media's credibility with the public, particularly in a country like ours which still needs to evolve to get an independent press;

It can help develop confidence in the public that free media is not irresponsible while protecting the rights of journalists/producers to be independent;

It can help inculcate a professional culture to be judged for mistakes not by those in power but by colleagues.

It would help lessen pressure on the judiciary if violations of personal rights by the press are corrected with satisfaction by self-regulatory bodies.

Self-regulation can be set up both industry-wide and in-house and equally, interested stakeholders could be civil society's representatives like business owners and artists, retired judges, professionals, any other interest groups, besides, of course, individual members of the public.

"If sharp criticism disappears completely, mild criticism will become harsh. If mild criticism is not allowed, silence will be considered ill-intended. If silence is no longer allowed, not praising hard enough is a crime. If only one voice is allowed to exist, then the only voice that exists is a lie."

The quote is taken from a 2015 essay by Zhang Xuezhong, an outspoken Chinese legal scholar who has criticised the political oppression and lack of rule of law in mainland China. Zhang's essay was influential and cited by many others at the time. As noted British columnist Polly Toynbee puts it that the best way to destroy an undesirable idea is not to brush it under the carpet but to air it in public.

Courtesy: 'The Wire' as extracted from:https://thewire.in/media/moral-policing-netflix-amazon-prime-latest-episode-censorship-india

Sneak Peek:

No. of words: 2892 words

Note: In this article, the author is critically analyzing the BBMP Bill which is tabled in the Karnataka assembly. The author raises concern with regard to the bill and has done a comparative study of the KMC Act, 1976 and BBMP Bill. The proposed Bill can at best be described as window-dressing as it does not contain any far-reaching provisions that can drastically improve the quality of living in the city. Do follow this new development of law.

Article: 6

Bengaluru's New City Governance Bill is an Opportunity Which Should Not be Lost

It is time to revamp urban governance. The Karnataka government needs to take the bull by its horns.

A revamp of urban government is long overdue in India. Our country's freedom fighters led a long struggle for 'Swaraj', ie., 'self-rule'. But grassroots governance as a concept has eluded entire generations since independence due to the centralised nature of government in the country.

Cities and towns have, in administrative terms, remained colonies of their respective state governments, giving the residents of the cities little to no say in the way they are governed. Citizens have been forced to remain mere bystanders, as they watch their dear cities degenerate into polluted, congested and unhealthy sprawls.

While the 73rd constitutional amendment, ie., the Panchayati Raj Act has ushered in local governance in rural areas, the 74th Constitutional Amendment, enacted as an afterthought for urban local governance, has not had any traction even after three decades.

The resulting disconnect between the cities and its residents have reduced the latter's relationship with the city to that of a mere bystander, instead of a responsible citizen who has an equal part in shaping the destiny of their city.

Why a BBMP Bill?

Bengaluru is now governed under existing state legislation, the Karnataka Municipal Corporations (KMC) Act, 1976, through which most towns and cities of Karnataka are governed.

On Basic Structure Doctrine, Rulings of the SC's First Five Judges Inspire Hope

In March this year, the Karnataka government introduced the Bruhat Bengaluru Mahanagara Palike (BBMP) Bill in the state legislature as a fresh, stand-alone legislation for Bengaluru's governance. Facing wide-ranging objections, the Bill was referred to a joint select committee to hold consultations to improve it, but the noises emanating from the committee are only about how long the mayor's term ought to be and how many wards the city should have.

Are these really the key issues, or are there more fundamental questions to address?

A quick reading of the Bill shows that by and large, it is just a replica of the KMC Act with minor changes, but nothing transformative in the works. Is this enough for Bengaluru or for that matter for any urban habitat? Also, there are questions being asked as to why desirable amendments couldn't be made to the KMC act or the 74th amendment which then would benefit a large number of cities and towns of the state and the country. Don't all other cities and towns face similar challenges, don't they deserve the same attention?

Is the introduction of a standalone Bill for Bengaluru due to a lack of will to reform across the board? Or is it an attempt to establish a model Bill that could be replicated elsewhere? These questions are not answered.

How is the fate of this Bill relevant to the country?

India's urban population is expected to more than double by 2050, and even exceed the rural population. At the same time, cities across India are poorly managed, already on the verge of collapse. It is unlikely they can bear this rapid growth. Which is why the BBMP Bill assumes great significance.

Will it really solve the woes of Bengaluru and set a model example of a city government Bill? Or is it designed to fail, missing a great opportunity for change, both for Bengaluru and for all cities in India?

Why does Bengaluru require a new law to be empowered?

The Bruhath Bengaluru Mahanagara Palike (BBMP), the urban local body with a grandiose sounding name, is in actuality a nominal body with no serious legislative, planning, or administrative powers.

The demand for such a new law is driven by the premise that the present governance paradigm fails on many levels. It is a reaction to the tragic consequences of misgovernance that citizens face today such as:

Pollution and degeneration of our natural habitat

Reduction of our green cover from a healthy 70% to just 3% in just 5 decades; runaway unplanned development has turned the once beautiful 'garden city' into a 'concrete desert',

Lack of stewardship and environmental responsibility that has reduced what was once a 'city of thousand life-giving lakes' to one with a few large septic tanks that are best avoided

Lack of holistic and sustainable urban planning, resulting in faulty public infrastructure, overpopulation, crowding and congestion, cramping the quality of life of all residents.

What are some of the city's historic shortcomings?

1) Lack of an aspirational vision: Our constitution and it's directive principles spell out a vision for what kind of a nation we need to build. But, do we ever hear of what our city is envisioned to be? Do we build a healthy city? A sustainable city? A green city? A happy city? An inclusive city? No, we don't.

Luckily for Kempe Gowda, the founder of Bengaluru, his mother gave him that vision in just one line: "Keregalam kattu, marangalam nedu", ie., "Build lakes, plant trees". The reason we are here today is thanks to his mother's vision. But in modern times, our lack of vision has destroyed the beautiful city our predecessors imagined and built for us.

2) Lack of understanding: Governance is the art of the practical. A city has limits, and it has huge impact. By not acknowledging them, we've set ourselves up for failure. The city originally evolved organically to perform various functions and allow informal interactions between people and livelihoods. Traditional methods and wisdom safeguarded the ecological services of the environment, in fact improved them.

However, the modern top down approach to development has ensured that the processes and knowledge that defined and evolved this city are ignored, be they economic, social, geographical, cultural, or traditional. Real life features such as informal markets, street vending, footpaths, urban forests, community spaces, commons, ponds and lakes are destroyed, while characterless infrastructure and concrete replace them, leading to eternal

conflicts. Sustainable watershed management has given way to importing water from far away rivers, and traditional tree planting has given way to destruction of green cover.

3) Jurisdiction and manageability: As a city grows, it impacts the entire district. However, we have had a short-sighted practice of setting city limits around the core populated areas, and leaving the rest of the district to the district administration, resulting in different jurisdictions and laws in the same district. For eg, in Bengaluru, we have the Greater Bangalore metropolitan area under BBMP, then the Bengaluru Urban District and the Bengaluru Rural districts under the district administration. There are disparities in laws, and quality of administration varies. Also, the expected periodic expansion of city limits leads to speculative investments just across the city limits leading to unplanned development and urban sprawl, putting serious pressure on those areas as well as creating congestion in the city. Even wards are so badly delimited, the only parameter taken being population, ignoring geography, watershed, manageability, etc.,

4) Lack of planning: The 74th amendment prescribes that a Metropolitan Planning Committee duly constituted with people's representation, which consolidates ground-up planning by area sabhas and ward planning committees, generate the Masterplan for the city. But the State Govt has been appointing parastatal agencies like BDA to create the Masterplan, which is illegal.

The bigger challenge is resolving the disconnect between the planning authority and the executive. Even worse, there is no capacity building – there are no urban planners or transport planners employed by the city govt or any agency that plans for the city; as a result, every intervention in the city is on a project oriented approach, which breaks down the functionality of the city, that has evolved over centuries. At one level this leads to mindless projects, and at another level, it leads to the collapse of entire systems, such as the rajakaluve-lake system which supported the water security of the city for centuries.

The lack of an integrated, holistic masterplan, and a transport plan that is part of the masterplan, sees the city administration and state govt resort to ad-hoc projects that do not solve any problem systemically. This leaves the field open to vested interests to interfere and influence the city through dubious consultants, lobbies and infrastructure peddlers, in the garb of NGOs. The city is also at the mercy of the infamous consultant-contractor-politician-vendor nexus.

Solutions are imposed on the city to benefit some business, it's normally the case of a solution finding a problem. Examples are the expensive Metro project, which is ill-planned, and mirrors the existing rail network which could have easily been upgraded to a Suburban Rail system at negligible cost, whereas the metro spent 400 times the money and literally destroyed the garden city with its ugly bridge and destruction of trees and buildings.

Much more madness was avoided thanks to heightened civic activism, for eg., the hare-brained projects such as Steel Bridge, Elevated corridors and Taxi Pod projects, which citizens thankfully protested against and stopped. The city keeps becoming more and more dysfunctional, and excludes rather than include all of its population, disempowering various segments, particularly vulnerable, poor, aged, sick, women and children.

5) Lack of legislative and executive powers: The BBMP at present is only an executor of laws created by the state legislature and in a very limited domain. It has absolutely no powers to legislate on the myriad issues that play out in its jurisdiction. It is a paper tiger that even the political class also does not take seriously.

6) Lack of citizen engagement: Citizens are neither engaged not consulted in any decision that affects their lives directly, be it land use planning, control over commons, decisions that affect the ecology, or policy decisions that impact the city in every way. This has disconnected citizens to a point where they live a parasitic existence

in the city. The non-involvement of public in decision-making also reduces oversight, resulting in rampant corruption and poor decision-making.

7) Bengaluru is a parastatal jungle: Let's face it, Bengaluru's governance is a total mess, due to the multiplicity of agencies, that do not even talk to each other. The state govt keeps intervening in the city either through its various depts., or by creating parastatals like BDA, BMRDA, BWSSB, KRDCL, BESCOM, BMTC, DULT, BMRCL, etc, to carry out projects / provide services, overlapping and undermining the city govt. Effectively, this has translated into multiple governments; the local govt has no primacy over the city, and no control over how the city is managed. Information exists in islands, often replicated or conflicting.

8) Outdated methods: As one of the IT capitals of the world, it is shameful that the power of GIS mapping and modelling and various other software planning tools are not utilised for planning this city. There is no unified information system accessible to all arms of govt or to citizens, leading to mismanagement, replication and very often conflicts. While there is a huge wealth of knowledge among citizens, the Govt does not leverage this to improve governance.

How this Bill can really matter

The big question: Will the new BBMP Bill attempt to solve all these issues listed above? If not, it's just another wasteful exercise. How can the government do things differently? As we are all aware, time is running out, the city is crumbling; urgent reforms are required. Now is the moment, the Karnataka government needs to take the bull by its horns. Else, it will be a missed opportunity that it shall never be forgiven for.

Here are a few recommendations:

1) Any legislation has to respond to the challenges of its times. We are going through a critical time, facing global and local challenges, such as the Climate Emergency, pandemics, deforestation, degeneration, pollution, water security, liveability, and widespread health challenges. The BBMP bill has to re-imagine the idea of a city government and reposition the BBMP as the steward of the city, one that is tasked with the sustainability and regeneration of the city. Nothing less is acceptable.

2) A green agenda should not just be part of, but should form the core of any urban governance bill. An 'Ecology plan' should form the basis of the 'Master plan' for the city, with a strong emphasis on 'localization' and 'community engagement', especially for water and waste management, food security, energy, mobility, land use, etc., It should include a directive for capacity building through employment of ecologists, urban planners and transport planners in every department, to ensure sustainable planning and development.

3) Define limits to growth: A clear outer limit needs to be set on the growth of the city. Establish laws that do not allow growth beyond the 'bio-limit' of the city's geography. Establish a framework of development that is within sustainable parameters, based on local resources and ecology.

4) Responsibility: A metropolis has impact way beyond its boundaries; it affects life and environment for thousands of Kilometres, due to its hunger for energy and resources. Hence, it has a responsibility towards the world. Laws must be instituted to penalize the import of resources and incentivize the use of local renewable resources, to encourage sustainable living, and to limit carbon footprint.

5) SWARAJ and Decolonisation Agenda: Devolution of powers to Local Govt needs to be complete. In all matters related to planning, legislation, execution, and administration of the city, the sole power should be BBMP, they include vital functions such as law and order, mobility/transport, essential public services, social development, community building, education, health, power, water, food security, environment, etc., And the state govt needs to be taken out of the equation.

Nomenclature, positions and power structures that were inherited from a centralised colonial administration and thinking need to be dismantled. Control over the commons need to be returned to the communities. True decentralisation needs to percolate to the lowest levels with elected members in area sabhas, wards committees, etc., and the BBMP council should transform into a city republic. Local wards and area sabhas not only should have real powers, but also responsibilities to steward and manage local ecological services and resources.

Citizen engagement should be an essential part of decision making – public consultation should be mandatory for all legislations and projects.

6) Remove conflicts: Merge all parastatal agencies with the BBMP to streamline administration. Restrict State agencies and departments from city administration and from planning and executing projects for the city.

7) Public Information and data access: Unify all databases and geographical and spatial information maps infrastructure. Open source them, and have them in the public domain to ensure transparency and to inculcate public ownership. Use latest tools for GIS maps and solution modelling and planning.

8) Holistic jurisdiction: it would be wise for the bill to address the entire district of Bengaluru under one law, to avoid the tangled mess of multiple jurisdictions, and to allow for holistic planning of the district, applying ecological principles, and establishing distinct urban zones, and green zones, rural zones, etc., with specific restraints, to prevent urban sprawls, and unplanned growth.

9) The Planning Imperative: A fresh new way of planning needs to be prioritised, that treats the city as a living entity. Planning should follow life and processes of the community, instead of imposing on it. Local traditional wisdom that ensured resilience for thousands of years, should be re-adopted, infusing life back into the concretised landscape. The organic growth of the city and its surroundings, as a city of villages, needs to be honored, and leveraged as a framework. Each village/ward needs its own planning zones and resilience, defined by its own planning committees. Capacity building to undertake this in terms of education and awareness generation should be the priority of the BBMP.

10) Unschooling of Democracy: This is potentially the most important role of the BBMP, ie., fostering democratic learning and culture among citizens.

The Area sabhas and ward committees are the nearest arm of real governance for a citizen, to both engage and shape a community's future. This is where citizens can cut their teeth in democratic participation, and those publicly inclined can progress further in politics with a sound foundation. Hence, formation of ward committees and Area sabhas need to be democratic exercises — the members of these committees need to be elected, instead of being nominated.

This would provide opportunities to novices to obtain experience in the real dynamics of public representation, and inculcate the spirit of democratic traditions among both members and citizens at grassroots; the BBMP would thus function as an incubator for democracy, and provide fertile breeding grounds for well equipped future leaders! Committee members and councillors are the future mayors, MLAs, MPs and Prime Ministers of the nation.

If we lack quality politicians at the state and national level today, it is the price we have paid for not empowering the foundation of our democracy – 'local government'. Which brings us to our last point.

10) The mayor's term and the number of wards: By now it is obvious that these are the least difficult of all the questions. The answers to these are rather simple: Yes, we require a full-term mayor.

And wards have to be of manageable size, smaller the better. Converting the de-facto old village boundary to ward boundary might be the simplest and most effective solution. There should be no limit to the total number of wards.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/government/bangalores-new-city-governance-bill-is-a-missed-opportunity

Sneak Peek:

No. of words: 444 words

Note: This article highlights the need for the enforcement of maintenance laws in order to protect dependent women. This article highlights the said importance in the view of the recent Supreme Court decision in Rajnesh v. Neha. As a CLAT aspirant do follow it and go for that Vidhigya 360 analysis of the judgment and make your own short notes too.

Article: 7

Alimony guidelines: On maintenance laws

Early enforcement of maintenance laws is a must to protect dependent women

In India, though more girls are going to school now, for many, the inevitable reality seems marriage before completion of higher education. Girls are married off early and bear children long before they should. This triggers a state of poor maternal health and is one of the root causes of high levels of child stunting and wasting in India. There is also the possibility of a marriage not working out for varied reasons, leaving the girl or young woman in extreme distress because often she is not financially independent. Parliament and the courts have persistently enacted legislation to give women better rights. Article 15(3), which states 'nothing in this article shall prevent the State from making any special provision for women and children', read together with Article 39, which directs state policy towards equal pay and opportunities for both men and women, and protecting the health of women and children, are two key constitutional safeguards. On Wednesday, the Supreme Court leaned on these two Articles, and a host of other laws, while hearing a dispute between a Mumbai-based couple, and set down comprehensive guidelines on alimony. The court ruled that an abandoned wife and children will be entitled to 'maintenance' from the date she applies for it in a court of law.

In a outlined specifics, including "reasonable needs" of a wife and dependent children, her educational qualification, whether she has an independent source of income, and if she does, if it is sufficient, to follow for family courts, magistrates and lower courts on alimony cases. Given the large and growing percentage of matrimonial litigation, some clarity was necessary. Cases are known to drag on and acquire cobwebs, worsening the misery for vulnerable women. The Court laid down that while women can make a claim for alimony under different laws, including the Protection of Women from Domestic Violence Act, 2005 and Section 125 of the CrPC, or under the Hindu Marriage Act, 1955, it "would be inequitable to direct the husband to pay maintenance under each of the proceedings", urging civil and family courts to take note of previous settlements. Perhaps keeping in mind the vastness of India and its inequities, the Court also added how an "order or decree of maintenance" may be enforced under various laws and Section 128 of the CrPC. For women in India, especially the poor who are often overlooked in discourses, the top court's words that maintenance laws will mean little if they do not prevent dependent wives and children from "falling into destitution and vagrancy", offer a glimmer of hope.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/alimony-guidelines-the-hindu-editorial-on-enforcement-of-maintenance-laws-to-protect-dependent-women/article33043467.ece

Sneak Peek:

No. of words: 1190 words

Note: In this article, the author is examining the recent recommendation of the Internal Working Group (IWG) of RBI to review extant ownership guidelines and corporate structure for Indian private sector banks have come out with a slew of suggestions allowing large corporate/industrial houses to promote banks in the country. Do follow this new development of law and go for that VIDHIGYA 360 degree analysis of the report.

Article: 8

Say 'no' to corporate houses in Indian banking

The banking sector needs reform but the recommendation of corporate-owned banks is neither 'big bang' nor risk-free

An Internal Working Group of the Reserve Bank of India (RBI) has recommended that corporate houses be given bank licences. In today's pro-business climate, you would have thought the proposal would evoke jubilation. It should have been hailed as another 'big bang' reform that would help undo the dominance of the public sector in banking. Instead, the reaction has ranged from cautious welcome to scathing criticism. Many analysts doubt the proposal will fly. It is worth examining why.

First, the idea

The idea of allowing corporate houses into banking is by no means novel. In February 2013, the RBI had issued guidelines that permitted corporate and industrial houses to apply for a banking licence. Some houses applied, although a few withdrew their applications subsequently. No corporate was ultimately given a bank licence. Only two entities qualified for a licence, IDFC and Bandhan Financial Services.

The RBI maintained that it was open to letting in corporates. However, none of the applicants had met 'fit and proper' criteria. The IWG report quotes the official RBI position on the subject at the time. "At a time when there is public concern about governance, and when it comes to licences for entities that are intimately trusted by the Indian public, this (not giving a license to any corporate house) may well be the most appropriate stance."

In 2014, the RBI restored the long-standing prohibition on the entry of corporate houses into banking. The RBI Governor then was Raghuram G. Rajan. Mr. Rajan had headed the Committee on Financial Sector Reforms (2008). The Committee had set its face against the entry of corporate houses into banking. It had observed, "The Committee also believes it is premature to allow industrial houses to own banks. This prohibition on the 'banking and commerce' combine still exists in the United States today, and is certainly necessary in India till private governance and regulatory capacity improve. (https://bit.ly/3ftp7Yf)" The RBI's position on the subject has remained unchanged since 2014.

The worry is the risks

What would be the rationale for any reversal in the position now? The Internal Working Group report weighs the pros and cons of letting in corporate houses. Corporate houses will bring capital and expertise to banking. Moreover, not many jurisdictions worldwide bar corporate houses from banking.

It is the downside risks that are worrying in the extreme. As the report notes, the main concerns are interconnected lending, concentration of economic power and exposure of the safety net provided to banks (through guarantee of deposits) to commercial sectors of the economy. It is worth elaborating on these risks.

Corporate houses can easily turn banks into a source of funds for their own businesses. In addition, they can ensure that funds are directed to their cronies. They can use banks to provide finance to customers and suppliers of their businesses. Adding a bank to a corporate house thus means an increase in concentration of economic power. Just as politicians have used banks to further their political interests, so also will corporate houses be tempted to use banks set up by them to enhance their clout.

Not least, banks owned by corporate houses will be exposed to the risks of the non-bank entities of the group. If the non-bank entities get into trouble, sentiment about the bank owned by the corporate house is bound to be impacted. Depositors may have to be rescued through the use of the public safety net.

The Internal Working Group believes that before corporate houses are allowed to enter banking, the RBI must be equipped with a legal framework to deal with interconnected lending and a mechanism to effectively supervise conglomerates that venture into banking. It is naive to suppose that any legal framework and supervisory mechanism will be adequate to deal with the risks of interconnected lending in the Indian context.

Corporate houses are adept at routing funds through a maze of entities in India and abroad. Tracing interconnected lending will be a challenge. Monitoring of transactions of corporate houses will require the cooperation of various law enforcement agencies. Corporate houses can use their political clout to thwart such cooperation.

Second, the RBI can only react to interconnected lending ex-post, that is, after substantial exposure to the entities of the corporate house has happened. It is unlikely to be able to prevent such exposure.

Third, suppose the RBI does latch on to interconnected lending. How is the RBI to react? Any action that the RBI may take in response could cause a flight of deposits from the bank concerned and precipitate its failure. The challenges posed by interconnected lending are truly formidable.

Regulator credibility at stake

Fourth, pitting the regulator against powerful corporate houses could end up damaging the regulator. The regulator would be under enormous pressure to compromise on regulation. Its credibility would be dented in the process. This would indeed be a tragedy given the stature the RBI enjoys today.

What we have discussed so far is the entry of corporate houses that do not have interests in the financial sector. There are corporate houses that are already present in banking-related activities through ownership of Non-Banking Financial Companies (NBFCs).

Under the present policy, NBFCs with a successful track record of 10 years are allowed to convert themselves into banks. The Internal Working Group believes that NBFCs owned by corporate houses should be eligible for such conversion. This promises to be an easier route for the entry of corporate houses into banking.

The Internal Working Group argues that corporate-owned NBFCs have been regulated for a while. The RBI understands them well. Hence, some of the concerns regarding the entry of these corporates into banking may get mitigated. This is being disingenuous.

There is a world of difference between a corporate house owning an NBFC and one owning a bank. Bank ownership provides access to a public safety net whereas NBFC ownership does not. The reach and clout that

bank ownership provides are vastly superior to that of an NBFC. The objections that apply to a corporate house with no presence in bank-like activities are equally applicable to corporate houses that own NBFCs.

It points to privatisation

There is another aspect to the proposal that cannot be ignored. Corporate houses are unlikely to be enthused merely by the idea of growing a bank on their own. The real attraction will be the possibility of acquiring public sector banks, whose valuations have been battered in recent years. Public sector banks need capital that the government is unable to provide. The entry of corporate houses, if it happens at all, is thus likely to be a prelude to privatisation. Given what we know of governance in the Indian corporate world, any sale of public sector banks to corporate houses would raise serious concerns about financial stability.

India's banking sector needs reform but corporate houses owning banks hardly qualifies as one. If the record of over-leveraging in the corporate world in recent years is anything to go by, the entry of corporate houses into banking is the road to perdition.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/say-no-to-corporate-houses-in-indian-banking/article33172192.ece

Sneak Peek:

No. of words: 999 words

Note: In this article, the author has highlighted the concern with regard to judicial review of the Central Bank policies and decisions and it has now become a new normal to go for judicial review of central bank policies and actions. The author is suggesting a polycentric test which will help to sustain the legitimacy of judicial review while retaining the accountability of technocratic institutions such as the central bank. It is suggested to have a fair idea about it.

Article: 9

Courts must assess which central bank policies are suitable for judicial review while insisting on RBI's accountability

Adopting the polycentricity test within constitutional jurisprudence would help sustain the legitimacy of judicial review while retaining the accountability of technocratic institutions such as the central bank.

Monetary policy and pecuniary penalties are at two extreme ends of the polycentricity spectrum.

Judicial review of central bank actions appears to have become commonplace in India. The Supreme Court is currently considering if the RBI should extend the COVID-19 induced loan moratorium and waive the accrued interest on interest. Earlier this year, the court struck down an RBI circular imposing a ban on virtual currencies. Last year, it quashed another RBI circular that mandated banks and financial institutions to initiate insolvency proceedings against defaulting companies with significant loan exposures.

Increasing judicial scrutiny of central banks is not entirely unique to India. In May this year, the German constitutional court ruled against the European Central Bank's public sector purchase programme on grounds that it failed to apply a proportionality analysis. While only time will tell if these instances portend a wider trend, there is an urgent need to recognise the logical limits of judicial review of central bank actions.

Legal scholars have long recognised that certain disputes are inherently unsuitable for adjudicative disposition. The most influential arguments on this subject were advanced by the American legal philosopher Lon Luvois Fuller in a paper titled "The Forms and Limits of Adjudication".

Fuller's central thesis was that adversarial adjudication is not suitable for resolving "polycentric" problems. He compared polycentricity with a spider's web — a pull on one strand distributes the tension throughout the web in a complicated pattern. Applied to adjudication, polycentric problems normally involve many affected parties and a somewhat fluid state of affairs. The range of those affected by the dispute cannot easily be foreseen and their participation in the decision-making process by reasoned arguments and proofs cannot possibly be organised. As a result, the adjudicator is inadequately informed and cannot determine the complex repercussions of a proposed solution.

Fuller argued that attempts to resolve polycentric problems through adjudication would lead to inferior outcomes. Either the solution would fail, or the adjudicator would be forced to ignore judicial proprieties to try out various solutions. Worse, the adjudicator may reformulate the problem itself to make it amenable to adjudicative disposition. Evidently, polycentricity is the underlying reason why adjudicators usually refrain from reviewing policy decisions.

Fuller did, however, recognise that all disputes submitted to adjudication have some elements of polycentricity. For instance, a judicial decision may act as an awkward precedent in some future situation not foreseen by the judge. He, therefore, concluded that ultimately it is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.

Disputes involving certain central bank functions are highly polycentric and are unsuitable for resolution through judicial review. For example, consider monetary policy function. This involves varying short-term interest rate to control supply and demand of money in the economy, which, in turn, influences economic activity and inflation. If judicial review supplants the central bank's decision on this rate with the decision of the adjudicator, the repercussions would affect every single borrower and saver. Yet, the adjudicator can neither offer a meaningful hearing to all those affected parties, nor can he effectively process all the necessary information to determine an optimal solution. Evidently, disputes about monetary policy rate are highly polycentric and are better resolved outside the court.

This, however, does not imply that all disputes involving central bank functions are incapable of resolution through judicial review. For example, a dispute regarding imposition of a pecuniary penalty by a central bank on its regulated bank for failure to comply with the law could be resolved through judicial review. If the adjudicator finds the central bank to be correct, it need not interfere. If the adjudicator finds the central bank to be incorrect, it could modify or overturn the central bank's decision. Clearly, judicial review could be effectively used to resolve bipolar disputes involving the central bank

if they exhibit low polycentricity.

Monetary policy and pecuniary penalties are at two extreme ends of the polycentricity spectrum. There are, however, various central bank functions of intermediate polycentricity. Consider prudential regulations such as bank capital regulation. These regulations could be at the heart of a bipolar dispute involving the central bank. If judicial review supplants provisions of such regulations with the decision of the adjudicator, it may appear to directly impact only the banks and nobody else. But in reality, it could impact bank lending, which, in turn, would have complex repercussions on the entire credit market and risk-taking abilities across the economy. An adjudicator is not equipped to determine who all would be affected due to such repercussions. Effective hearing of all affected parties, directly or indirectly, would, therefore, be impossible. Consequently, some bipolar disputes involving the central bank may be too polycentric for meaningful resolution through judicial review.

It may be useful to note here that all the above examples involve substantive judicial review — the central bank's decision is supplanted by the adjudicator's decision. This need not always be the case. Judicial review could be purely procedural — the adjudicator could merely review whether the central bank's action is within its legal mandate or not. The adjudicator could at most nullify a procedurally invalid central bank action, but may never supplant the decision of the central bank with his own. Therefore, procedural judicial review of central bank actions need not be concerned with Fuller's polycentricity.

Overall, the polycentricity test offers a conceptual framework for determining if a commercial dispute brought before the court involves a question of public policy that should ideally be kept beyond the remit of substantive judicial review. Adopting this test within constitutional jurisprudence would help sustain the legitimacy of judicial review while retaining the accountability of technocratic institutions such as the central bank.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/rbi-covid-19-loan-moratorium-supreme-court-7046727/

Sneak Peek:

No. of words: 1018 words

Note: In this article, the author is criticizing the new Labour code, on which no inputs have been called by the government from trade unions as a process of pre-legislative consultations. The author also discussed the history of the Trade Union in India. As a CLAT aspirant it is suggested to have a fair idea about it.

Article: 10

A recipe to tear down trade unions

The new labour laws are a brutal attack on workers' ability to safeguard their rights

Labour law 'reform' has been on the table since 1991 as every government's favourite solution for economic growth. Yet, there was no consensus between governments, political parties, workers and their trade unions, and employers, on what this meant. Unlike other political formations, the BJP has been in unqualified agreement with employers that the existing labour laws needed to be replaced. During its rule in 1998-2002, the BJP constituted the 2nd National Labour Commission and limited trade union representation in it. The consequent recommendations of the Commission were rejected by trade unions across the country.

This time too, the BJP-led Central government has actively excluded trade unions from pre-legislative consultations on drafting the new labour codes, repealing all existing labour laws and replacing them with four new labour codes. It saw these through Parliament in the absence of the Opposition, whilst ignoring substantive recommendations of the Parliamentary Standing Committee.

The BJP portrayed the now-repealed laws as serving only a small, exclusive section of working people, while claiming that what has now been legislated has a universal reach. This is just political chicanery. What is common to all the four codes is that they dilute workers' rights in favour of employers' rights, and together undermine the very idea of workers' right to association and collective action.

Long history

Trade unions first emerged in the 19th century as self-managed organisation of workers in the face of extreme exploitation. They provided, and continue to provide, a collective voice to working people against employers' exploitative, unfair and often illegal practices.

It is through trade unions that workers have been able to win better wages, fairer employment conditions, and safe and secure workplaces.

In India, workers won the legal right to form trade unions under the colonial rule in 1926, when the Trade Union Act (TUA) was adopted. The law provided a mechanism for the registration of trade unions, from which they derived their rights, and a framework governing their functioning. The TUA also bound workers' actions within a legal framework by providing for deregistration if a trade union "contravened any provisions of the Act".

The TUA gave workers the right, through their registered trade union, to take steps to press their claims, and where necessary, as in the case of a malevolent employer, agitate for their claims and advance them before the government and the judiciary. It also provided members (workers) and elected officers of a union a degree of immunity, including against the law on criminal conspiracy. Importantly, the law recognised that actions based on collective decisions by workers were legal and did not constitute criminal conspiracy.

The so-called "simplifying" of labour laws, repealing the TUA, the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946, and creating the Industrial Relations Code (IRC), has a very sinister outcome for workers' right to association. The code enormously widens the grounds under which a trade union may be deregistered. Under the TUA, deregistration was limited to the internal functioning of a union — in case a union violated the financial rules set down under the law or its own constitution. The Standing Orders Act and the Industrial Disputes Act were concerned with conditions of employment and settlement of disputes respectively. They had nothing to do with the internal functioning, and, therefore, with the existence of a trade union.

Vague definitions

Under the new IRC, a trade union can be deregistered for contravention of unspecified provisions of the code. It simply says that deregistration would follow in case of "contravention by the Trade Union of the provisions of this Code". The possibility of deregistering a trade union in this unspecified manner shifts the balance completely in favour of employers, who continue to enjoy protection under the Companies Act. This violates the principles of equality before the law and of natural justice.

When a trade union is deregistered, it can no longer represent its members (the workers) before the dispute resolution machinery or in court. And, the moment a trade union loses its registration, any collective decision taken by its members and elected officers can be treated as illegal. For example, a decision for strike action would leave employers free to either dismiss striking workers or charge them huge penalties for their claimed losses. It also means that the trade union's members and elected officers lose their immunity from prosecution for criminal conspiracy for collective decisions and actions, which is exactly what the TUA protected them against. The new code has cut and pasted from the TUA the provisions granting immunity against charges of conspiracy, but this is meaningless if the trade union itself is deregistered. The new code appears to be designed to deter collective action by workers' unions, and make them fearful of getting trapped in the cross hairs of the new, supposedly "simplified" code.

Extra-legal formations

With the threat of deregistration ever-present, workers and their unions will be pushed to create extra-legal formations like 'struggle committees' and 'workers' fronts, such as existed before the TUA, in order to advance their demands against unreasonable employers. This would have two outcomes: first, it will push employment dispute resolution outside the legal framework, which, in turn, will lead to the second, even more damaging outcome, which is criminalising working class dissent, since workers' agitations will have to take place through extra-legal formations. The freewheeling provision for trade union deregistration in the IRC, apart from being an attack on a century-old universal right is, very importantly, also the withdrawal of an absolute right. Once a trade union is deregistered or is effectively silenced by a constant and amorphous threat of deregistration, workers effectively lose their fundamental right to freedom of association.

This has grave implications for the working class's ability to defend its rights at a time when it is up against a capitalist class whose greed is insatiable, a vengeful government, and a capricious judiciary. Undermining trade unions, as the new code does, bodes ill for democratic rights in this country.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/a-recipe-to-tear-down-trade-unions/article33104097.ece

Sneak Peek:

No. of words: 640 words

Note: In this article, the author is criticizing the way the Governors and the President are withholding their decisions with regard to mercy petitions. The author is criticizing with the help of various Supreme Court decisions. As a CLAT aspirant, it is suggested to have a fair idea about it.

Article: 11

Constitutional fault lines

T.N. Governor's inaction on advice to free Rajiv case convicts warrants judicial intervention

The Governor of Tamil Nadu (T.N.), Banwarilal Purohit, has continued to withhold his decision on an application seeking pardon filed by A.G. Perarivalan, one of the seven prisoners convicted in the Rajiv Gandhi assassination case. In September 2018, the Supreme Court (SC) had observed, while hearing a connected writ petition, that the Governor should take a decision. A subsequent resolution passed by the Council of Ministers in favour of releasing all seven prisoners had rendered the matter fait accompli. The inaction by the Governor now has given rise to constitutional fault lines within the Executive arm of the government.

A five-judge Bench of the Supreme Court in Maru Ram v. Union of India (1981) held that the pardoning power "under Articles 72 and 161 of the Constitution can be exercised by the Central and the State Governments, not by the President or Governor on their own." In that case, Justice V.R. Krishna Iyer, speaking for the majority judgment, reiterated that the "advice of the appropriate Government binds the Head of the State". Therefore, a Governor is neither expected, nor is empowered, to test the constitutionality of the order or resolution presented to her. That is a power reserved exclusively for constitutional courts of the country.

Past judgments

Only recently, the Supreme Court, had examined the inordinate delay by constitutional authorities — the President and the Governor — in taking decisions on mercy petitions. The Supreme Court, in the case of Shatrugan Chouhan v. Union of India, laid down the principle of "presumption of dehumanising effect of such delay". Taking cognisance of undue delay in the cases of the petitioners who were incarcerated prisoners, the Supreme Court confirmed that the due process guaranteed under Article 21 was available to each and every prisoner "till his last breath". The Supreme Court had exercised its powers under Article 32 of the Constitution to commute the death sentences of 15 convicts and essentially interfered when an inordinate delay to perform a constitutional function was brought to its notice.

For long, Governors, like Speakers, considered themselves to be unanswerable for their actions. However, the apex court has clarified that constitutional functionaries are not exempt from judicial scrutiny. In the recent case of Keisham Meghachandra Singh v. Hon'ble Speaker (2020), the Supreme Court was asked to examine the Speaker's inaction with regard to disqualification proceedings. It was hitherto believed that the powers of the Speaker, holding a constitutional office and exercising powers granted under the Constitution, were beyond the scope of a 'writ of mandamus'. However, the apex court, recalling an earlier judgment in Rajendra Singh Rana v. Swami Prasad Maurya (2007), had confirmed its view that the "failure on the part of the Speaker to decide the application seeking a disqualification cannot be said to be merely in the realm of procedure" and that it "goes against the very constitutional scheme of adjudication contemplated by the Tenth Schedule".

Consequently, breaking years of convention, the SC, in the Keisham Meghachandra Singh case issued a judicial direction to the Speaker to decide the disqualification petitions within a period of four weeks. By doing so, the Supreme Court has indicated that it would only exercise caution when it comes to providing injunctions in quia timet actions, but would not be precluded from issuing directions in aid of a constitutional authority "arriving at a prompt decision".

In the present case, there has been a substantial delay at the hands of the Governor. The fifteenth Legislative Assembly of Tamil Nadu and consequently, the Council of Ministers, will end in May, 2021. This calls for the immediate interference of the Supreme Court, for it otherwise would render the resolution passed by the Council of Ministers and words contained in Article 161 of the Constitution meaningless.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/constitutional-fault-lines/article33120499.ece

Sneak Peek:

No. of words: 2108 words

Note: To mark the 71st Constitution Day, the author has discussed the eight cases of the Supreme Court of India. It is a very informative text. A must-read for every law aspirant. Enjoy this article!!

Article: 12

Constitution Day 2020: Constitution Bench judgments passed by the Supreme Court this year

In this pandemic-hit year, Constitution Benches of the Supreme Court delivered eight decisions - not much in the way of putting a dent in the dozens of matters pending before benches of five judges or more.

In the midst of the recurring debate on what its role in the Indian polity ought to be, what is arguably the core function of the Supreme Court is often forgotten. Apart from safeguarding the liberties of the citizens of the country (some would argue, disproportionately), the chief role of the Apex Court is to interpret the Constitution of India.

It is for this reason, and when there are conflicting judgments of benches of lesser strength, that a Constitution Bench of the Supreme Court is formed. Since the matters decided by these benches are unlikely to be overruled for a long time, one can safely say that Constitution Benches wield great power and responsibility in fixing the path that the law is to take.

In this pandemic-hit year, Constitution Benches of the Supreme Court delivered eight decisions - not much in the way of putting a dent in the dozens of matters pending before benches of five judges or more. Even so, the previous Chief Justice's plan to set up a permanent Constitution Bench to decide these matters remains dead in the water.

On the occasion of Constitution Day 2020, we take a look at how Constitution Benches of the Supreme Court have interpreted the Constitution and put to rest the confusion surrounding various statutory provisions. We will also offer a glimpse into Constitution Bench matters that will likely come up for hearing in the near future.

1. Fixed period of anticipatory bail [Sushila Aggarwal vs State (NCT of Delhi)]

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, SR Bhat

At the start of this year, the Court cleared the confusion over whether the protection given to a person through anticipatory bail should exist for a fixed period.

Reiterating the law laid down in the 1980 judgment in the case of Gurbaksh Singh Sibbia and others v. State of Punjab, which was also delivered by a Constitution Bench, the Court clarified:

There is nothing in the Code of Criminal Procedure (CrPC) to indicate that the grant of pre-arrest/anticipatory bail should be time-bound.

However, the concerned court has the discretion to impose conditions for the grant of anticipatory bail, including a limited duration of protection, on a case-to-case basis, depending on the stage at which the application for anticipatory bail is moved.

As a normal rule, there should be no such time-limit imposed in granting the pre-arrest protection.

The duration of an anticipatory bail order does not normally end when the accused is summoned by the court. However, it is open to the Court to impose additional restrictions if there are peculiar circumstances warranting the same.

2. Reference of Article 370 challenge to larger Bench (Dr Shah Faesal & Ors v. Union of India)

Bench: Justices NV Ramana, Sanjay Kishan Kaul, R Subhash Reddy, BR Gavai, Surya Kant

A five-judge Constitution Bench held that there was no need to refer the petitions challenging the abrogation of Article 370 of the Constitution to a larger Bench.

These petitions were filed after two Presidential orders of August 5 and August 6 of 2019 paved the way for the abrogation of Article 370 and the subsequent bifurcation of the erstwhile State into two Union territories.

The Bench found no contradiction between the Supreme Court's judgments of Prem Nath Kaul v. State of Jammu & Kashmir and Sampat Prakash v. State of Jammu & Kashmir, both of which dealt with interpretations of Article 370.

3. Compensation under Land Acquisition Act (Indore Development Authority v. Manoharlal and Ors etc)

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, SR Bhat

In March, the Court overruled all precedents pertaining to the interpretation of Section 24 of the Land Acquisition Act, 2013

The Court held that under Section 24(1)(a) of the Land Acquisition Act, in case the award is not made as of January 1, 2014 (date of commencement of the 2013 Act), there will be no lapse of proceedings and the compensation will have to be determined as under the 2013 Act.

In case the award is passed within the window of five years, then proceedings shall continue as under 24(1)(b) of 2013 Act "under the Act of 1894 as if it has not been repealed". The period of five years mentioned here excludes the period of time covered under any interim orders passed by the Courts, the Apex Court clarified.

Effectively this means that there will be no lapse of proceedings in case where:

possession of the land is taken, and compensation is not paid.

possession of the land is not taken, and compensation is paid.

Moreover, if a person is tendered compensation under Section 31(1) of the Act of 1894, it is not open to him to claim lapse of acquisition due to non-payment or non-deposit of compensation. The obligation of the government to pay is complete on tendering the amount under Section 31(1)

Conflicting interpretations of this Section led to a reference being made to this Constitution Bench. The conflict was between the judgments in Pune Municipal Corporation v. Harakchand Misrimal Solanki of 2014 and Indore Development Authority v. Shailendra (D) thr LRS of 2018.

However, the issue may not be settled just yet. Chief Justice of India SA Bobde recently hinted that an aspect of the Court's judgment on the interpretation of Section 24 of the Land Acquisition Act needs some clarification.

4. Striking down 100% reservation in Scheduled Areas (Chebrolu Leela Prasad Rao & Ors. v. State of AP & Ors)

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, Aniruddha Bose

In a controversial decision, the Court held that a government order passed by the erstwhile State of Andhra Pradesh allowing for 100% reservation in teaching posts for Scheduled Tribes in scheduled areas was illegal and impermissible.

The Court said that providing 100% reservation is "not permissible under the Constitution of India" and specified that the outer limit for reservations as laid down in the Indra Sawhney judgment stands at 50%. The Court also added that the notification was violative of Articles 14 and 16(4) of the Constitution.

The Court also imposed costs of Rs 5 lakh to be shared by present day States of Andhra Pradesh and Telangana.

A review petition was later filed against the Supreme Court's judgment passed in April this year.

5. Pricing of sugarcane (West UP Sugar Mills Association v. State of Uttar Pradesh)

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, Aniruddha Bose

As an example of the wide variety of matters that come up before Constitution Benches, the Court ruled that there is no conflict between the minimum prices of sugarcane set by a State and the Centre, till the time the price set by the former is higher than that set by the latter.

It was ruled that the Central government has complete authority to set the statutory minimum price and that State governments can fix an advisory price, which needs to be higher than the one fixed by Centre.

In effect, the Court upheld the Supreme Court's five-judge Bench verdict in UP Cooperative Cane Unions Federation v. West UP Sugar Mills Association.

6. Functioning of co-operative banks (Pandurang Ganpatii Chaugule v. Vishwasrao Patil Murgud Sahakari Bank Limited)

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, Aniruddha Bose

In an important judgment for rural and semi-urban India in particular, the Court ruled that cooperative banks come under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act 2002 (SARFAESI Act).

The Bench held that co-operative banks are "banks" for the purposes of Section 2(1)(c) of the SARFAESI Act, and that the recovery procedure u/s 13 of the Act is also applicable to such banks. Further, it was clarified that co-operative banks involved in banking activities are covered u/s 5(c) & 56(a) of the Banking Regulation Act, 1949 which is a legislation relatable to Entry 45 of List I.

In effect, the Court held that co-operative banks cannot carry on any activity without compliance of provisions of the 1949 Act and any other legislation applicable to such banks and the RBI Act.

7. Informant and investigation officer under NDPS Act [Mukesh Singh v. State (Narcotic Branch of Delhi)]

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, SR Bhat

At a time when the crackdown on drugs in high places became the centre of the media’s focus, the Court held that a person accused for an offence under the Narcotics Drugs and Psychotropic Substances Act (NDPS Act) is not entitled to acquittal on the ground that the informant and the investigating officer are the same.

The Court held that there is no automatic apprehension of bias when the informant and the investigation officer (IO) is the same, and such cases will have to be decided on a case-to-case basis.

In 2018, a three-judge Bench of the Supreme Court had held that the trial stands vitiated in case the informant and the IO are the same. This judgment was passed in the case of Mohanlal v. State of Punjab. The correctness of Mohanlal judgment was, however, questioned by a two-Judge Bench in the case of Mukesh Singh v. State (Narcotic Branch of Delhi), leading to the reference to the Constitution Bench.

8. Reservation for in-service medical officers in postgraduate degree courses (Tamil Nadu Medical Officers' Association & Ors v. Union of India & Ors)

Bench: Justices Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah, Aniruddha Bose

The Court held that the Medical Council of India (MCI) has no power to make any provision for reservation for in-service medical officers in respect of postgraduate degree courses in medical colleges.

The Court further held:

MCI provisions cannot affect the provisions under the legislative framework.

States will be within their power to provide for reservation for in-service officers

States should provide for such reservation after requiring candidates to serve in rural, tribal, hilly areas etc.

The Court also clarified that the ruling will only have prospective effect, clarifying that "any admissions given earlier taking a contrary view shall not be affected by this judgment."

Apart from these, three other matters that were listed before the Constitution Bench headed by Justice Arun Mishra remain undecided. These are:

Kaushal Kishor v. State of Uttar Pradesh: A case filed by a relative of the Bulandshahr rape accused. The petitioner had sought action against then Uttar Pradesh Minister Azam Khan for his remarks on the incident. In this matter, important questions pertaining to comments made by persons holding public offices in rape and other heinous offences were referred to a Constitution Bench.

CBI v. RR Kishore: This case pertains to Section 6A(1) of the Delhi Special Police Establishment Act, 1946. The Section deals with obtaining prior approval of the Central government for conducting any inquiry into an offence under the Prevention of Corruption Act, 1988 (PC Act) where the allegations have been made against officers of the level of Joint Secretary and above. In 2014, the Supreme Court had struck down the said section as unconstitutional. The question that is now being considered is whether the operation of that said judgment is retrospective or not.

Aziz Qureshi v. Union of India: This case relates to the interpretation of Article 156 of the Constitution, which lays down the term of office of the Governor. The petition itself was filed by former Uttarakhand Governor Aziz Qureshi in 2014. He had alleged that there was a move by the Narendra Modi government to ease him out of office.

In view of Justice Mishra's retirement earlier this year, the matters are likely to come up before a newly formed Constitution Bench.

In the months to come, burning issues that have sparked widespread debate among the citizenry are likely to be heard and decided by Constitution Benches of the Supreme Court. These include the challenge to the validity

of the Constitution (One Hundred and Third) Amendment Act, which introduced 10% reservation for the Economically Weaker Sections (EWS); the matters relating to the abrogation of Article 370; and the reference made in the Sabarimala review case. The Court had also hinted that the petitions challenging the constitutional validity of the Citizenship Amendment Act may be heard by a Constitution Bench.

Given the significance of these matters, it will be interesting to see how Constitution Benches will determine the course of India's history in the near future.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/constitution-day-2020-constitution-bench-judgments-supreme-court

Sneak Peek:

No. of words: 2466 words

Note: The author is critically analyzing the concept of personal liberty in contemporary time with the help of the incident of Arnab Goswami and other similar matters. The author is criticizing the way machinery is functioning nowadays. The concept of personal liberty is different for different people. It is a very informative text to understand the legal position about the subject.

Article 13

Where Free Speech Is A Path To Lose Personal Liberty: After 70 Years Of Constitutional Democracy

We celebrate 70 years of Constitutional Governance in India, i.e., Bharath on 26th November 2020 with Damocles sword on free speech that could deprive personal liberty.

None is bothered about those innocent, not very popular, common journalists and protestors who were arrested for talking against the establishment or protesting against Government policies like the Citizenship Amendment Act (CAA). In recent times, several Journalists have been charged under the sedition law, the Official Secrets Act, for incitement to riots and under the Unlawful Activities Prevention Act (UAPA). Left wing thinkers, poets and academicians are arrested without any convincing evidence or charge, and are denied bail by the Courts.

Why Sudha Bharadwaj, a professor should be denied bail? Why Varavara Rao, a teacher and poet should suffer incarceration without much to suspect him? It is the same Mumbai Police along with NIA that denies bail to these academicians. Why there is no condemnation of the repeated arrests and harassment of a good doctor named Kafeel Khan? Why some are happy about it. Why is it ok for Umar Khalid to rot in jail?

A journalist in Yogi Adityanath's Uttar Pradesh was booked and accused of criminal conspiracy for exposing how a government school was serving roti and salt for mid-day meals. A journalist in Tamil Nadu was arrested for his Covid-19 coverage. Another journalist in Gujarat was arrested and charged with sedition merely for a speculative story that the state may get a new Chief Minister. A Kerala born journalist was arrested when he went to Hathras to report the notorious gang rape.

The Union Home Ministry is opposing dropping of sedition charges against journalist Vinod Dua for critically analysing Modi Government. Parashar Biswas, a journalist in Tripura was beaten up after criticising Chief Minister Biplab Deb's threat to the media for their reporting on his handling of Covid-19 pandemic.

Some journalists in Kashmir were detained and assaulted by police during the Covid lockdown. The newspapers are shut down in Kashmir, Internet was shut down for months, leaders are kept in house arrest, habeas corpus writ petitions are pending unanswered or not scheduled.

Personal liberty & Affordability

Personal liberty is equated with the Right to life under Article 21 of our Constitution. This constitutional right cannot depend on the persons asking for it and personalities arguing for them or personalities deciding it. It should be on principles of liberty as 'established by law', which is the crucial expression used in the repository Article of Constitutional Rights- Art 21.

Whether the personal liberty depends on affordability to reach the Apex Court and hire advocates who have greater rapport with establishment and judges?

Pre-trial arrest: Draconian power

If the purpose of arrest is served without arresting him, any person should not be arrested. This is the principle of personal liberty. The power of pre-trial arrest is the draconian power in the hands of police and their political bosses, which is misused, abused, and unused for their own vested interests. Hence every pre-trial arrest must be reviewed in judiciary.

Once FIR is filed and police pursues it with local courts, it is difficult to get the FIR quashed. Whether there is any evidence or not, threat of pre-trial arrest looms large and bail is the only hope journalists and protestors look for. None knows whether prosecutors have enough evidence to convict the accused, but even before the charge-sheet is filed hundreds or thousands languish in jails without bail. This is the modus operandi of all the Governments, states or centre. The power is politically misused to suppress the voices against their Governments. The media and civil society discuss only popular accused but refuse to acknowledge the breach of personal liberty of many.

Why Supreme Court does not have time for them? Why their cases do not come up before the liberal judges and famous lawyers? How many could afford the top lawyers who could secure bail from any court or the Top Court?

Criminality in Arnab's case

One must see the criminality in Arnab Manoranjan Goswamy's case that led to his controversial arrest. It was not for his journalistic TV shows but for non-payment that led two persons of a family to commit suicide. Investigating and arresting Arnab in such a criminal case should be a step in enforcing the rule of law. He has no immunity just because he is a journalist, though alleged to be pro-BJP campaigning anchor of a TV channel. At the same time, he would not lose his liberty on the grounds of his bias for the ruling party.

Arnab shouted for arrest of Rhea Chakraborty, alleging that she was responsible for abetment of suicide of the film actor, Sushant Singh Rajput. And it is a paradox that he was arrested for the similar charge. He is an accused anchor against whom there is an FIR, suicide note and primary evidence that supports allegation of abetment to suicide of two persons. He demanded arrest of Rhea, a friend of Rajput who committed suicide, though there is no suicide note or complaints or any piece or trace of evidence. It became a political issue for Bihar Elections.

The case against Arnab is for abetment to suicide under 306 of the Indian Penal Code. Mr. Anvay Naik, then Managing Director of Concorde Designs Private Limited, and his mother Kumud were found dead in their home in Kavir village of Alibaug in May 2018. Naik was found hanging in Alibaug and his mother was found strangled to death. Later a suicide letter was recovered naming the owners of three companies — Arnab Goswami of Republic TV, Feroz Shaikh of IcastX/Skimedia and Neetish Sarda of Smartworks — saying they owed Naik's firm Rs 83 lakh, Rs 4 crore and Rs 55 lakh, respectively. Anvay Naik purportedly wrote in the note that he and his mother decided to take the extreme step as the owners of the three companies did not clear the payments. In April 2019, the Raigad Police said there was no evidence in the case and a local court allowed the case to be closed. But the Uddhav Thackeray-led Maha Vikas Aghadi government comprising the Shiv Sena, Nationalist Congress Party and the Congress, reopened it. The question again is whether closure and reopening of case against a politically biased journalist are genuine or vitiated by political bias?

"There was always this question as to whether the government had been too hasty in burying this case," Shekhar Gupta said. After Naik's daughter met the Home Minister, the latter asked CID to reopen the case. Besides CID investigation, the police had authority of local court to reopen the case. In the words of Shekhar Gupta, "So a prominent face in the media, who might have been the darling of the establishment earlier, was now no longer the darling of the establishment in the state now. That is the nub of the politics here".

Giving it to CBI

It will be interesting to hear the Union Ministers saying the state police is harassing one journalist. At a point of time it appears that this journalist is caught in feud between ruling party at centre and state. Arnab Goswami and Republic TV made the Sushant Singh Rajput case into a very big story and it played into Bihar's politics. The central government and the Bihar government, which is a BJP-allied government, intervened in the case. A criminal case is booked in a state different than where the crime is committed. Murder case is registered in Bihar for the crime in Maharashtra. Shekhar Gupta also pointed out that in this case, the Centre and the state together asked the Supreme Court if the case could be transferred to the CBI and the Top Court granted it. The central agencies, CBI and Narcotics Control Bureau (NCB) came into play then. Actor Rhea Chakraborty and her brother were arrested and denied bail for a long time.

Selective listings?

Supreme Court Bar Association (SCBA) President Dushyant Dave wrote a letter to the Secretary General of Supreme Court lodging strong protest on selective listing of Arnab's bail appeal. Kapil Sibal pointed out plight of Kerala journalist Siddique Kappan, who was arrested while he was on his way to Hathras, Uttar Pradesh, to report on the alleged gang-rape and murder of a woman in Hathras. The Supreme Court did not hear Kappan's petition and asked him to approach the trial court. Arnab is privileged to get his case listed and secure interim bail.

Chandrachud's order

Justice Chandrachud, while granting bail to Arnab made certain comments, which we do not find in the interim order. He lamented high courts not giving bail, leaving people languishing in jail for months, which had burdened the Top Court with bail cases. Indian Supreme Court takes heavy burden of cases every year compared to any top court in any democratic country. Most of them are bail cases. One must agree with the question posed by Justice Chandrachud; "If constitutional courts don't protect liberty, who will?"

His final judgement is reserved. That might explain some legal nuances of his conclusions. His interim order is simply given out brief facts and concluded with interim bail. His oral observations are staple food for media next day. He observed that he disagreed with Goswami's position that police cannot investigate the case further if a closure report has been filed in a case where there is an offence but evidence has not been traced, which we might find in his final draft of judgment.

At the same time, Justice Chandrachud shared his "deep concern" at the growing trend of states "targeting" those who follow a different ideology than that of the government. He recalled a case from West Bengal where a girl, who tweeted that the coronavirus was not being dealt with, was issued a police notice. "They did this, saying we will show you reality," he remarked. He also said that Arnab Goswami cannot be punished or treated inhumanly merely because his style of presenting news does not suit the state government. He advised: "Forget the way he screams and yells. I do not watch this news channel, but what concerns me is the value ascribed to human liberty. We are deeply concerned about it. Our democracy is extraordinary resilient, and governments must ignore all this. This is not the basis on which elections are fought".

"If constitutional courts do not interfere today, then we are travelling the path of destruction, undeniably. We must send a message to the High Courts today that please exercise your jurisdiction to uphold personal liberty," Justice Chandrachud said. This is also not part of the interim order. We do not know about final judgment.

Why do you watch his TV?

Another of his comment widely reported is: "You do not watch a channel if you do not like it. I myself prefer to cuddle with a good book," while responding to Kapil Sibal, the Senior Advocate who appeared for Maharashtra Government and the State's Police. He was right when he said judges should ignore the twitter comments on judgments.

While this case of abetment to suicide is not related to Arnab's journalistic profession, and another case pertaining to his resistance while arresting, all other cases arise out of his TV shows and their controversial content, which rooted in certain offences under IPC and Cable TV laws.

Assault on arresting officers?

One case of alleged assault on woman constable while resisting arrest was booked against Goswami under the Indian Penal Code, under the provisions relating to assault or using criminal force to deter a public servant from discharging duty, intentional insult to provoke breach of peace, and criminal intimidation. The FIR named his wife, Samyabrata Goswami, their son and two others. Arnab Goswami has, in turn, alleged that the police assaulted him.

Cases on TV shows

Five other cases concerning reports and TV shows have been registered against Goswami and Republic TV by the MVA government so far. BJP is leading the mantle of opposition in Maharashtra and championing the cause of personal liberty and press freedom with limited reference to Arnab, who openly voices for their political causes.

a) Mumbai Police filed FIR against senior editors and newsroom staff of Republic TV for airing news about a "revolt" within the force against its commissioner Param Bir Singh under sections of the Police (Incitement to Disaffection) Act, 1922, and claims the editors and staff "attempted to incite disaffection" among members of the police.

b) Mumbai Police Commissioner Param Bir Singh told media on 8 October that a "racket" of private channels allegedly manipulating their Television Rating Points (TRPs) to get more revenue was discovered against the owners of Republic TV, Fakt Marathi and Box Cinema.

c) Many filed FIRs against Republic TV's coverage of the Palghar mob lynching incident on 16 April, wherein three Mumbai residents — two Hindu sadhus and their driver — who were on their way to Silvassa in the Union Territory of Dadra & Nagar Haveli, were lynched by residents of Gadchinchale on the suspicion that they were thieves. The Mumbai Police sent a show cause notice Arnab Goswami, saying his comments could create communal disharmony and hatred between Hindus and Muslims, and asking why a bond of good behaviour should not be taken from him.

d) There are 15 FIRs filed mostly by Maharashtra Congress workers against Arnab's allegation against Sonia Gandhi that she is getting Sadhus killed and reporting to Italy. Then activist Nilesh Navlakhs invoked sections of the Cable Television Networks (Regulation) Act, 1995, against Goswami for alleged stirring up communal hatred and divide on his news channel.

e) In another show Goswami questioned gathering of a crowd of migrant workers on 14 April outside Mumbai's Bandra Railway Station demanding transportation to return to their homes during Covid19, breaking norms of physical distancing etc. Police booked FIR against Goswami for trying to spread hatred against the Muslim community and booked him under various sections of the Indian Penal Code.

Right wing politicians do not condemn arrests of journalists and protestors and others hesitate to condemn arrest of Arnab. The response of civil society to onslaught on free speech and liberty is also divided on political and communal lines.

Whether governments are really interested in rule of law or freedom of speech. The hypocrisy on either side is equally notorious, which was exposed by Arnab's arrest. If every person's personal liberty does not have same value, we cannot call ourselves a rule of law society. If Constitution of India does not help a person or citizen to secure personal liberty from pre-trial arrest for vehemently criticising draconian policy of a Government, we cannot describe ourselves as democracy with 70 years of Constitutional governance.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/freedom-of-speech-after-70-years-of-democracy-166423

Sneak Peek:

No. of words: 1956 words

Note: In this article, the author is critically examining the recent observation of the Chief Justice of India while hearing Kerala journalist Siddique Kappan's habeas corpus plea. It was observed that the Supreme Court was "trying to discourage Article 32 petitions". The author with the help of Union of India v. Paul Manickam (2003) 8 SCC 342 case critically analyses the said observation. It will help you to enhance your legal acumen. 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: 14

Discouraging Article 32 Habeas Corpus Petitions – The Legal Basis

Observations by a bench of the Supreme Court headed by the Chief Justice of India while hearing a habeas corpus writ petition under Article 32 of the Constitution that the court is trying to discourage Article 32 Petitions - has understandably received coverage critical of the judicial attitude of the court. Particularly, as it came in the backdrop of an order granting interim bail to Arnab Goswami in a hastily convened vacation hearing punctuated by several oral observations by the bench on the paramountcy of personal liberty. This also led the court to later lament how the coverage of its observations in the habeas corpus matter had been unfair.

In this article, we try and examine the basis of the court's observations that they are trying to discourage Article 32 habeas corpus petitions.

The court's observations ostensibly come from passage in Union of India v. Paul Manickam (2003) 8 SCC 342, that is often relied on by the State to defeat Article 32 habeas corpus petitions that are preferred in the first instance without going first to the High Court.

The passage in the judgment authored by Arijit Pasayat J, as part of a bench of two judges, is as follows.

"22. Another aspect which has been highlighted is that many unscrupulous petitioners are approaching this Court under Article 32 of the Constitution challenging the order of detention directly without first approaching the High Courts concerned. It is appropriate that the High Court concerned under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke the jurisdiction under Article 32 of the Constitution to approach this Court directly, it has to be shown by the petitioner as to why the High Court has not been approached, could not be approached or it is futile to approach the High Court. Unless satisfactory reasons are indicated in this regard, filing of petition in such matters directly under Article 32 of the Constitution is to be discouraged."

On the face of it then, the court is just following a precedent and the law laid down in an earlier case. However, on a closer examination, it becomes clear why this passage in Paul Manickam ought to not have any value as a precedent at all, notwithstanding it being part of a pronouncement of the highest court of the land.

First, the Paul Manickam decision arose in the contest of a Special Leave Petition filed under Article 136 challenging a judgment of the High Court under Article 226 quashing a preventive detention order. The scope and ambit of the right under Article 32 to challenge detention orders and to seek a habeas corpus writ was not in issue at all. It is settled law that only the ratio decidendi of the court is a precedent and observations that have no nexus with the issue that is being decided in a case have no precedential value.

Second, the Court in Paul Manickam neither considered nor distinguished prior constitution bench judgments that have expressly held that Article 32 is the right and prerogative of the petitioner and that the petitions cannot be dismissed merely because the petitioner did not approach the High Court first. The unambgious decision of Das CJ writing for himself and three others as part of five-judge bench in K.K. Kochunni v. State of Madras 1959 Supp (2) SCR 316 considered the issue and had this to observe.

"8. Shri Purshottam Tricumdas appearing for some of the respondents has taken a preliminary objection as to the maintainability of the petitions. The argument in support of his objection has been developed and elaborated by him in several ways. In the first place, he contends that the petitions, insofar as they pray for the issue of a writ of mandamus, are not maintainable because the petitioners have an adequate remedy in that they can agitate the question now sought to be raised on these petitions and get relief in the pauper suit filed by one of the respondents after the passing of the impugned Act. This argument overlooks the fact that the present petitions are under Article 32 of the Constitution which is itself a guaranteed right. In Rashid Ahmed v. Municipal Board, Kairana [1950 SCR 566.] this Court repelled the submission of the Advocate-General of Uttar Pradesh to the effect that, as the petitioner had an adequate legal remedy by way of appeal, this Court should not grant any writ in the nature of the prerogative writ of mandamus or certiorari and observed:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only."

Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226 of the Constitution, as to which we say nothing now — this Court cannot, on a similar ground, decline to entertain a petition under Article 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right. It has accordingly been held by this Court in Romesh Thappar v. State of Madras [1950 SCR 594] that under the Constitution this Court is constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking the protection of this Court against infringement of such rights, although such applications are made to this Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. The mere existence of an adequate alternative legal remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is prima facie established on the petition."

The extended context given in the earlier quote is to labour the point that the issue of the Court's powers to throw out Article 32 petitions on the ground that the petitioner has not approached the high court first or has not tendered adequate explanation for not approaching the high court first actually arose in Kochunni and the decision . The matter however does not end there.

There is perhaps one argument that could be made – that is, Paul Manickam was specific in the context of habeas corpus writs which are distinct from other Article 32 petitions – to the extent that a second habeas corpus petition to the Supreme Court under Article 32 can be preferred even if a 226 writ is denied. (In fact, habeas corpus petitions are considered a species of their own (see Dharyao v State of U.P. AIR 1961 SC 1457). This is unlike other kinds of writs wherein once 226 jurisdiction of the high court is invoked, an article 32 petition ceases to be maintainable, being hit by the doctrine of res judicata. The distinction becomes germane because 32 and 226 are mutually exclusive for a person in other types of writs, and there is no such problem with a habeas corpus writ and therefore there is no real denial of Article 32 remedy even if the petitioner is directed first to approach the High Court under Article 226. However, for such distinction to be proper in law, it has to come through a

judicial pronouncement that clearly distinguishes, clarifies or overrules the previous constitution bench judgments by larger bench or atleast of a bench that is coordinate strength – in a matter that this question actually arises.

Moreover, the rationale behind non-applicability of res judicata to habeas corpus petitions is the consideration of paramountcy of personal liberty as a protected constitutional right and the role of the court as its protector (Ghulam Sarwar v Union Of India AIR 1967 SC 1335, 5-Judge bench, Subbarao CJ). That being the case, it is not immediately apparent why that distinction that was made to more effectively protect personal liberty ought to be understood to serve as a distinction to defeat the interests in the case of dealing with an Article 32 Petition for habeas corpus preferred in the first instance.

The third argument that can perhaps be advanced is a favourite of the State in not just habeas corpus cases, but many other Article 32 petitions. That is, the consideration of the court's docket and the workload of the Supreme Court and it being a good policy to have persons approach the High Court first so that flood gates of litigation in Supreme Court don't open.

Apart from this argument having no independent standing in light of Article 32 being a fundamental right in itself and the Supreme Court's own holding of its lack of discretion to entertain or refuse Article 32 petitions so long as there is a fundamental right asserted and infringement claimed in the petition, it also suffers on another count. The writ docket in the supreme court is a miniscule fraction of its workload. In 2019 for instance, only 1947 Writ Petitions were registered in the Supreme Court, as against more than 42000 Special Leave Petitions under Article 136. This is despite the remedy under Article 136 being a discretionary one and the remedy under Article 32, a matter of right. The Court's humongous workload in its discretionary jurisdiction cannot rationally be used to defeat its duty to entertain petitions under Article 32. Moreover, it is in fact the State's own failure that it has not created more courts to supplement the Supreme Court in exercising Article 32 jurisdiction, which it is empowered to do under Clause (3) of that article – something that the courts ought not to allow the State to take advantage of.

This leads us to another syndrome that has afflicted not just our court, but also those that comment on the court. That is the clamour to rush to brand writ petitions – particularly public interest litigation as frivolous or unworthy of the supreme court's time and indeed exhorting the court to dismiss such petitions with costs : missing totally the prerogative and the right of every citizen under Article 32 to bring claims to the Supreme Court. The social cost of guaranteeing such a remedy is necessarily that there will from time to time be causes that are objectively and truly unworthy of the Supreme Court's time. But the answer to that cannot be making Article 32 a discretionary remedy akin to Article 136 where the court can on a whim decide whether or not the complained of cause is worthy of its time and attention.

Some of the court's recent orders imposing costs on a petition that sought to protect artifacts found during the Ayodhya excavation, or the refusal to entertain the petition that sought a declaration epidemic act as unconstitutional and asking the Petitioner to approach the high court first – are clearly not in keeping with the letter and the purpose of Article 32 being a guaranteed right.

If Article 32 were to be realised as a guaranteed right, the court ought to ordinarily not dismiss such petitions in limine and whenever it does, it must do so with a speaking order showing how the petition discloses no cause of action – i.e. it does not claim a fundamental right being engaged or that it does not claim of an infringement of that right.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/discouraging-article-32-habeas-corpus-petitions-the-legal-basis-166230

Sneak Peek:

No. of words: 1038 words

Note: In this article, the author criticizes the recent controversial remark of discouraging the petition under Article 32 of the Indian Constitution. This article is in furtherance of the earlier article, which tries to justify the said remark and this article criticizes. Both the articles presented a different point of view to you and it will help you to develop your legal acumen.

Article: 15

Right to constitutional remedies is the Constitution's soul. Surely SC is mindful of that

The learned Chief Justice of India, Justice SA Bobde, is reported to have stated during the hearing of journalist Siddique Kappan's bail matter, that the Court was trying to "discourage" recourse to Article 32, the fundamental right to constitutional remedies. Pratap Bhanu Mehta, says that the CJI has "unwittingly let the cat out of the bag", demoting the fundamental right to a mere matter of organisational adjudicative leadership. For him, this is "a perfect metaphor for our times", because such discouraging involves episodic suspension of Article 32. Apart from recalling philosopher Walter Benjamin's thesis that there is "no document of civilisation which is not at the same time a document of barbarism", I do not engage the wider aspects of his analysis but here focus narrowly on the analytic of Article 32.

The cat was out of the bag a long while ago. The apex judicial process shows clearly that the Court regards Article 32 as a judicial power subject to the fundamental principles of administration of justice. It has already extended rules and doctrines such as laches (delays) or res judicata (a matter already decided by a competent court) or any other principle of administration of justice. CJI M Hidayatullah in Tilokchand (1970) said that what Article 32 does is to keep open "the doors of this court" and requires the state not to "put any hindrance" to a person seeking to approach the Court. But this does not mean that "the Court must ignore and trample under foot all laws of procedure, evidence, limitation, res judicata and the like". Justice MP Thakkar (and Justice BC Ray) in Kanubhai Brahmbhatt (1987) went even further: Speaking of the "alarming proportions" of judicial delays, they observed that "time for imposing self-discipline has already come, even if it involves shedding of some amount of institutional ego" and to "inspire confidence in the litigants that justice will be meted out to them at the High Court level, and other levels". True, faith "must be inspired in the hierarchy of Courts and the institution as a whole" and not" only in this Court alone". So, even if there is a constitutional right to remedies it remains subject to the discipline of judicial power and process.

But the Court has also discovered new facets of Article 32. As early as 1950, it has ruled that powers under Article 32 are not limited to the exercise of prerogative writs; in 1987 the Court ruled that it has powers to rule for compensation of violation of fundamental rights; and in 1999 it said that this power extended to the rectification of its own mistakes or errors. Thus, it is simply unworthy to attribute or impute any insidious motive from a stray remark: Does CJI Bobde at all wish to cancel all these norms, and more?

Many further questions are raised. First, can the CJI or the Court as a whole suffer from epistemic collapse so as to receive sharp reminders and rebukes from citizen commentators? How may we ever forget that justices swear an oath to protect the "constitution by law established" and that they inherit judicial worlds and wisdom? Second, justices usually come to the Supreme Court not as Alice enters the Wonderland; rather they emerge as judicial beings after long years at the bar and the bench, and many have served as chief justices of one or more

high court. Are they then likely to suffer from amnesia of the constitutional fact that Article 32 does not merely confer wide powers on the Court but also the judicial duty to provide constitutional remedies?

Third, do lawyers and justices not know that what distinguishes Article 32 from Article 226 is the very dimension; the high court's vast jurisdiction technically casts no duty on them to enforce fundamental rights. They have the discretion to act or not to; in contrast, the Supreme Court must.

Fourth, Article 32 is not absolute, no constitutional right is. Of course, the Supreme Court decides on what "appropriate proceedings" should be for it to be so moved. But the Court may not prescribe any process as it likes but only that process which preserves, protects and promotes the right to constitutional remedies.

Article 33 clearly says that the right will not extend to the members of armed forces, those members of armed forces "charged with the maintenance of public order", those "employed in any bureau or organisation established by law" for "intelligence or counter intelligence", and "employed by any State bureau or organisation established by any Force" for (or in connection with) "telecommunication system". Article 32 may not restrict or abrogate the "maintenance of discipline among them". The Court has also upheld (in 1997) the 50th amendment enlarging the scope of this article against a challenge of the basic structure of the Constitution. And the power may validly be delegated to the rule-making competence of the executive, provided that such rules "are necessary for ensuring the proper discharge of duties by the Armed Forces".

Justice AK Patnaik, editing further DD Basu's "Shorter Constitution of India", rightly doubts the state power to amend a law under Article 33, and particularly Article 34 , authorising Parliament to indemnify particular persons "for any act done… in connection with the maintenance or restoration of order in any area within the territory of India". But even such a power, Justice Patnaik rightly maintains, will not eclipse the right of a "person… detained without the authority of law… to move for habeas corpus".

The just demand for an expeditious and effective bail system stems from manifest discrimination in bail where one case is fast tracked whereas others are consigned to slow moving judicial action, even when rights to life and health are endangered. Scandalous judicial delays, measures of decongestion and diversion, and a bold resolution of "who watches the watchman" syndrome now demand urgent apex response.

As the Yale historian Rohit De reminds us vividly, Article 32 makes the apex court into a "people's court". And future historians should not be able to conclude that the Court deliberately dealt deathblows to this "soul" of the Constitution, as Babasaheb Ambedkar described Article 32.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/protecting-article-32-7064324/

Sneak Peek:

No. of words: 1003 words

Note: In this article, the author is criticizing the attitude of the government with regard to the Aarogya Setu application and the author is analyzing in the light of the recent incident by PIO for not having info of developers of the said application. As a CLAT aspirant, it is a suggested to have a fair idea about it.

Article: 16

Is Aarogya Setu Another 'Experiment' in Govt's 'Big Tech' Plans?

Today's criticism of Aarogya Setu is about who built the app and how, without accountability by private players.

Aarogya Setu or Health Bridge is indeed the government's first major consumer application which was intended to act as a bridge leading to the health tech industry in India. Since day one of Aarogya Setu becoming mandatory, people have opposed this location tracking application. Fully aware of past fiascoes of Aadhaar data leaks and the mandatory push, people were alert in resisting this application in the absence of a data protection law. This opposition was vital in getting the Aarogya Setu application partially open-source, and resulted in bringing in the Aarogya Setu Data Sharing Protocol.

Was The Govt Only Interested In The 'Branding' Of Aarogya Setu?

While these were small wins, it conveyed to the government that citizens are not ready to be taken for a ride anymore. A small but important action was taken by residents of Noida who challenged and won against Noida Police for criminalising non-installation of Aarogya Setu. Several organisations like Internet Freedom Foundation and Software Freedom Law Centre have sent legal notices and approached courts against the government's decisions on Aarogya Setu. The current notices to Public Information Officers of NIC, NEGD and MeITY from the Central Information Commission is yet another victory in this direction.

The present day criticism of Aarogya Setu rests on who and how the app was built without any accountability by private players.

It is now on record with a report in The Quint that the government was least interested in safeguarding citizens data and was primarily driven by install metrics that would make Aarogya Setu beat Pokemon Go. The Government was interested in the branding of Aarogya Setu, the grand plans to use Big Data in governance to look cooler and smarter. But it seemed less interested in the problems of citizens who were facing issues with the app.

Govt's 'Lack Of Interest' In Safeguarding Citizens From Exploitation

The Aarogya Data Sharing Setu protocol that has been brought by the government was also in partnership with another private think tank, Vidhi Centre for Legal Policy. While citizens were demanding a law to safeguard them from any harm that might arise because of Aarogya Setu, they were handed a data-sharing protocol that is neither a law nor policy.

Policy professionals have been very apprehensive about the protocol since day one, as it was mere intention with no actual physical safeguards in place.

The current revelations about how none of the procedures mentioned in the protocol were implemented, makes it clear as to how the government has little interest in safeguarding citizens from exploitation. Audit mechanisms, paperwork are important accountability practices employed to ensure government procedures are not bypassed by anyone.

By taking away these very basic procedures, it seems that the government's leanings are more towards the private sector.

The push for digital products like Aarogya Setu by the Government of India is to convert India's vast citizen population into consumers for an emerging data economy. Aarogya Setu too was an economic play by the private sector, and the priorities of both the government and private sector were clear from the start. The people associated with the app always stated their intentions to use Aarogya Setu to promote India's National Health Stack or National Digital Health Blueprint.

Is Govt 'Hand-In-Glove' With Private Sector?

The mandatory push for Aarogya Setu raised doubts about the State's interest in tracking real-time surveillance of locations of dissenters and opposition. While there is no evidence of this actually happening, the lack of purpose, the limitations and data protection law allows the emergence of a Big Government, and they were right to be afraid. With no paper or digital trail on who has access to data from Aarogya Setu, it is near impossible to know whether a particular State has shared the data with its Police Department instead of Health.

When it comes to the emerging data economy, surveillance and capitalism go hand-in-hand. One can't only be critical of surveillance or capitalism anymore in silos, since both have inter-connected roles.

With the increased digitisation of society and no laws safeguarding citizens, the government and private sector are both policing and making profits with our data. Surveillance is no more a government activity, and profits are not merely generated by the private sector. The private sector can do better surveillance and the government can make larger profits by forcing mandatory laws to install apps. Often these arrangements are informal, and paper trails are non-existent, or the information is never shared easily.

These partnerships are now increasing in the name of public digital infrastructures/goods like Aarogya Setu or National Health Stack. Often these partnerships, like in the case of Aarogya Setu, ignore established due process of governance to favour the private sector. In the case of Aarogya Setu, no one knows if these volunteer developers have signed any contracts, just like in the case of Aadhaar.

These volunteers have claimed all the credit for building an app – the credibility of which nobody can attest to. But when it comes to questioning government practices in handling the data, the app developers are nowhere to be seen, even when they are informed beforehand about the challenges that arise out of creating these infrastructures.

Aarogya Setu was just another experiment in Big Tech plans for the data economy in India. These plans, including the recent push to make the National Health ID or Aadhaar mandatory – if and when a vaccine arrives – is a tactic Big Government and Big Tech have mastered.

'Unless you give us your data and become a consumer to create a health data industry, you will find it hard to get a vaccine' – seems to be the message. Whether we accept it or not, citizens are increasingly being reduced to consumers, and citizens must push for more safeguards and accountability procedures to shield themselves from onslaught by Silicon Valley.

Courtesy: 'The Quint' as extracted from:

https://www.thequint.com/voices/opinion/modi-govt-aarogya-setu-app-cyber-safety-potential-breach-citizens-concern-transparency-accountability-private-players#read-more

Sneak Peek:

No. of words: 2492 words

Note: In this article, the author is examining the concept of obscenity and while examining it concluded that there is no precise definition or requirement of an act to be called an act of obscenity. Rather it will depend on the facts and circumstances of each case. It is a very informative text to understand the legal position about the subject. A must-read for every law aspirant. Enjoy this article!!

Article: 17

Who Knows What Is Obscene? I Know It When I See It.

The offences relating to 'obscenity' are back in the news. Last week an FIR was registered against actor and model Milind Soman for running naked on a Goa beach. Mr Soman shared a picture of himself running nude on a beach to mark his 55th birthday. Around the same time, another complaint was filed with the Goa Police against the actor and model Poonam Pandey for shooting an 'obscene' video in Goa. On 11.11.2020, the Hon'ble Madhya Pradesh High Court refused to quash that the complaint filed against film and television producer Ekta Kapoor under Sections 284, 298 and 34 of the IPC and Sections 67 and 67-A of the I.T. Act.

Sections 292, 293 and 294 of the IPC provide for crimes relating to obscenity. Section 294 makes it an offence to sell, etc., obscene books, Section 293 makes it an offence to sell, etc. obscene objects to young persons and Section 294 provides for offences relating obscene acts and songs. Obscenity is a sine qua non for any of the aforementioned offences. However, the term obscene or obscenity have not been defined in the Indian Penal Code. Since obscenity itself is subjective, there is no clarity as to what is obscene and what is not.

The Queen's Bench Division made the earliest attempt to lay down a test or a guideline to assist in identifying the obscene nature of an act or a thing in The Queen v. Hicklin. The Court was examining whether pamphlet entitled, "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession" was an "obscene" book. The pamphlet consisted of extracts taken from the writing of theologians on the doctrine and discipline of the Romish Church and particularly on the practice of auricular confession. About half of the pamphlet related to controversial questions and the latter half of the pamphlet was alleged to be grossly obscene, as pertaining to impure and filthy acts, words, and ideas. Hicklin was accused of selling the obscene pamphlet.

Cockburn, C.J. observed as under in the course of his judgment:

"…It is quite clear that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr Kydd, that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, cause there are in many standards and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands are publication of this sort may fall…"

This test laid down by Cockburn, C.J. in Hicklin is popularly referred to as the Hicklin Test. It postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults.

The United States, however, made a marked departure from the Hicklin test. In Roth v. the United States, the constitutionality of a criminal obscenity statute was in question before The Supreme Court of the United States. Rot conducted business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26 counts indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. The conviction was affirmed by the appellate Court. The question which The Supreme Court was called upon to answer was whether obscenity is utterance within the area of protected speech and press.

Justice Brennan, who delivered the opinion of the Court, took into consideration the earlier pronouncements and the provisions of The First Amendment to the Constitution of the United States, and ultimately held that obscenity is not within the area of constitutionally protected speech or press. He further observed as under:

"18. The early leading standard of obscenity allowed the material to be judged merely by the effect of an isolated except upon particularly susceptible persons. Regina v. Hicklin, (1868) L.R. 3 Q.B. 360. Some American courts adopted this standard, but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

Thus, the community standards test, was held by the Supreme Court of the United States to be more appropriate than applying the Hicklin test to determine whether something was obscene or not.

The decision in Roth was followed by another decision of the Supreme Court of United States in Jacobellis v. State of Ohio. Nico Jacobellis, manager of a motion picture theatre in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film viz. 'Les Amants' ('The Lovers'). It was contended before the Hon'ble Supreme Court that the determination whether particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to the lower Courts, with the Supreme Court exercising only a limited review. Justice Brennan considered the aforesaid an observed as under:

"3. …The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law…Such an issue, we think, must ultimately be decided by this Court…"

While discussing the proper standard for determining obscenity, Justice Brennan observed that the community standard test laid down in Roth, was 'not perfect'. But at the same time, he also observed that "…any substitute would raise equally difficult problems…". Thus, he ultimately adhered to the community standard test.

More interesting is the observation of Justice Stewart, who, while concurring, held:

"18. It is possible to read the Court's opinion in Roth v. United States and Albers v. California, 345 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Perhaps, Justice Stewart's non-attempt to define obscenity is more accurate than others' attempt to define it in an inaccurate manner.

A Five-Judges Bench of the Supreme Court of India was called upon to examine whether a book is obscene or not in the matter of Ranjit D. Udeshi v. State of Maharashtra. Udeshi, an owner of a book stall in Mumbai, was prosecuted along with other partners, under section 292 of the IPC for being in possession for the purpose of sale of an obscene book called Lady Chatterley's Lover.

The Court thereafter observed that the Indian Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by the Supreme Court. The test which the Supreme Court proposed to evolve was to be of a general character which would admit of a just application from case to case by indicating a line of demarcation not necessarily sharp, but sufficiently distinct to distinguish between that which is obscene and this which is not. Having said so, the Bench also observed that '…treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more'.

The Court considered the aforementioned English decision in Hicklin and the aforementioned American decision in Roth. The Court observed that the Hicklin Test had been uniformly applied in India. Ultimately, however, the test laid down by the Court in Ranjit D. Udeshi is as under:

"22. … In our opinion, the test to adopt in our country (regards being had to our community 'mores') is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc., are matters for consideration in each individual case."

The meaning of the term 'obscene' came up for consideration before the Supreme Court of India in Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra and OthersIn Kakodkar, the Supreme Court took into consideration the English decision in Hicklin and the Indian decision in Udeshi and held that it was the duty of the Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall.

The law relating to obscenity has not changed too much since Ranjit Udeshi. The tests laid down by the Constitution Bench continued to be applied to individual cases by different Court. However, an important judgment came in the form of Aveek Sarkar v. State of West Bengal. Aveek Sarkar was the editor of the magazine Sports World which had published an article with a picture of Boris Becker, a world-renowned tennis player, posing nude with his dark-skinned fiancée Barbara Feltus, a film actress, but Boris Becker covering his fiancee's breasts with his hands. The article conveyed a message to the people at large of Boris Becker being a strident protester against the pernicious practice of apartheid.

A practising lawyer filed a complaint under Section 292 against Aveek Sarkar. The Supreme Court discussed the decision in Hicklin. It observed as under:

"20. The Hicklin test postulated that a publication has to be judged for the obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. The United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In Roth v. United States, the Supreme Court of United States directly deal with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

23. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Penal Code, of course, uses the expression "lascivious and prurient interests" or its effect. Later, it has also been indicated in the said section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than the "Hicklin test" to determine what is "obscenity"…"

The Court also relied on its decision in Bobby Art International v. Om Pal Singh Hoon where it was called upon to deal with the question of obscenity in the context of a film called Bandit Queen. In Bobby Art International the Court pointed out that the so-called objectionable scenes have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreadful dacoit. In other words, the Court looked at the message that the allegedly obscene work sought to convey. Ultimately, the picture of Borris Becker and Barbara Feltus was held to be not obscene.

From the aforesaid discussion, one thing is clear: obscenity does not and cannot have a definition which may meet the requirement of each and every case. It has to be examined in a fact-specific manner. The tests laid down by the Courts are mere guidelines. The guidelines themselves are subjective. For instance, a man running naked on a beach to promote the idea of physical fitness may be applauded in metropolitan cities, but a woman expressing her sexuality in an artistic manner may be looked down upon by the very same society. Perhaps the time has come for the law makes to revisit the provisions relating to "obscenity" and amend them in a manner which would be in consonance with the evolving social mores and expanding the scope of speech. After all, as a democracy, it is our duty to promote speech and expression.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/who-knows-what-is-obscene-i-know-it-when-i-see-it-165860

Sneak Peek:

No. of words: 8298 words

Note: In this article, the author is explaining the role of cabinet and its functions with regard to the peculiar condition of India. It is a very informative text to understand the position of the subject. As a CLAT aspirant, you need not need to mug up the facts of the case but just to have a fair idea about it. A must-read for every law aspirant. Enjoy this article!!

Article: 18

Cabinet Government

The Constitution has adopted the Cabinet form of representative democratic government as in the UK, a form of government tersely described as based on the 'Westminster model' which is a constitutional monarchy.

The President of India is the head of the State. He represents the nation. He is conferred with a large repository of powers. All actions are taken in his name. What is true of the President at the Centre is generally true of the Governors at the State level.

There shall be a President of India. The executive power of the Union shall be vested in the President, so also the supreme command of the Defence Forces of the Union- Arts 52 and 53. Similarly there shall be a Governor for each State. The executive power of the State shall be vested in the Governor-Arts 153 and 154.The executive power is co-extensive with the legislative power-Arts 73 and 162.Executive power is the residue after the exercise of legislative power and judicial power-cf Ram Jawayya's case (AIR 1955 SC 549).

A literal reading of the provisions of the Constitution shows that the President is endowed with and enjoys a mélange of powers. All this appears quite impressive. However, as Dicey says in his Law of the Constitution referring to Blackstone's Commentaries talking of the Sovereign and the royal prerogative, it has but one fault: the statements it contains are the direct opposite of the truth. The executive in England is, in fact, in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that person is not the Sovereign, but the Prime Minister. That is so in India also.

The truth is that the President/Governor is only a metaphor for the Council of Ministers on whose advice alone they can act except in very narrow areas clearly defined and confined-Arts 74 and 163. The machinery of government set up by the Constitution follows in essentials the British model- the Westminster form of Government. "Not the Potomac but the Thames fertilizes the flow of the Yamuna if we may adopt a riverine imagery," observed Krishna Iyer, J. picturesquely in Samsher Singh (AIR 1974 SC 2192) bringing out the essence of our system of Government.

The Constitution has adopted, as already stated, the 'Westminster model' which is a constitutional monarchy where the King reigns but does not rule and his relations with the Ministry headed by the Prime Minister are governed by well recognised conventions. This is the Parliamentary system of government as contrasted with the Presidential. It is well settled that parliamentary system of government is not government by Parliament but it is government by Cabinet subject to the control and criticism of Parliament. Indeed IIbert in his Parliament remarks that the Cabinet legislates with the advice and consent of Parliament.

Articles 74, 75, 77 and 78 (re: the Union) and Articles 163,164, 166 & 167 (re: the States) capture and embody the essence and nuances of the parliamentary system. This is succinctly expressed in Chief Justice B.K.

Mukherjea's judgement in Ram Jawaya (AIR 1955 SC 549): "Our Constitution, though federal in its structure, is modelled on the British parliamentary system..... The President is the formal or constitutional head of the Executive and the real executive powers are vested in the ministry.... We have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet "hyphen which joins, a buckle which fastens the legislative part of the State to the executive part."....The Cabinet enjoying, as it does, the majority in the legislature concentrates in itself the virtual control of both legislative and executive functions ; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

Exercise of powers by President/Governor

The constitutional position regarding exercise of powers by the President and the Governor is settled and clear. They have to exercise their powers and discharge their functions on the basis of Ministerial advice. It is now well established that the position of the President and the Governor is akin to that of the constitutional monarch in Britain. He is generally bound by the advice of his Ministers except where it is otherwise prescribed constitutionally. He can do nothing contrary to their advice nor can he do anything without their advice. Art 74 and Art 163 deal with the functioning of the President and the Governor respectively.

Moving the Draft Constitution in the Constituent Assembly on 4.11.1948, Dr. Ambedkar posed the question as to what is the form of government that is envisaged in the Constitution and what is the form of the Constitution and proceeded to say: "There is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing in common between the form of Government prevalent in America and the form of Government proposed under the Draft Constitution. The American form of Government is called the Presidential system of Government. What the Draft Constitution proposes is the Parliamentary system. The two are fundamentally different.... Under the Draft Constitution, the President occupies the same position as the King under the English Constitution. He is the Head of the State but not of the Executive. He represents the nation but does not rule the nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known.... The President of the United States is not bound to accept any advice tendered to him by any of his Secretaries (who are in charge of different departments). The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice...." (CAD Vol.VII p.32- quoted in Samsher Singh's case, AIR 1974 SC 2192: (1974) 2 SCC 831). If there is any office under the Constitution comparable to the US President it is the Prime Minister (CAD Vol VII p.998 on 13.12.1948).

In the debate regarding Draft Art 61 which is Art 74 (on 30.12.1948) it was stated that these articles "should not be interpreted literally because they embody conventions of the Cabinet system of government evolved in Great Britain as a result of a long struggle between the King and Parliament. At every stage of the struggle the King yielded some power, but was anxious to preserve his prestige. Therefore, at the end of the struggle, the King gave up all his power but preserved all his forms. Therefore, it is said here that there shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President in the exercise of his functions. That does not mean, that normally, the function of the Prime Minister is to aid or advise the President in the exercise of his functions. In fact, the position is altogether opposite or the reverse. It is the Prime Minister's business with the support of the Council of Ministers to rule the country and the President may be permitted now and then to aid and advise the Council of Ministers. Therefore, we should look at the substance and not at the mere phraseology which is the result of conventions." (CAD Vol. VII p.1155)

"There is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister or his Cabinet...Under a Parliamentary system of Government there are only two prerogatives which the King or Head of State may exercise. One is the appointment of the Prime Minister and the other is the dissolution of Parliament....The position of Governor is exactly the same as the position of the President..." (Dr. Ambedkar on 30.12.1948 CAD Vol.VII p.1158)

Art 163 makes a slight difference in the position of the Governor, viz., that he is not bound by the advice of the Ministers in matters where he is by or under the Constitution to act in his discretion. The discretionary power of the Governor is restricted by the express language of Art 163 which does not confer on the Governor a general discretionary power to act against or without the advice of the Council of Ministers. The exposition in the Constituent Assembly Debates is clear. Speaking on Draft Article 143 which is Art 163, Sir Alladi Krishnaswami Ayyar said in the first place the general principle is laid down in Art 143, namely, the principle of Ministerial responsibility that the Governor in the various spheres of executive activity should act on the advice of his Ministers. Certain specific functions are to be exercised in his discretion as expressly provided in some articles.

As Dr. Ambedkar stated, "The article will have to be read in conjunction with such other articles which specifically reserve the power to the Governor. It is not a general clause giving the Governor power to disregard the advice of his Ministers in any matter in which he finds he ought to disregard." (CAD Vol VIII p. 501, on 01.06.1949). The functions which are specifically required by the Constitution to be exercised by the Governor in his discretion are specified in Arts.239 (2), 371 A (2)(b),(d) and (f);and Para 9(2) of the 6th Schedule.

As the Supreme Court observed in U.N.R.Rao vs. Indira Gandhi (AIR 1971 SC 1002) we must remember that it is interpreting a Constitution establishing a parliamentary system of government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

The position that in the discharge of their functions the President and the Governors have a discretion to disregard the advice of their Council of Ministers is inconsistent with the express conferment of discretionary power on the Governors under Art 163(2), for, if Governors have a discretion in all matters under Art 163(1), it would be unnecessary to confer on them an express power to act in their discretion in a few specified matters. It negatives the view that President/Governor has general discretionary power to act against Ministerial advice. (H.M. Seervai, Constitutional Law of India 4th Ed. p.2037). The area of discretion is clearly defined and confined.

The only functions which the Head of State can, as per settled constitutional law and conventions, exercise in his discretion are: appointment of the Prime Minister/Chief Minister; dismissal of the Government when it has lost its majority in the House but refuses to quit; dissolution of the Lower House of the Legislature; granting sanction to prosecute a Minister; and in the case of a Governor making a report under Art 356 regarding failure of the constitutional machinery in the State; apart from those expressly conferred by the Constitution like Arts 103/ 192.

This does not reduce the Head of State to a mere figurehead or rubber stamp. He will still have the 'right to be consulted, the right to encourage and the right to warn' (Bagehot- The English Constitution pg 111) and 'the right to offer on his own initiative suggestions and advice to the Ministers even where he is obliged in the last resort to accept the formal advice tendered' (de Smith & Brazier- Constitutional & Administrative Law p. 114).

Acting on Ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. He can state all his objections to any proposal and ask his Ministers, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice (Sir B.N. Rau).

This principle and the right of the Head of State to influence his Council of Ministers is embodied in Arts 74(1) read with 78 and 163(1) read with 167.

The purport of all this is clear from a passage in the Memorandum submitted by Prime Minister Asquith to King George V in 1913 and expressed tersely and precisely ".....a constitutional monarch in this country is entitled and bound to give his Ministers all relevant information which comes to him; to point out objections which seem to him valid against the course which they advise; to suggest, if he thinks fit, an alternative policy. Such instructions are always received by Ministers with the utmost respect and considered with more respect and deference than if they proceeded from any other quarters. But, in the end, the Sovereign always acts upon the advice which Ministers after full deliberation and (if need be) reconsideration, feel it their duty to offer. They give that advice well knowing that they can, and probably will, be called upon to account for it by Parliament." This has been quoted in the Constituent Assembly Debates on 2.6.1949 (CAD Vol VIII. p.542).

These conventions have been adverted to, reiterated and accepted by the Supreme Court as part of constitutional law and hence legally enforceable. Reference may be made to some of the decisions- S.C. Advocates-on-Record Association vs. Union of India (II Judges Case) (AIR 1994 SC 268); S.R.Bommai vs. Union of India (AIR 1994 SC 1918).

Sir Alladi Krishnaswami was one of the principal architects of our Constitution and one of the most eminent constitutional lawyers in the country. Both the first President and the first Prime Minister sought his views on the constitutional position of the President vis-à-vis the Prime Minister. In response, he said that it has been tersely put by writers on Constitutional law that the King from having to be advised by the Prime Minister has become an adviser to the Ministry. In the felicitous language of Prof. Walter Bagehot, the King has no alternative to signing his death warrant if the Parliament chooses to pass a measure in that behalf. He further stated that "Art 74 is all pervasive in its character and does not make any distinction between one kind of function and another. It applies to every function and power vested in the President, whether it relates to addressing the House or returning a Bill for reconsideration or assenting or withholding assent to the Bill..... The expression 'aid and advise' in Art 74 cannot be construed so as to enable the President to act independently or against the advice of the Cabinet....." In Art 111 dealing with the power to remit a Bill for reconsideration, "the President is not intended to be a revisional or appellate authority over the Cabinet. A Bill might have been introduced either by a private member or a member of the Cabinet. It may be rushed through in the Parliament. The Cabinet might notice an obvious slip or error after it has passed the Houses. This power vested in the President is as much intended to be exercised on the advice of the Cabinet as any other power."

It is also relevant to refer to the 20th report of the Governors' Committee. "Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice. In any relationship between the Governor and his Council of Ministers, the process of mutual discussion is implicit, and the Governor will not be committing any impropriety if he states all his objections to any proposed course of action and asks the Ministry to reconsider the matter. In the last resort, he is bound to accept its final advice, but he has a duty, whenever necessary, to advise the Ministry if he thinks that the Ministry is taking an erroneous step and to suggest to it to reconsider the proposed course of action. In the process of advice and consent, there is ample room for exchange of views between the Governor and Council of Ministers even though he is bound to accept its advice."

All this has been referred to with approval by the Supreme Court in Samsher Singh. As Seervai points out, "it is enough to say that Samsher Singh's case (AIR 1974 SC 2192) has finally established, it is submitted rightly, that the President is the constitutional head of government obliged to act on the advice of his Council of Ministers." (H.M. Seervai, Constitutional Law of India 4th Ed. p. 2035).

Samsher Singh was referred to a larger Bench to delineate the constitutional position of the President/Governor. It was necessitated by a couple of earlier rulings which really represented a drift and not the trend of judicial opinion in that behalf. The issue was whether the constitutional requirement of the satisfaction of the President/Governor means his personal satisfaction. The Court unequivocally reiterated the settled legal position that the President/Governor is only the constitutional head, the real power being vested in the Council of Ministers on whose aid and advice the President/Governor exercises his powers and functions. The satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the cabinet system of government, that is, the satisfaction of his Council of Ministers. In Constitutional Law, the 'functions' of the President and Governor and the 'business' of Government belong to the Ministers and not to the Head of State, that 'aid and advice' of Ministers are terms of art which in law mean, in the Cabinet context of our constitutional scheme, that the aider acts and the advisor decides in his own authority and not subject to the power of President to accept or reject such action or decision, except , in the case of Governors, to the limited extent that Art 163 permits and his discretion, remote controlled by the Centre, has play.

As Justice Krishna Iyer put it in his inimitable style in Samsher Singh ,"The omnipotence of the President and of the Governor at the State level is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power and functions is written into the Articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basics of our political architecture".

This underscores the ideas of representation and responsibility, the twin attributes of a parliamentary system. And the legal position was laid down: We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations.

The basic tenets /features of the parliamentary system (cabinet government) are: 1) Primacy of the Prime Minister; 2) Accountability of the Government (executive branch) to the lower House of the legislature; 3) Collective responsibility.

It has been said that he Cabinet is the keystone of the political arch in the Westminster model, but the Prime Minster is the keystone of the Cabinet arch. It is the Prime Minister through whom accountability and collective responsibility can be enforced.

Primacy of the Prime Minister

Ernest Barker, a great political scientist and commentator says that the Cabinet is the core of the British constitutional system. It is the supreme directing authority; the 'magnet of policy' which co-ordinates and controls the whole of the executive government and integrates and guides the work of the legislature. In a parliamentary system of government based on the Westminster model the Cabinet is the keystone of the political arch, as Lowell put it, but according to John Morley the Prime Minister is the keystone of the Cabinet arch. However, Ivor Jennings said that it would be more accurate to describe him as keystone of the Constitution which is as precise a definition as it is picturesque. It is said that the Prime Minister is central to the formation of the Cabinet, central to its life and central to its death. The Government is the master of the country, the Prime Minister is the master of the Government. He is 'the focal point of public attention and governmental power'. Bagehot said that the Cabinet is 'a hyphen which joins, a buckle which fastens the legislative part of the state to the executive part'. But Crossman in his Introduction to the 1963 edition of Bagehot's 'The English Constitution'

emphasising the growing importance of the institution of the Prime Minister said that 'the hyphen which joins, the buckle which fastens' is one single man, that is, the Prime Minister.

That sums up the pre- eminent position of the Prime Minister in our governmental set up. The primacy of the Prime Minister in the parliamentary system of Government is beyond doubt. It is the Prime Minister who rules and governs. The President, like the Crown in U.K, is only the nominal, ceremonial head who represents the nation. The position of the Governor in the States is no different except as regards matters which he has to exercise in his discretion. The area of discretion is clearly defined and confined by the Constitution. (Reference to the President will include reference to the Governor and the Prime Minister will mean the Chief Minister also).

The Prime Minister's functions and powers are wide and varied. His position rests on his leadership of the Cabinet/ Government, in Parliament and in the ruling party, on his being the main channel of communication with the Head of State, his control over Cabinet, in selecting Ministers, assigning them portfolios and even compelling them to resign, in setting the agenda for Cabinet meetings and taking decisions. He also decides and seeks dissolution of the Lower House of Parliament and a fresh mandate. Some critics in England have, therefore, rightly said that what obtains now is not so much the Cabinet system of Government but the system of Prime Ministerial Government. "If the Cabinet discusses anything, it is the Prime Minister who decides what the collective view of the Cabinet is..... no Minister could make a really important move without consulting the Prime Minister, and if the Prime Minister wanted to take a certain step the Cabinet Minister concerned would either have to agree, argue it out in Cabinet or resign." (See Mackintosh: The British Cabinet.)

There is no better delineation of the Prime Minister's position than what Jennings says in his Cabinet Government: "Given a solid party backing and confidence among party leaders, a Prime Minister wields an authority that a Roman Emperor might envy or a modern dictator strive in vain to emulate." It is said that he has even the power of destroying his creator- the House of Commons. For, if the Government is defeated in the Commons he can, instead of resigning, advise the Queen to dissolve the House and go in for a fresh election. The position, however, is held to be slightly different under the Indian Constitution in that the President must explore the possibility of having an alternative Government in place and if that is not feasible, dissolve the House and set in motion the process of seeking a fresh mandate. Dissolution is a power in the hands of a Prime Minister to appeal from the legal to the political sovereign.

Apart from being fortified by these conventions about the parliamentary system of government which are part of constitutional law, the office of the Prime Minister (and of the Chief Minister of a State) has been formally mentioned in the Constitution which explicitly says that he is the Head of the Council of Ministers. Dr. Ambedkar speaking in the Constituent Assembly (See: CAD Vol VII p. 1159-60) emphasised the concept of collective responsibility as an over-arching principle of the parliamentary system and said that the Prime Minister is the only sanction through which collective responsibility could be enforced. That requires the enforcement of two principles- that no person be nominated to the Cabinet except on the advice of the Prime Minister and that no person be retained as Minister if the Prime Minister wanted him to be dismissed. "The Prime Minister is really the key stone of the arch of the Cabinet and unless and until we create an office and endow that office with statutory authority to nominate and dismiss the Ministers, there can be no collective responsibility." The Constitution recognises the pivotal position of the Prime Minister in the constitutional scheme.

It is also important to remember that a Cabinet enters office and goes out with the Prime Minister. A change of the Prime Minister by resignation or death entails a change of Cabinet. It has been rightly observed that while the party system gives the Cabinet its homogeneity, it is the position of the Prime Minister which gives it solidarity. The Prime Minister is the leader of the nation and also its voice. One of his major tasks is to formulate

the policy and coordinate the working of the Government and give it a general direction. The Prime Minister must know what is happening and ensure that all Departments of Government work as an integrated whole.

P.N.Haksar, a distinguished civil servant with a rich experience in the working of government speaks of three elements required "to give a concrete shape to the social purpose of the Indian State"- the Prime Ministerial leadership, a vibrant political party and an efficient civil service and we may add an independent and upright judiciary. Thus the Prime Minister is required "to use his perch to manufacture a sense of moral direction and policy clarity behind his ideas and preferences." This basic requirement of Prime Ministerial leadership remains and has to remain unchanged and unaffected – whatever the nature of government-whether it is a single party or a coalition or a minority government which is not unknown.

The compulsions of coalition politics cannot be allowed to dilute the authority and importance of the Prime Minister. Otherwise it will result in a breakdown of a meaningful working of the parliamentary system of government. It is imperative to realize, recognize and adhere to the concept of prime ministerial authority and primacy. The Prime Minister should always have the last word on who is to be in the Cabinet and how the portfolios are to be allotted. It is he who should give a direction to the policy and working of the government. This cannot be dictated by party bosses or the allies supporting the Government. Parties can support from outside without joining the government, it can even be a minority government with outside support whenever necessary. Any interference in this regard from any quarters will sap the Prime Minister's authority and weaken the system of government to which we are committed constitutionally. It will retard the nation's development and progress and also bring down the country's image among the comity of nations.

The Constitution Bench judgment in Manoj Narula (2014) 9 SCC 1, it is submitted, lays down the correct legal position. It has been held that the choice of who should be appointed to the Council of Ministers is entirely with the Prime Minister or the Chief Minister. No directions can be issued in this regard. It is a legitimate constitutional expectation that the Prime Minister/Chief Minister would choose appropriate persons. While interpreting Article 75(1) a disqualification cannot be added. It is legitimately expected that the Prime Minister living up to the trust reposed in him would not choose a person with criminal antecedents. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to his wisdom.

Accountability

Similar to the pre eminent position of the Prime Minister in the Westminster model parliamentary system, another essential feature of the system is the accountability of the government (the executive branch) to the Lower House of the Legislature.

It is implicit in this requirement that the Prime Minister must be a member of the Lower House, the Lok Sabha. The Supreme Court in S.P.Anand vs. H.D.Deve Gowda (1996) 6 SCC 734 and Janak Raj Jai vs. H.D.Deve Gowda (1997) 10 SCC 462, held that a person not being a member of either House can be appointed Prime Minister and he could be elected to Parliament within six months. It did not consider it mandatory that the Prime Minister must be a member of the Lower House. These decisions were rendered on the basis of the language of Article 75(5) holding that all Ministers are the same and that the Constitution makes no distinction between the Prime Minister and other Ministers.

It is submitted that these decisions do not appear to be correct and cannot be said to reflect the true constitutional position. While Article 75(5) treats all ministers alike, the judgments miss to notice the pre-eminent position of the Prime Minister in the scheme of things. All Ministers are appointed on the advice of the Prime Minister. With the Prime Minister's departure, either by resignation or death, the entire ministry goes out of office. It is not so in the case of other Ministers. The Prime Minister is central to the life of the Cabinet. Hence the Ministry

enjoying the confidence of the majority of the House means the Prime Minister commanding such majority. It is inconceivable that the Prime Minister can enjoy the confidence of the majority without being a member. There may be some difference even between the position of the Prime Minister and Chief Ministers. While there can be President's rule in the State, there is no such thing at the Centre. Moreover, these questions cannot be decided on the plain language without a reference to and understanding of the conventions underlying the constitutional provisions and prevalent at the time the Constitution was framed. (See: U.N.R.Rao vs. Indira Gandhi AIR 1971 SC 1002 @ 1003).Furthermore the decisions in Deve Gowda's cases were by a two Judge Bench. Such matters of great moment were not referred to and decided by a Constitution Bench. These decisions fall foul of Art 145(3).

The constitutional requirement is that the Government is responsible to the Legislature and must enjoy the confidence of the majority of the House. The crucial question is what is the test of this majority support and how often is that to be determined.

When a party or combination or alliance of parties has the requisite number to constitute a majority in the House, the position is quite simple. A government headed by the leader of such a party or alliance is to be installed in office as Prime Minister. If, however, there is some uncertainty about the numbers supporting a leader who appears capable of forming a viable government, the President may swear him in as Prime Minister and require that he seek a vote of confidence and establish his majority in the House within a specified period. That may be both legitimate and requisite. The Supreme Court has held with reference to such directions: "Our Constitution knows of no such hybrid thing as a 'Prime Minister subject to a condition of defeasance.' Conditions (like the Prime Minister seeking a vote of confidence within a particular time) imposed by the President, may create considerations of political morality or conventional propriety but not of constitutional validity."[Har Sharan Verma v. Charan Singh (1985) 1 SCC 162]

Once a Government takes office it is important to note that the Government being responsible to the Legislature and enjoying the confidence of the House need not be on a minute-to-minute basis. Minority governments are not unknown or impermissible. When a Government is in office and has won the vote of confidence (if there is any doubt when the Government is installed) then the issue of responsibility to the House and enjoying majority support therein is between the Government and the House. Thereafter the President asking the Prime Minister to seek a vote of confidence is wholly unnecessary and improper. It is politically wrong and legally untenable. It eats into the vitals of the - functioning of a parliamentary democracy. The annual budget presented and passed in the House is perhaps the most emphatic expression of the confidence of the House in the Government. It is well settled that defeat of every motion or even a Bill does not require the Government to resign. It is only when a motion of no- confidence is voted or when a finance bill or any measure involving substantial issues of governmental policy is defeated that the Government has to resign. If it is felt that the Government does not enjoy the confidence of the House, it is for the Opposition to move a no- confidence motion and unseat the Government by successfully carrying the motion.

Implicit in these well established conventions is the idea that minority Governments can function, that a Government need not be seen or shown to enjoy the confidence of the majority of the House at every moment and on every issue. No day-to-day Presidential surveillance of this is contemplated or warranted. The President is not to act like the Opposition and require the Prime Minister to seek and win a vote of confidence. Any such directions by the President to the Prime Minister being clearly unconstitutional are liable to be ignored and not acted upon. The constitutional role and position of the Head of State cannot be converted to that of the Opposition. Otherwise the whole concept of our parliamentary democracy based on the Westminster model will run the risk of being perverted. Instances of such directions are not uncommon these days. They undermine the parliamentary system –its ethos and working. The system cannot be allowed to suffer a loss of identity. The nuances of parliamentary democracy are political. "The responsibility of Government to Parliament is a political

relationship. As such it is not a matter of precise definition and lawyers must resist the temptation to lay down rules for it."(E.C.S. Wade & G. Philip, Constitutional & Administrative Law by A.W. Bradley, 5th Edn. p. 97)

The President, like the British Monarch, has 'the right to be consulted, the right to encourage, the right to warn' and 'the right to offer on his own initiative, suggestions and advice even where he is obliged in the last resort to accept the formal advice tendered to him.' These conventional rights of being kept informed adequately have been given constitutional recognition in Articles 78 and 167. However these rights cannot extend to the President's active participation and interference in governance. It is the Prime Minister and his Government that has to govern. Any inroad into this is not good for the health of the system. Such inroads and interference may appear to be an instant solution or panacea seemingly wholesome and welcome. But it is really not. 'A faint crack develops in the foundation of our Government,' to adapt the language of Robert Bork. Nightfall does not come at once, nor does break-down of systems. In both cases there is a twilight when everything remains seemingly unchanged. It is at such times that we have to be aware of change in the air- however slight- lest we are unwittingly overtaken by the imperceptible change.

Collective Responsibility

Another fundamental feature of the parliamentary system is the concept of collective responsibility of the Council of Ministers for all actions of the government. As has been rightly quipped, "It matters not what we say, but we must all say the same."

The concept of collective responsibility predicates 1) All loyal to the policies of Government- solidarity; 2) Government as a whole to resign if defeated or if the Prime Minister resigns; 3) Cabinet and Government business to be confidential- confidentiality; 4) Protection of Ministers against personal responsibility.

The doctrine of collective responsibility has been stated in absolute terms by Lord Salisbury: " For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues...It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established." Dr. Ambedkar also emphasised the need and importance of collective responsibility in our parliamentary system of government.

In India the concept of collective responsibility is constitutionally recognized and codified in Articles 75(3) and 164(2) which lay down that the Ministry shall be collectively responsible to the Lower House of the Legislature. As regards individual responsibility of a Minister it would be indirectly enforced through Articles 75(2) and 164(1) which envisage that a Minister holds office during the pleasure of the President/Governor. This doctrine is one of the foundational elements of the working of the Cabinet and the parliamentary government.

Articles 77 and 166 deal with the conduct of Government business. The Rules of Business are framed under Articles 77 and 166 for the more convenient transaction of the business of the Government and allocation of such business among Ministers. The scheme of these Articles is for the purpose of discharging executive functions. But the Council of Ministers is collectively responsible to the legislature. The Rules lay down how matters are to be dealt with and by whom, how decisions are to be taken. They also speak expressly of collective responsibility.

In Bachhittar Singh vs. State of Punjab (AIR 1963 SC 395) a Constitution Bench noted the concept of collective responsibility as also the primacy of the Chief Minister in the scheme of things and the Rules in that regard and held that an order passed by the Chief Minister even though on a matter pertaining to the portfolio of a particular

Minister would be deemed to be the order of the Council of Ministers and it would be the Chief Minister's advice to the Governor for which the Council of Ministers would be collectively responsible.

In Sanjeevi Naidu vs. State of Madras (AIR 1970 SC 1102) a Constitution Bench stated that the Governor was authorised to make rules for the more convenient transaction of government business, that it is of the essence of joint responsibility that every individual Minister and the Cabinet is responsible to the legislature for every action taken in any of the Ministries, this responsibility is political and not personal.

All the Constitution Bench judgments speak of the parliamentary system of government envisaged by the Constitution and recognise the primacy of the Prime Minister/ Chief Minister and the doctrine of collective responsibility both of which are cardinal features of the parliamentary system. All the Supreme Court cases dealing with this are based 'on the root authority in R. vs. Sibnath Banerjee (AIR 1945 PC 156)' as observed in Samsher Singh vs. State of Punjab (AIR 1974 SC 2192).

Some change in UK

The Sovereign's prerogative of dissolution, of course, to be exercised on the advice of the Prime Minister and the Prime Minister's right to seek dissolution and get a general election which have been long and well established in UK have now been consigned to constitutional history there with the passing of the Fixed- Term Parliaments Act 2011. Under the new enactment the term of Parliament is fixed. Even the dates of the successive general elections are determined - the first Thursday of May every five years. The first poll thereafter was held on Thursday, May 7, 2015. The Prime Minister can provide by a statutory instrument that the scheduled poll be delayed by up to two months (justifiable in case of some emergency). An early general election would be possible at any time only if the House of Commons by a majority of at least two thirds of its total membership votes for that or if the House passes a vote of no-confidence in the Government which vote is not reversed within 14 days. This gap of 14 days is to provide for the possibility of a new Government taking office without the need for an election. These are the only exceptions to the pre-fixed polling dates.

This is a major, far reaching constitutional reform seeking to ensure stability. It is, perhaps, too early to comment on its wisdom or efficacy.

Whether reform needed in India

The moot question is whether India should now seriously consider some reform without tinkering with the Constitution. The malady of hung legislatures and the uncertainty of coalition politics and governments are very well known. Many a time the whole system is brought to a halt - the Prime Minister/Chief Minister is reduced to less than a figurehead and parliamentary democracy becomes farcical. Everything other than national/public interest is the controlling factor.

The term of the Lower House is fixed by the Constitution as five years unless dissolved earlier. Such earlier dissolution is occasioned generally by bringing down a Government by passing a no- confidence motion or by the Government advising and securing dissolution. The National Commission to Review the Working of the Constitution (headed by Justice Venkatachaliah) recommended in 2002 that the Leader of the House should be elected along with the Speaker in like manner and the person so elected be appointed the Prime Minister and that the motion of no-confidence against the Government should be proposed by at least 20% of the total membership of the House and it should be accompanied by a proposal of an alternative leader to be voted simultaneously. This is on the lines of the German Constitution and was also suggested by Shri Nani Palkhivala in September 1979- while delivering the Madras University Convocation Address.

It is of interest and significance to know that that this has also been adverted to by Dr.Ambedkar in the Constituent Assembly. Participating in the debate on Draft Art 61 (which is Art 74) on 30.12.1948, he said that the only other way by which appointment of the Prime Minister could be provided for without vesting the authority or the discretion in the President, "is to require that it is the House which shall in the first instance choose its leader, and then on a choice being made by a motion or resolution, the President should proceed to appoint the Prime Minister." However, it was then felt desirable to leave the matter to the discretion of the President (See: CAD Vol.VII p. 1158). But with our past experience this may be highly desirable.

The only requirement for a person to be appointed Prime Minister is that he should command the support of the majority of the House. Instead of only the members of the majority party electing the leader who will be the Prime Minister as at present, the entire House should elect the leader who would then be appointed the Prime Minister. Further if he is to be voted out the House should elect an alternative leader who can form a Government and the legislature can complete its full term. It would then be difficult for even the majority party to dislodge the Government and bring about uncertainty and chaos. The Prime Minister and the Government would be able to function effectively without various groups attempting to have their pound of flesh or pull the carpet from under the leader's feet. In keeping with the principle that the Government is responsible to the Lower House and can be in office only as long as it enjoys its confidence the election of the Prime Minister by the whole House would be quite apposite.

This can be achieved without amending the Constitution –by evolving conventions about the entire House electing the person to be appointed Prime Minister and by appropriately amending the relevant Rules of Procedure and Conduct of Business as regards a no-confidence motion. The basic postulate of the parliamentary system- accountability and Ministerial responsibility- would be kept inviolate while imparting greater stability to the Government. It may be pre eminently worthwhile to consider these reforms.

Judicial Review-an auxiliary precaution

Constitutional functions like imposition of President's rule, emergency, removal of Governors, grant of pardon are all exercised based on Cabinet advice. The President/Governor, that is in effect the Cabinet, is the sole judge of the sufficiency of facts and propriety of the action. Yet, while the advice is constitutionally immune from scrutiny, the material which formed the basis for such advice is open to examination- whether such material was relevant and was such that on its basis a reasonable man could have come to the conclusion. It is to be examined whether the facts were verified- whether it was bonafide. Governor's report and President's action is open to scrutiny. Legal malafides, irrationality, extraneous considerations are all grounds of challenge to a Presidential proclamation- though approved by Parliament- it is not legislative unlike an Ordinance (which is not susceptible to such challenge).

Doctrine of pleasure has also been hedged in by constitutional limitations. It is not a licence to act arbitrarily. Discretion conferred on a public authority in absolute and unfettered terms will necessarily have to be exercised reasonably and for public good. The distinction between the need for a cause vis-a -vis need to disclose the cause is important and has to be borne in mind. It is imperative that a valid cause must exist. Judicial scrutiny is for the limited purpose whether the reasons bear rational nexus to the action. Absence of reasons or bad reasons can destroy a possible nexus and vitiate the order on the ground of malafides. Thus the court will interfere for absence of reasons or irrelevant reasons or where the exercise of power is vitiated by self denial or wrong application of the full amplitude of power or the decision is arbitrary, discriminatory, malafide. See B.P.Singhal v Union of India (2010) 6 SCC 331. Non-assent to Bills, it is submitted, is also justiciable even though it may be on limited grounds. Government formation-choice and appointment of Ministers as also appointment of judges is open to judicial review on the narrow ground of eligibility alone as contrasted with

suitability – Manoj Narula v Union of India (2014) 9 SCC 1; High Court of Madras v. R. Gandhi (2014) 11 SCC 54.

All seemingly wide and unfettered powers of the Head of State are tempered by constitutional limitations - express or inherent in the very nature of constitutionalism- to be exercised in accord with public law principles and subject to judicial review and correction depending on the nature of the functions.

James Madison, one of the Framers of the American Constitution, had said in The Federalist - "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." Judicial review is one such auxiliary precaution.

Epilogue

Having said all this, it needs to be stated that the President has the constitutional right and duty to intervene in public affairs of seminal importance and give of his wisdom and experience privately without any fanfare. As he represents the Nation he can use that representative position to temper the excesses, if any, of the elected representatives. There is always the dialogue between the Prime Minister and the President (constitutionally mandated by Art 78). The extent of such dialogue would depend upon the personal equations between the two and their personalities. As late President Venkataraman said, the President is like an emergency lamp which becomes active when power fails and becomes dormant when power is restored.

How must a President as the constitutional Head of State express his disapproval of any Governmental action was answered by a former Chief Justice of Pakistan in the context of whether the President could refuse assent to a Bill validly passed by the National Assembly (when Pakistan had a Constitution like ours and was experimenting with parliamentary democracy). Justice Munir said something like this: "If you think it is a matter of great importance, and you cannot in all conscience accept the measure presented to you, you can and you must (if you are true to your oath) refuse to assent – but having refused assent, you must then resign; the system must go on; people will know why you resigned, and will sort things out with their Governments." This, in essence, delineates the position and functioning of the President (and the Governors).

In the ultimate analysis the power and position that a Prime Minister enjoys depends upon his personality. As the Earl of Oxford and Asquith said: The office of the Prime Minister is what its holder chooses to make it. The influence that a President or Governor will have on the Ministry will also depend upon the personality of the occupant of that exalted office.

"Constitutions are easily copied, temperaments are not." No system, however good, is self-executing. It would depend on the men who work the system. It is, therefore, imperative to develop and abide by a constitutional culture.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/cabinet-government-165661

Sneak Peek:

No. of words: 1218 words

Note: In this article, the author is critically analyzing the antitrust case against Google and comparing it with 1998 Microsoft, antitrust case. As a CLAT aspirant do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 19

Antitrust case in tech space needs to be built on intellectual evidence, rather than on ideology

Anti-trust proceedings against Google could mark a shift from the times when it, along with Microsoft, Amazon, Facebook and Apple, dictated terms in the tech world.

It took a long while coming but it has finally arrived. Roughly 20 years after it threatened to break up Microsoft for abusing its monopoly power, the United States Department of Justice (DoJ) has launched antitrust proceedings against Google. The charges against Microsoft then and Google today are disconcertingly similar: The use of monopoly power to exclude potential rivals from gaining a foothold in the market, also known in competition law as "exclusionary conduct".

In what was one of the most celebrated antitrust cases of its time, the DoJ in 1998 accused and found Microsoft guilty of using its considerable muscle in the operating system (OS) market to effectively destroy Netscape Navigator in the browser market. Microsoft did this by bundling its own browser, Internet Explorer with its Windows OS and "refused to deal" with any computer hardware manufacturer who dealt with the now-defunct Netscape. Microsoft's almost complete dominance of the OS market at that time meant that no serious hardware manufacturer had the nerve to challenge it.

Google, alleges the DoJ, exercises exclusion by paying device manufacturers — including phone-makers such as Apple — huge sums of money to pre-install its proprietary search engine on devices, thereby cementing its monopoly in search and sustaining it by the advertising profits it generates because of its dominance. A market share in excess of 90 per cent ensures that a sort of virtuous cycle gets created in search and advertising for Google but not so for consumers, claims the DoJ, who are deprived of alternatives.

"Google scholars" — a pun, that for us, refers to the coexistence of legions of zealous devotees and packs of intense detractors — will recall that two years ago the European Commission (EC) had fined Google a record $5 billion for abusing its market power. The EC claimed that Google abused the ownership of its Android mobile operating system to reinforce dominance in search. Specifically, Google forced Android handset and tablet manufacturers to pre-install the Google search app and its own web browser, Chrome, as a condition for allowing them access to its Play app store. The EC also found Google guilty of making payments to large manufacturers and mobile network operators that agreed to exclusively pre-install the Google search app on their devices.

Has the DoJ come to the party two years too late or was Google's monopoly conduct limited to markets outside the US until now? Take your pick, but 20 years of lack of antitrust action in the US against big tech (Google is one of the big five that includes Apple, Facebook, Amazon and Microsoft) could rest on two mutually exclusive arguments, separated by time and space.

One is the battle for technological supremacy between China and the US manifested in ambitions of dominance in Artificial Intelligence (AI). A narrative, presumably self-serving, was created in the US that to counter the state-led, data-abundant development of AI in China, the US needed to create its own national champions. That aim is best supported by a permissive regime that not only looks the other way in case the big five breach the "lakshman rekha" in respect of data privacy and abuse, but by outright support. "Without more leadership from Congress and the President, the US is in serious danger of losing the economic and military rewards of AI to China", concluded a report from the US Congress.

The other influence which made the US more laissez-faire in dealing with the structural dominance of big tech was arguably the Chicago-inspired approach to competition law. The Chicago school's intellectual arguments that became mainstream in the 1970s and 1980s have dominated discourse in the US both inside and outside courtrooms even as the rest of the world, including European Union, was passing judgments including harsh penalties to curb the excesses of big tech. Judged on the basis of efficiency and consumer welfare alone, the Chicago doctrine privileged markets over antitrust action. Technological change and Schumpeterian competition, it argued, will result in "fragile monopolies", with single companies dominating segments for a while, until they are toppled by rivals.

Some of that strong influence may now be coming unstuck as the untrammelled power of big tech grows ubiquitous. If the big five were a country, their combined market capitalisation would make them the third-largest country in the world in terms of GDP. Between them, free cash flows in 2019 exceeded a trillion dollars. According to the EC, in 2017, the big five spent a total of $31.6 billion on acquisitions of start-ups. Over the period 2001-2018, Google alone bought one firm a month, every month and Apple buys a company every two to three weeks on average. This digital "conglomerisation" is reminiscent of the merger waves in the US in the 1980s and 1990s when several firms with free cash flows bought others in order to build empires, even at the expense of shareholder value. Managerial hubris was not resolved by the market punishing the bad managers as one had hoped, just as it is unlikely that a failure by a firm to maximise profits and efficiency will be punished by the competitive forces of the market. Even if it is, the wait can be too long if companies have market power and a willingness to exercise it. Antitrust action can reduce the exercise of market power and potentially improve the welfare impact.

The US DoJ has shown its commitment to investigate Google for alleged violation of competition law. It may be premature to infer that this represents a shift away from the intellectual influence of the Chicago School in competition law and enforcement. But if it did, what could be a competitive remedy in this case or for that matter, big tech in general? This is a weighty question which has no simple answer. But bad decisions should be studiously avoided. A structural remedy or breaking up the tech monopoly, while appealing to the popular spirit, is, according to us, a recipe for failure. Profound network effects in this space mean that the broken entity will become big again sooner than later. A lasting resolution could centre around severe, effective and rapid penalties for breach of rules and constant monitoring by competition authorities. Microsoft's brush with litigation (accompanied by a credible threat of break-up) in 1998 has kept it out of harm's way since. An isolated example, admittedly, but an example nonetheless.

The case for or against antitrust action in the tech space needs to be built on powerful intellectual evidence, rather than on ideology. In the tech economy, for example, technological change may not be exogenous, that is, independent of an industry's structure. In other words, sufficiently powerful incumbents like Google or Apple could buy startups to choke innovation. Three Chicago professors refer to this as the "Kill Zone", a phenomenon prompted by access to cash and aided by barriers to entry. In this world, it is unlikely for markets to discipline errant firms, and hence we feel that the Chicago manual needs to be revisited. Fortuitously, that process has started in Chicago itself.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/google-antitrust-case-us-facebok-7052763/

Sneak Peek:

No. of words: 960 words

Note: In this article, the author has compared the two statements given by the political figures and highlights the way the government reacts to both statements. As a CLAT aspirant, it is suggested to have a fair idea about it.

Article: 20

Tavleen Singh writes: Is it any wonder that in Modi's India dissidence is being seen as sedition?

When it comes to dog whistles it is true to say that both Hindu and Muslim 'leaders' are guilty. But, it is those who hold high office in Modi's government who have the highest platforms and the loudest whistles, so they need to show the highest responsibility.

We heard two political dog whistles last week. Both ugly and both dangerous but the one from the Home Minister more so, because he has the capacity to do more harm than the former Chief Minister of the former state of Jammu & Kashmir. The first murmurings of political activity in Kashmir since the revocation of Article 370 have just begun with district-level elections. And, it is possible that this is what provoked the dog whistles.

The first came from Amit Shah who took to Twitter to declare that the 'Gupkar Gang' was trying to invite foreign powers to interfere in the Valley's politics. What he said was wrong on several levels. It was wrong for the Home Minister to describe a coalition of Kashmiri political parties as a 'gang'. It was wrong for him to diminish the high office he holds by speaking in the language of a streetfighter. And, it was wrong for him to indicate to his Hindutva base that in the view of the Government of India these Kashmiri political parties were all acting against the interests of India, thereby 'anti-national'. Within hours of his tweets, the BJP's more venomous spokesmen popped up on primetime talk shows to hurl invectives at the 'Gupkar Gang' and to charge them with that ultimate term of Hindutva abuse, 'Pakistani, Pakistani'.

Mehbooba Mufti's dog whistle came when she told the Kashmiri people about a plot to settle 'outsiders' on land that belonged to Kashmiri nomads. It was a signal that since her release she has thrown in her lot with the Islamic fundamentalists and the jihadi terrorists who have collaborated to bring ruinous, religious changes in the Valley in the past 30 years. Mehbooba seems to have forgotten that until just the other day she headed a government that was a coalition with the BJP. Her political statements are all dog whistles. After being released from 18 months of house arrest she said that the Indian flag would only be allowed in Kashmir when "we get our own flag back". What she has not noticed is that it is exactly this kind of language that the BJP's Hindutva base wants to hear so that they can make all political battles in India about 'nationalism'.

Speaking of which, I recently read Shashi Tharoor's new book, The Battle of Belonging, and found that the most interesting thing about it was the distinction he makes between patriotism and nationalism. And, how 'nationalism' is being used by the BJP and its Hindutva followers to make a distinction between those they consider India's real citizens and those they consider lesser citizens because they do not meet their definition of 'nationalism'. It is assumed that the decision to decide someone's 'nationalism' remains in the hands of those who believe that aggressive Hindutva qualifies them instantly to win their nationalism badge.

So when Anurag Thakur, a minister in Modi's government, uses an ugly slogan that says 'traitors should be shot', he passes his 'nationalism' test with flying colours. But when at the same time Muslim women, afraid of losing their right to be Indian, gather for days with the Constitution held high, to protest against the amendment

to the citizenship law, they are labelled 'traitors and Pakistanis'. This happened, please remember, after a dog whistle from the Home Minister. The minute he declared that (Hindu) voters should push the button so hard on the EVM (electronic voting machine) that the 'current' would be felt in Shaheen Bagh, his acolytes in the media and his party spokesmen wasted not a moment in declaring the women of Shaheen Bagh 'Pakistanis'.

Is it any wonder that in Modi's India dissidence is being seen as sedition? Is it any wonder that journalists writing against government policies are being labelled Congress party 'durbaris'? Is it any wonder that in the eyes of the world India is now being seen as descending into illiberalism? Personally, I believe that we have not got there yet but as someone who remembers well the halcyon days when we were a truly liberal democracy, I can see how much things have changed, and the changes are worrying. It is time for Modi and his 'gang' to realise that it is the patriotic duty of those who love India to speak out when they see signs of illiberalism. It is the patriotic duty of judges who are brave enough to speak the truth to speak out about the pressures they increasingly endure. It is the patriotic duty of journalists to speak out against policies that they consider harmful to India. The Prime Minister and his Home Minister have recently declared that they believe in a 'free press', so we have sanction from the top.

True patriots always show the courage to speak out when they see something wrong. As someone who considers myself a true patriot, I would like to end by saying that I believe that our level of political discourse has descended to dog whistles that incite the worst emotions in the worst people in India. When it comes to dog whistles it is true to say that both Hindu and Muslim 'leaders' are guilty. But, it is those who hold high office in Modi's government who have the highest platforms and the loudest whistles, so they need to show the highest responsibility. Sadly this is what we do not see yet.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/dangerous-dog-whistles-7060666/

Sneak Peek:

No. of words: 526 words

Note: The Finance Commission is a constitutionally mandated body that is at the center of fiscal federalism. Set up under Article 280 of the Constitution. This article has highlighted the importance of the finance commission in the Centre-state fiscal relationship and how the recommendation has been taken by the government.

Article: 21

Centre and state

Finance Commission must maintain delicate federal balance. Government needs to table report, address apprehensions

Ever since the framing of the terms of reference of this Finance Commission, there have been concerns about what is being seen by many as attempts by the Centre to claw back the fiscal space ceded to states.

In the midst of testing times for Centre-state relations, the 15th Finance Commission, on Monday, submitted its report to the president, which includes recommendations on the sharing of tax revenues between the Centre and states for the coming five-year period. With recent events signalling the Centre's attempt to reassert its dominance over the country's fiscal architecture, how the commission, as a neutral arbiter, seeks to balance the contesting claims, will be critical. The commission's recommendations will have a bearing on how Centre-state relations are reshaped as the country recovers from the COVID shock.

Ever since the framing of the terms of reference of this Finance Commission, there have been concerns about what is being seen by many as attempts by the Centre to claw back the fiscal space ceded to states. The 14th Finance Commission had pushed for greater fiscal autonomy for states by increasing their share in the divisible tax pool from 32 per cent to 42 per cent. In reality, though, states' share never touched 42 per cent of tax collections, simply because the Centre began to rely more on cesses and surcharges to raise resources, revenue from which is not shared with the states. Reportedly, the commission has maintained devolution at the existing level. On the other hand, any attempt to reduce the divisible tax pool that is shared with the states — by, for example, acceding to the Centre's demand for sequestering a part of the tax revenue for defence and security spending — would mean a fall in the states' share of taxes. This would be unfortunate, especially in the current circumstances. States are at the forefront of fighting the pandemic, and need to be assured of more resources, more so in light of the breakdown in consensus over the issue of compensating them for the loss of their GST revenues. This is not to suggest, of course, that spending on defence does not need to be ramped up. But more resources could be found by reorienting the Centre's expenditure priorities — over the past few decades, central government spending has risen on items that fall in the state and concurrent lists, while falling on items in the Union list.

Equally important will be the Commission's views on other issues that form part of its terms of reference — the roadmap for fiscal consolidation, performance-based incentives for states in line with the Centre's priorities, among others. How it reconciles the centralising tendencies of this government with its role as a neutral arbiter which must maintain a delicate balance will have a bearing on the future of the federal framework. Considering its far-reaching ramifications, especially in light of growing strains on the relationship between the Centre and the states, it would be prudent for the government to table the report without delay, and address any apprehensions it may give rise to

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/editorials/centre-and-state-tax-revenues-7048283/

Sneak Peek:

No. of words: 1425 words

Note: In this article the author examining the legality of the Online Fantasy Sports in India with the help of various court decisions. It is a very informative text to understand the legal position about the subject.

Article: 22

Legal matrix of Online Fantasy Sports in India

A growing body of academicians consider fantasy sports to be skill-dominant, but does the judiciary agree?

The commercialization of traditional and modern sports has paved the way for online platforms to increase engagement in these activities. There are a host of online games that are available, from money games such as online poker and fantasy football or cricket, to casual games such as Candy Crush and Temple Run, and then of course, e-sports such as Counter-Strike or FIFA.

Of these games, fantasy sports itself has generated a revenue of Rs 2,400+ crore for the FY20 compared to Rs 920+ crore in FY19, with the market expected to grow exponentially in the coming years. It is anticipated that the growth will reach Rs 11,880 crore by FY23 at CAGR 22.1%.

In fantasy sports, participants draft their own virtual sports team, selecting real-life players from teams scheduled to play against each other. There is a plethora of fantasy games that a participant can choose from, including football, basketball, cricket, or kabaddi. These fantasy games offer two model formats - the "free to play model" and the "pay to play model." As the names suggest, the free to play model does not require any entry fee for a user to participate, whereas in the latter model, the participants are required to deposit an entry fee to register for the contest. The pay to play model not only generates revenue for the operator, but is a considerable source of revenue for the government through income tax deductions on the participant's earnings and goods and service tax revenue calculated on the operator's gross revenue.

Legality of Fantasy Sports in India

The rise of fantasy sports raises questions about the legality of such activity, that is, whether it would amount to gambling or betting. Under the Constitution of India, gambling and betting are State subjects, with each state forming its own laws. Some states, such as Assam, Orissa, and Telangana, prohibit any gaming activity for money. The constitutional validity of the Telangana Act is pending challenge before the High Court of Telangana. Other states permit gambling with respect to games of skill.

The expressions "gambling" and "game of skill" have been dealt with by a Constitution Bench of the Supreme Court in the case of Dr. KR Lakshmanan v. State of Tamil Nadu & Anr. Following the earlier decisions in RMD Chamarbaugwala & Anr. v. Union of India & Anr. and State of Andhra Pradesh v K Satyanarayana & Ors, the Court held that gambling is the payment of consideration for a chance to win a prize. A game may be of chance or of skill, or a combination of both elements. A game of chance is determined entirely or largely by luck, whereas a game of skill depends on the players superior knowledge, experience and adroitness. The Court

concluded that though an element of chance exists in a skill game, the element of skill predominates over the element of chance.

The Court authoritatively held that a 'game of chance' would fall within the vice of gambling and is prohibited as per state law, whereas a 'game of skill' is distinguishable from gambling and enjoys protection under Article 19(1) (g) of the Constitution.

It is pertinent to note that the Law Commission of India, in its 276th Report examining the aspect of legalizing gambling and sports betting in India, recommended that skill-based games may be exempted from the ambit of gambling, without specifying the games that would qualify as 'game of skill'.

In light of the above noted Supreme Court decisions, it is evident that the legality of online fantasy sports depends on whether these sports would constitute a 'game of skill' or 'game of chance.' Several leading academic institutions, including Indian Institute of Management, Bangalore (IIM-B), have conducted empirical studies to affirm that fantasy sports are games of skill. Researchers at Massachusetts Institute of Technology (MIT) and Columbia University contrasted data gathered from fantasy cricket and basketball platforms against data collected from the stock market and concluded that fantasy sports participants demonstrate a higher degree of skill than mutual fund managers who manage stock portfolios.

A growing body of academicians consider fantasy sports to be skill-dominant, but the rather important question is, does the judiciary agree? The High Court of Punjab & Haryana had an occasion to consider this issue in Shri. Varun Gumber v. Union Territory of Chandigarh & Ors' There, after examining the business model of an operator, the Court held that playing fantasy sports calls for considerable skill, judgment, and discretion, as the user has to judge the athleticism and dexterity of the players, comparing their strengths and weaknesses against other players, and accounting for other, non-athletic, characteristics, such as biases and prejudices. The Court held that fantasy sports possess an element of skill that predominantly affects the outcome of the games and, as such, are not gambling activities but are games of skill. A challenge against this judgment before the Supreme Court was summarily dismissed.

This decision was followed by the High Court of Bombay in Gurdeep Singh Sachar v. Union of India, and the High Court of Rajasthan in Chandresh Sankhla v. State of Rajasthan and Ravindra Singh Chaudhary v. Union of India. The decision of the High Court of Bombay was challenged inter alia by the State of Bombay before the Supreme Court. By an interim order, the Apex Court has stayed the operation of the High Court order.

The latest decision of the High Court to touch upon this issue has been that of the High Court of Rajasthan in Ravindra Singh Chaudhary, decided on October 16 this year. The Court had occasion to consider the effect of the Supreme Court's order staying the judgment of the High Court of Bombay. The Court observed that, despite the interim order of the Supreme Court, the stand of the Union of India and the GST department before the Court was that fantasy sports are a game of skill and do not amount to betting and that the 276th Law Commission Report has opined that fantasy games, such as fantasy football, would be considered as "gaming," as opposed to betting.

The Court observed that the users are not gambling on the outcome of any game, since the result achieved by a participant of online fantasy sports is wholly independent of the result in the real-life game. Considering these factors and the presence of industry regulators that place checks and balances on operators, the Court arrived at an independent view that fantasy sports are a game of skill.

It is a very fine element of skill that differentiates fantasy gaming from gambling. While the decisions of the High Courts have encouraged businesses and websites offering fantasy gaming, it remains to be seen whether the Supreme Court will affirm the decision of the High Courts and classify fantasy sports as a game of skill.

Regulation of Fantasy Sports

Only a few States regulate online gaming. For example, the State of Nagaland legislatively recognizes fantasy sports as a game of skill and requires a license to operate/offer such virtual games, and the State of Sikkim requires a license to be obtained in order to conduct any online gaming.

The Governor of Tamil Nadu recently promulgated an ordinance to "ban online gaming." The moves comes even as the Madras High Court continues to deal with two PILs filed on allied issues, one being to ban online games and another which also seeks action against celebrities endorsing online games.

Online fantasy sports

Tamil Nadu Governor promulgates Ordinance to "Ban Online Gaming"

Indeed, the High Court of Madras in D. Siluvai Venance v. State has recognized the need for a comprehensive legislative framework to regulate the online gaming industry. The Court has observed that such regulation would encourage investment in the sector, resulting in technological advancements and generation of revenue and employment.

By and large, the fantasy sports arena is self-regulated by industry bodies, such as the All India Gaming Federation, which ensures that online gaming is conducted in an ethical manner. The Federation calls for responsible gaming, requiring its members to meet the standards implemented across the online gaming industry, maintain transparency with the players, protect their confidentiality, and set up a grievance redressal mechanism, etc. After examining in detail the charter of a similar industry body, the High Court of Rajasthan in Ravindra Singh Chaudhary appears to hold that operators that comply with the charter will be considered as legitimate business activities.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/legal-matrix-of-online-fantasy-sports-in-india-2

Sneak Peek:

No. of words: 1272 words

Note: In this article, the author is critically analyzing the power of CCI to issue interim orders and highlights the need that CCI should use its power to issue interim relief in view of the ongoing situation. It will help you to enhance your legal acumen.

Article: 23

The CCI's power to issue interim relief: Lost in the interim?

The probable reasons of the limited usage of the CCI's interim powers and the need to revive its use in appropriate cases.

The Competition Commission of India (CCI), armed with a civil court's power, can issue interim orders to temporarily restrain anti-competitive conduct that occurs or is about to occur during the course of an inquiry. However, with only four interim orders issued in the past 11 years, this power has been seldom used by the CCI.

Much of its underutilization could be attributed to the high standard that the CCI needs to meet while passing such an order. In this piece we assess the probable reasons of the limited usage of interim powers and the need to revive its use in appropriate cases.

A heightened threshold for application

Section 33 of the Competition Act, 2002 (Act) specifies the necessary conditions for passing an order for interim relief. The provision stipulates two main conditions, firstly, the order granting interim relief could only be "during an inquiry", and secondly, there should be "satisfaction" of the CCI that any contemporaneous or about-to-occur future conduct of a party is anti-competitive. Once such satisfaction by the CCI has been established while the case is at the inquiry stage, the CCI could pass orders temporarily restraining such party from carrying such an act.

The first and seminal decision by the Supreme Court of India interpreted the above set of cumulative requirements. To a great extent, the words "during an inquiry" goes on to form the basis of the Court's observations.

By way of background, before initiating an investigation against a party, the CCI is statutorily required to form a prima facie view, colloquially referred to as a preliminary view, that the party is in contravention of the Act. As per the CCI's framed regulations, an inquiry is said to commence only once the CCI's prima facie view is formed and the Director General, the investigative arm of the CCI, is directed to commence investigation.

Thus, relying on the CCI's definition of the term "inquiry", the Supreme Court held that the CCI cannot issue interim orders unless a prima facie case of contravention has been made. The Court also ruled that the CCI's satisfaction in deciding to pass an interim order must be of a higher degree than the prima facie view required to initiate an investigation against a party. The level of satisfaction required for issuing interim relief has to be over and above the satisfaction at a prima facie level required to initiate an investigation.

The other two conditions laid down by the Court were that such an order of interim relief must be a) necessary, and b) there must be an apprehension of irreparable and irreversible damage to the party, or competition in the market. Apart from laying down the standard of satisfaction and the stage at which an order for interim relief could be passed, the Court also specified that this power must be used in compelling and exceptional circumstances.

Decisional Practices

With such high standard of satisfaction required, the CCI has used this power sparingly and possibly only where smoking-gun evidence has been available. One of these instances is the case of G Krishnamurthy v. Karnataka Film Chamber of Commerce & Ors, where crucial evidence of a YouTube video proved that a press meet had been attended by all the opposite parties wherein a common intention to prevent the release of a dubbed movie was demonstrated. The CCI passed an interim order restraining the opposite parties from hindering the release of another film.

In another case involving intertwined issues of patent licensing and anticompetitive conduct by Mahyco Monsanto Biotech (India) Limited and its affiliate/subsidiaries (Monsanto), the Commission was convinced that interim relief was necessary. Monsanto, which was found to be prima facie dominant, sought to invoke those very terms of the license agreement which the Commission had found to be prima facie unfair and abusive. The CCI found this to be meeting the higher-than-prima facie satisfaction criteria.

Monsanto sought to invoke certain post-termination obligations arising out of the license agreement that prevented the complainant from selling the seeds containing Monsanto's patented technology. Given that it takes 5-7 years to develop such seeds, the CCI concluded that effecting the clause could cause irretrievable harm to the complainant and Indian farmers dependent on such seeds. This was notably one of the exceptional cases/circumstances where interim relief was felt warranted by the CCI.

While a final order is pending in this case, the rationale behind passing interim relief in the Monsanto case appears to be that a) the CCI was sure that the apparently anticompetitive clauses are being invoked, and that b) they will have a long lasting impact on the market.

An exceptional but necessary tool

Given the higher threshold of satisfaction required before issuing interim relief, the CCI may likely be disincentivized to use interlocutory powers. The CCI could be wary that exercising such power could effectively foreclose its ability to ultimately dismiss the contravention claim after a detailed investigation by the DG. However, given that interim relief is granted based on a tentative opinion upon a preliminary assessment, in the midst of an ongoing investigation, reversal of stand at the stage of a final order is not only possible, but acceptable.

It is noteworthy that in SAIL, the Supreme Court, while laying down the higher standard three-step test, was considering "ex-parte" interim orders. This implies that the three requirements, including the need for a higher degree of satisfaction, are necessary before passing an "ex-parte" order where the opposite parties are not provided an opportunity to present their case. However, in its current practice, the CCI usually hears both parties before reaching its decision, and thus the possibility of error of judgment is reduced significantly. Therefore, with its current practice of hearing the either side, the CCI may be able to better judge the arguments of the parties in determining the three-step test before passing interim orders.

Given the fast pace in which markets function and long-life cycle of a case running into several years, interim relief is an important tool to prevent any immediate loss to the competitive landscape. It may be worthwhile to

notice the marked shift in the trend of various other countries in making a renewed effort to further utilise the interim relief framework in competition law matters.

For instance, the European Commission issued interim measures against Broadcom in October 2019, and Commissioner Vestager highlighted the pivotal role of interim measures in enforcing competition laws in a quick and effective way. Furthermore, in January 2019, the French competition authority imposed interim orders against Google's conduct within online advertising markets, and Germany is in the process of amending its antitrust laws to bolster the use of interim measures against digital platforms.

It would serve the Indian competition regime well if CCI were to follow suit, especially in the peculiar circumstances presented by the COVID-19 pandemic, which has disrupted the demand-supply mechanism in various sectors and resulted in extreme volatility of product prices. The impact of this pandemic, and the concurrent lockdown, is projected to be long-lasting which could lure players into anticompetitive conduct. Given the situation, there is a need for proactiveness in granting interim relief where any anticompetitive conduct could further dampen the economy, thereby undermining the wider objective of promoting competition.

Pending the outcome of inquiries, which potentially run into several months, if not years, the CCI must consider using the interim relief powers actively to maintain effective competition, and avert irreversible damage to the markets and economy.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/ccis-power-interim-relief-lost-in-the-interim

Sneak Peek:

No. of words: 1699 words

Note: In this article, the author has discussed a few key amendments to the Specific Relief Act and its implication on the situation which has aroused due to COVID-19. The author highlights the issue that the government at times legislate in a very hasty manner and then it goes on doing an amendment to the said Act because there is a lacuna in the said Act.

Article: 24

Contract enforcement during COVID-19: India should brace itself for tackling the amended Specific Relief Act

In nine months, COVID-19 has turned the world on its head and devastatingly impacted almost every aspect of human life. Naturally, contractual relations have also not escaped the impact, and lawyers across the globe are grappling with the legal implications of COVID-19 and its effect on contractual performance.

When one thinks about the impact of COVID-19 on contractual performance, what inevitably comes to the mind is the implication of a force majeure clause and the law of impossibility/frustration. Deliberations amongst the legal community have largely been focused on interpretation of these two concepts. But what happens if the facts of a particular case do not meet the threshold for force majeure or frustration?

Should a party-in-default be then declared as having breached the contract and be forced to perform? Would enforcing performance constitute an appropriate relief given that the pandemic may have made performance of contractual obligations difficult or unreasonably burdensome, if not impossible?

These aspects need serious consideration, especially in India, where the law on specific performance has undergone sweeping changes in the recent past. Thus, while navigating through the legal quagmire created by the pandemic, the Indian legal community will have to simultaneously face yet another demon. That of the amended Specific Relief Act, 1963.

This post seeks to bring into focus a few key amendments to the Specific Relief Act and the effect these may have on shaping contractual remedies available to parties in these extremely trying circumstances.

Specific Relief Act: The inevitable fallback

The possibility that a party-in-default would be dragged to courts/arbitral tribunals for breach due to inability to perform in these circumstances is very real.

While in most cases, the party-in-default would attempt to set up a defense based on force majeure clauses or the law of frustration under Section 56 of the Indian Contract Act, 1872, these could prove difficult to sustain. The contract would not be discharged by invocation of these defenses merely because its performance, under the changed circumstances, is onerous/burdensome or more expensive for the party-in-default. It has to be shown that fundamental basis of the contract itself is dislodged. The threshold for these defenses is, therefore, high and may not necessarily be met in the facts and circumstances of each case.

Should that happen, a party-in-default is staring at a possible declaration of breach which inevitably would be coupled with a direction for specific performance and/or payment of damages. Courts/arbitral tribunals would then have to necessarily fall back on the provisions of Specific Relief Act for appropriate remedies.

It is possible that courts may, in certain situations, find it more equitable to direct payment of damages as opposed to granting specific relief. Unfortunately, with the amendments to Specific Relief Act, courts barely have any discretion in the matter.

Specific Performance: no longer an exceptional or discretionary remedy

The Specific Relief (Amendment) Act, 2018 was formally notified on August 1, 2018 and it came into force on October 1, 2018.

Prior to the Amendment Act, specific performance was an exceptional remedy that could only be granted when actual damages caused by non-performance could not be ascertained or would not afford adequate relief. This restriction has been removed. Specific performance is now available as a remedy by choice. The non-defaulting party can, therefore, claim specific performance without having to demonstrate the inadequacy of damages

Moreover, the wide discretionary powers to refuse specific relief enjoyed by courts under the unamended Specific Relief Act have been taken away.

These amendments were aimed at improving contracting culture in India by encouraging performance by a contracting party. The intention is indeed laudable. However, the manner in which it has been effectuated in the Amendment Act is disquieting.

Exclusion of safeguards: an inexplicable deviation

The Amendment Act followed an Expert Committee Report that was submitted to the government in June 2016, but not made available in public domain. The Expert Committee had inter alia suggested two significant changes:

(i) Specific performance and injunction for breach of contract should no longer be exceptional remedies but remedies by choice;

(ii) Specific performance should no longer be a discretionary remedy and courts would be able to refuse these remedies only on stated grounds. For that purpose, the grounds contained in Sections 14 and 20 of the unamended Specific Relief Act should be merged into one section viz. Section 14.

Thus, while proposing availability of specific performance as a remedy by choice, the Expert Committee was conscious that specific relief (like damages) should not be an absolute remedy and must be subjected to certain restrictions. To that end, the Expert Committee had proposed inclusion of a single provision viz. the proposed Section 14, containing an exhaustive list of all negative grounds or exceptions based on which specific relief could be denied.

Some of the proposed negative grounds were already provided in Section 14 and Section 20 of the unamended Specific Relief Act. Others were based on international conventions such as Principles of European Contract Law and UNIDROIT principles of International Commercial Contracts.

These negative grounds/exceptions were intended to be the necessary safeguards that would ensure that grant of specific relief does not result in an inequitable situation. The proposed negative grounds included cases where:

(i) Performance would be unlawful or impossible; or

(ii) Performance (or enforcement) would involve some unforeseen hardship on the party-in-default/defendant or would be unreasonably burdensome or expensive; whereas non-performance would involve no such hardship on the non-defaulting/aggrieved party; or

(iii) Non-defaulting/aggrieved party could reasonably obtain performance from another source; or

(iv) Specific performance of a contract would unduly prejudice the rights of third parties.

By the Amendment Act, the government accepted the Expert Committee's proposal to make specific performance available as a remedy by choice without, however, incorporating the proposed necessary safeguards. In fact, the government went a step further and removed most of the safeguards that already existed in the unamended Specific Relief Act.

The Expert Committee Report was followed by the Specific Relief (Amendment) Bill, 2017 (SRA Bill) which provided that specific relief could be denied only in four situations being where: (a) non-defaulting party has obtained substituted performance of contract; (b) the contract involves performance of a continuous duty which courts cannot supervise; (c) the contract is so dependent on the personal qualifications of the parties that the courts cannot enforce specific performance of its material terms; (d) the contract is in its nature determinable.

The SRA Bill also provided for deletion of Section 20 of the unamended Specific Relief Act that contained some of the grounds/safeguards suggested by the Expert Committee.

Neither the Statement of Objects and Reasons (that accompanied the SRA Bill) nor the subsequent parliamentary discussion in the Lok Sabha or the Rajya Sabha contain any guidance as to the reasons for such exclusion. In fact, the SRA Bill was approved and the Amendment Act was passed by both houses of Parliament without even considering these exclusions.

While a few members of the opposition in the Rajya Sabha did express their concerns over complete exclusion of the courts' discretionary powers and potential implications of the proposed provisions, those concerns were not sufficiently addressed. The deviations, therefore, remained unexplained.

No discretion with Courts to ensure equity

The deletion of Section 20 of the unamended Specific Relief Act and exclusion of safeguards proposed by the Expert Committee completely stripped away the courts' powers to refuse specific relief on equitable grounds. The language used in the Amendment Act is clear- "specific performance of a contract shall be enforced" subject to limited exceptions provided in the amended Specific Relief Act.

That the relief of specific performance is no longer discretionary, and the courts are now obliged to allow specific performance subject to Section 11(2), Section 14 and Section 16 of the amended Specific Relief Act, has also been confirmed by the Supreme Court in B Santoshamma & Anr v. D Sarala & Anr.

The limited exceptions provided in Section 11(2), Sections 14 and 16 cannot be stretched enough to accommodate the circumstances that the courts would have to now deal with due to COVID-19. To the contrary, under the amended scheme, the courts/tribunals would have to mandatorily enforce specific performance notwithstanding the fact that it would be inequitable. The party disabled from performing its contractual obligations for reasons completely beyond its control would be subjected to unforeseen and unreasonable hardship.

It may be argued that courts can still exercise their extraordinary jurisdiction to do equity. But what about arbitral tribunals? These would be bound by strict provisions of the law which, in its present state, leaves no scope to give any consideration to the unique challenges that the contracting parties have been compelled to face due to the pandemic.

The safeguards proposed by the Expert Committee would have undoubtedly given courts/tribunals the requisite flexibility to consider and balance the interests of all parties while determining a claim for specific performance. One may even argue that the earlier regime provided a more suitable remedy for the present circumstances.

Conclusion

Most economic activities are based on commercial contracts. In the past few months, we have seen that every industry/business/company has faced and is continuing to face its own unique challenges due to COVID-19. It would be imprudent to think that issues faced by all could be addressed without granting any discretion to courts to equitably shape contractual remedies in the facts and circumstance of each case.

The Expert Committee's proposal to include negative grounds/safeguards was intended at addressing exactly such situations, but was inexplicably disregarded. This is a significant lacuna in the law which can only be addressed by timely legislative action. The government should, therefore, be proactive and take urgent steps to rectify the defects in the amended Specific Relief Act.

Back in 2018, an esteemed member of the Expert Committee had opined, while highlighting the several shortcomings of the Amendment Act, that "this Amendment is likely to be yet another instance of 'legislate in haste, amend at leisure'".

We are at the crossroads now; the clock is ticking and if the intention of the legislature was to eventually amend, the time to do that that would be now.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/contract-enforcement-covid-19-amended-specific-relief-act

Sneak Peek:

No. of words: 1815 words

Note: In this article, the author has discussed the concept of Love Jihad and critically examine the said concept and while examining, he concluded that it is a tool to systematically exclude Muslims from Indian society. This article gains prominence since it has written in the light of the recent announcement of few state governments to bring in laws to curb "Love Jihad".

Article: 25

Ulterior Motive of 'Love Jihad' Laws Is to Drive Muslims Out of the Social Ecosystem

Radical Hindu groups do not bother about the government's own denial of love jihad and want to carry the social exclusion of Muslims to its logical end.

The state governments of UP, Haryana and Karnataka have announced their intentions to bring in laws to curb the bogey of 'love jihad'. In a bizarre statement, the chief minister of UP has even warned men who 'hide their identities' and 'play with the honour of daughters and sisters' to get ready for their own funerals.

'Love jihad' caught public attention in 2009, when a website hindujagruti.org claimed that some organisation called Muslim Youth Forum had put up a poster regarding 'love jihad', which entailed 'trapping' Hindu girls in love with the aim of converting them for marriage. Later, its existence in some other states too was claimed. The claim of hindujagruti.org that five Islamic websites mentioned by them had references to love jihad was found to be false. After a sustained investigation, the Kerala police concluded that it was a campaign with no substance. Eventually, Justice M. Sasidharan Nambiar of the Kerala high court held that 'inter-religion marriages were common in our society and it could not be seen as a crime' and closed the investigation.

The sheer illegality of the very idea

The Union government itself has admitted before parliament, "The term 'love jihad' is not defined under the extant laws. No such case of 'love jihad' has been reported by any of the central agencies."

In the Hadiya case of 2018, the National Investigation Agency had alleged that Hadiya was a victim of what they had, for obvious reasons, hypothesised as indoctrination and psychological kidnapping. The Supreme Court observed that matters of belief and faith, including whether to believe, are at the core of constitutional liberty and the state or 'patriarchal supremacy' could not interfere in her decision. Justice Chandrachud wrote that the 'absolute right of an individual to choose a life partner is not in the least affected by matters of faith'.

Some confusion has been created by a misplaced reference to a recent Allahabad high court judgment in the case of Priyanshi. In this case, a Muslim girl had converted to Hinduism on June 29 and married a Muslim man on July 31. They had sought protection from the respondents. The high court said that conversion just for the purpose of marriage was unacceptable and declined to interfere.

Two Supreme Court rulings were also quoted out of context. In the cases of Lily Thomas (2000) and Sarla Mudgal (1995), Hindu husbands had converted to get a second wife. It was held that while a Hindu husband had a right to embrace Islam as his religion, he had no right under the Hindu Marriage Act to marry again without getting his earlier marriage under the Act dissolved. It was in this context that the court had held that a conversion would be valid only if there was a 'real change in belief'. It did not make it a necessary pre-condition for all conversions.

In November 2019, the UP State Law Commission (UPSLC) had submitted its eighth report to the state government along with draft legislation recommending a new law to regulate and control conversions.

Conceptually, it is similar to the (bizarrely named) Freedom of Religion Acts (essentially anti-conversion laws) in Arunachal Pradesh, Odisha, Madhya Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, and Uttarakhand, which seek to prevent conversion through forcible or fraudulent means, or by allurement or inducement.

In Rev. Stainislaus vs State of Madhya Pradesh & Ors (1977), a constitution bench of the Supreme Court had upheld the validity of the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968, and the Orissa Freedom of Religion Act, 1967. Making a fine legal point, the court had held that the right to propagate did not include the right to convert any person. In other words, propagation is different from proselytisation, which needed to be regulated.

However, now Justice (Retd) Aditya Nath Mittal, chairperson of the UPSLC, himself says that if the state government sought to bring a 'limited scope legislation' restricting marriages between a Hindu and a Muslim in the garb of curbing 'love jihad', it would not stand in law. Since the proposed draft Bill is not available yet, further comments on that are not warranted.

Sinister motive of raising the bogey of 'love jihad'

Radical Hindu groups do not bother about the government's own denial of love jihad. It can be inferred from their messages on social media and a large number of 'unofficial' websites that when they speak of 'love jihad', they want the Hindus to believe that it is a nefarious 'conspiracy' of the Muslims in India. To describe it as 'India's 'moral imaginaries' is utterly euphemistic.

In the fiction of the Hindu radical groups, their first objective is to make the Hindus believe that the Muslims are capable of 'taking away' their women, if not as 'spoils of war' as was supposedly the case in the medieval era, then by 'enticing' them. Second, it amounts to an insult to the honour of their womenfolk that they are sexually 'used' by Muslims. Third, it is a slap on the manhood of Hindu men that their women are obliged to look for men outside their community, for love, sexual gratification or whatever. Fourth, by marrying Hindu girls, they want to increase the Muslim population or propagate 'Muslim genes' at the cost of the Hindu population, which will have as many fewer girls to reproduce. Fifth, if it continues unchecked, eventually Muslims will overtake the Hindu population.

The fiction of love jihad provides a very convenient façade to prey on all these latent fears.

The real purpose of forming the SIT in UP

In an investigation by NDTV, several Hindu girls of Kanpur spoke emphatically on camera that they had married and converted out of their free will sans any coercion or inducement of any kind.

Hindu radical groups do not have any locus standi to raise their voice in this matter. However, even if the girls' families alleged that they had been coerced or deceived, at most the police could have asked the girls to depose before a magistrate or submit a notarized affidavit. There was no need to register cases and form a Special Investigation Team for that. They could investigate only if the girls' statements hinted at conversion through forcible or fraudulent means, or by allurement or inducement.

They know that it is difficult to secure convictions in such flimsy cases. It is therefore obvious that the ulterior motive of forming the SIT is to harass and hound those Muslim boys and their families by entangling them in the endless morass of the criminal justice system besides furthering a certain political agenda. The purpose of

harassment is to deter other potential 'candidates' and convey a message to the community that should some of them dare to deviate from the line set by the Hindu radicals, others too will have to suffer.

They are intended to appease those amongst the Hindus who see this narrative as an effort to save the 'honour' of their women from being 'violated' by those many of them consider 'mlechchhas' in a narrative that purposefully refuses to accept the integration of the Muslims in Indian society. This translates directly into electoral benefits.

Debunking the myth of love jihad

No reliable data is available regarding the number of inter-faith marriages in India. A 2013 study had used a very limited survey of just 41,554 households. Their finding of 2.21% of marriages being inter-faith, therefore, appears to be grossly misleading.

Even in Kerala, from where all this talk of 'love jihad' started, the high court quoted in 2009 that about 3,000-4.000 religious conversions had taken place in the past four years after love affairs. In 2012, the government informed the assembly that 2,667 women had converted to Islam in the state since 2006. In any case, there could not be more than 500-1,000 Muslim boy-Hindu girl marriages per year. Assuming that about 10 million marriages take place every year in India, Kerala would get a maximum of 2,76,000 marriages per year (its population being 3.34 crore out of a total of 121 crore in 2011). That gives a figure of just 0.36% marriages being interfaith. The national average can be expected to be somewhat less than this.

The very small percentage of interfaith marriages cannot contribute significantly to the growth of the Muslim population. In Kerala, the growth of the Muslim population during 2001-2011 was about a lakh per year. This means that interfaith marriages could not have contributed more than 1,000 to the yearly addition—that is, just 1%!

The illegality of their contention apart, the onus is on the radical Hindu groups to 'prove' as to why this insignificant contribution to the growth in Muslim population ought to be perceived as a cause of concern.

It is true that conversion is not necessary for an interfaith marriage. If they so desire, people can marry under the Special Marriage Act (SMA). However, it is for them to decide whether they want to marry under the SMA or not. In any case, the provision of the SMA regarding wide publication of the personal details of those who want to wed under it has been challenged in the Supreme Court. It is contended that it violates their privacy and has a chilling effect on the right to marry in the backdrop of violence against inter-caste and interfaith marriages.

Should they so desire, they can marry under the SMA and, just to prove the point, can convert thereafter. That the SMA exists cannot be a ground to deny the right to convert of one's own volition.

Dangerous portents

Governments do not have a right to legislate on a fictional thing.

The spectre of 'love jihad' both communalises and criminalises a matter of personal choice between two consenting adults. Such laws, if passed, besides being ultra vires of the constitution, will also demonstrate how the legislative process could be deliberately abused to further a political agenda. It would be inherently immoral because it would seek to delegitimise something as sacred as love. It would be patriarchal and anti-women because it would treat Hindu women as 'property' of their men, and thus control their sexuality. It would be degrading to them because it would presume that they are so gullible that they could not be trusted upon to decide what is good for them in life.

The ulterior political motive is to carry the social exclusion of Muslims to its logical end where, for all practical purposes, they are driven out of the social ecosystem altogether. They might not be able to make the Hindu rashtra a physical or political reality; they can sure strive to make it a social reality.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/communalism/love-jihad-laws-muslim-exclusion-ulterior-motive-hindutva

Sneak Peek:

No. of words: 3174 words

Note: In this article, the author is critically analyzing the case of a vendor of a Mobile shop who sold a SIM card without verification and the Delhi police charged him with draconian UAPA law. The author is criticizing the way the Delhi police booked him under UAPA. 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: 26

Damning Court Observations Raise Serious Questions on Delhi Police's Riots Probe

A survey of several bail orders in Delhi riots cases reveals the police's terribly casual and flawed approach.

Selling a mobile SIM card without due verification of a customer is against the law. But is it a 'terrorist act' so as to attract the provisions of the draconian ant-terror law Unlawful Activities Prevention Act(UAPA)? Yes, thinks the Delhi police.

In December 2019, Faizan Khan, who works in a mobile phone shop in the national capital, issued and activated a SIM card without proper verification of the subscriber's identity. It turns out that someone else's' Aadhaar card and photograph was submitted by the subscriber to purchase the SIM card from Faizan Khan.

Later, this mobile number was allegedly used by the media team of Jamia Coordination Committee headed by Safoora Zargar to create WhatsApp groups to coordinate protests against the Citizenship (Amendment) Act.

Almost three months later, communal riots happened in North East Delhi during the last week of February 2020. The Delhi police formulated a conspiracy theory to link the students/activists leading CAA protests to the riots. And Faizan Khan, who sold a SIM card in December for Rs 200, was booked for 'terrorism' under the UAPA, for the 'larger conspiracy' behind Delhi riots.

He was arrested on July 29. After nearly three months custody, the Delhi high court granted him bail, despite the stringent conditions under Section 43D(5) of UAPA, after raising serious doubts about the police case which was based solely on the fact that he had sold a SIM card without due verification.

The high court said that the materials produced by the investigating agency did not disclose commission of offences under the UAPA. Earlier this week, the Supreme Court confirmed the bail, dismissing the special leave petition led by the Delhi police against the high court order.

The case of Faizan Khan is an example of the pattern followed by the Delhi police – which answers to the Union Ministry of Home Affairs – to incriminate random persons in Delhi riots cases after exaggerating remote links with the incidents.

Fortunately, the courts have questioned this approach of Delhi police in many cases related to riots and have passed scathing orders against the investigation while granting bail to the accused.

A survey of several orders passed by courts while granting bail to accused reveal a terribly casual and awed approach followed by the police in many cases.

Police constables as eyewitnesses

A common feature of many riots cases was that the eyewitnesses mentioned in the chargesheet were police constables themselves, who could not inspire the confidence of the court even at the stage of bail hearing.

In the case Firoz Khan v State, the Delhi high court refused to accept the statement of the police constable who claimed to have witnessed the act of burning down a shop during riots.

The high court noted that the informant gave a statement that though he had contacted the police control room when his shop was being attacked, there was no immediate response. The court wondered why the informant contacted the PCR if the police constable (who claimed to be the eyewitness) was at the spot.

"Even on first blush, it is not understood as to why the complainant would say that he failed to reach the police by telephone, if Constable Vikas was already present there," the court observed.

The court also noted that there was no material to show how the police could pick up only Firoz Khan and another person out of an alleged unlawful assembly of 250-300 persons.

While granting bail to one Irshad Ahmed, who was alleged to have assisted Tahir Hussain in attacking the houses of Hindus, the Delhi high court made a damning observation that the eyewitnesses in the chargesheet "seemed to be planted". The so-called eyewitnesses were police constables themselves. The high court noted that though the two police constables claimed that they were at the spot of the crime and identified the accused, they waited for three days to lodge the FIR.

"As per the statement of Constable Pawan and Constable Ankit (both are eye witnesses and were present at the spot), they had identified the petitioner and other co-accused. However, they have not made any complaint on the date of incident, i.e. 25.02.2020, whereas the FIR was lodged on 28.02.2020. Thus, the said witnesses seem to be planted one," the high court observed.

In the case of Kasim as well, the high court refused to take into account the statements of police witnesses.

The court also noted that the two police constables, who claimed to have witnessed the involvement of petitioner Kasim, waited for seven days to make a statement implicating him in the crime.

Kasim was also alleged to be an associate of Tahir Hussain. While granting bail to him, the high court also noted that his presence was not there in the 11 video footages of the crime produced by the police in the chargesheet.

In the case of of Mohammend Rehan too, the police constables were the projected eyewitnesses. The high court was reluctant to accept the eyewitnesses' accounts after observing that they did not make any immediate entry in the records about the accused. In this case, like in the case of Kasim, the police officers' incriminating statement against the accused came seven days after the incident. The high court also noted that there was no CCTV footage, video clip or photo to corroborate prosecution's claim. Rehan had to remain under custody for nearly six months.

Only peaceful agitation; no evidence for instigation

The police had arrested student leader Devangana Kalita alleging that she had instigated a mob to resort to violence in a case related to Delhi riots. However, the high court observed that there was no evidence of Kalita instigating violence and that materials produced by the investigating agency only showed that she was participating in peaceful agitations against the CAA.

"I have gone through the inner case diary produced in a sealed cover along with pen drive and found that though her presence is seen in peaceful agitation, which is fundamental right guaranteed under Article 19 of the

Constitution of India, however, failed to produce any material that she in her speech instigated women of particular community or gave hatred speech due to which precious life of a young man has been sacriced and property damaged," observed the high court while granting bail to Kalita in one of the riots-related cases registered against her.

The court noted that there was no evidence of the agitation (against Citizenship Amendment Act-NRC), which had been going on for a long time since December 2019 with the presence of print and electronic media, leading to any acts of violence.

The court also refused to accept at face value the disclosure statements of witnesses, observing that they were recorded much belated on 30.06.2020, 03.07.2020 and 08.07.2020, whereas that witness is claimed to be present throughout, since December 2019 when the agitation initially started against CAA.

The Delhi Police attempted to challenge the high court order before the Supreme Court but met with no success.

"She is not going to run away," the Supreme Court remarked while dismissing the SLP of Delhi Police against the bail to Kalita.

Riots victim made accused

In another curious case, a 65-year-old man, Mithan Singh, who himself was a victim of Delhi riots, was chargesheeted by the Delhi police. The Delhi high court observed that there was no material in the chargesheet against him.

"[The] petitioner is 65 years old and is a victim of the riots. His house was also damaged by an unlawful assembly, to which he has also lodged a complaint," the court observed.

Investigation leaves a lot to be desired

Not just the high court, the lower courts in Delhi have also been raising doubts about the Delhi police investigation in many riots cases.

In the order granting bail to anti-CAA activist and member of the group 'United Against Hate' Khalid Saifi, the Additional Sessions Court of Karkardooma lambasted the police case. The court noted that the case showed "total non-application of mind by the police" which went to the extent of "vindictiveness".

"In my humble opinion, chargesheeting the applicant in this case on the basis of such an insignificant material is total non-application of mind by the police which goes to the extent of vindictiveness," observed Additional Sessions Judge Vinod Yadav of Karkardooma court.

The observation was made while referring to the oral evidence relied on by the Delhi police to allege that Saifi was part of conspiracy behind Delhi riots. The witness had told the police that he had seen Saifi dropping Tahir Hussain (who is accused of murder of IB officer Ankit Sharma) outside a building on February 27 and thereafter had seen Saifi and Umar Khalid going into the building.

In this regard, the judge observed:

"The sole evidence of this so called conspiracy is a statement of PW Rahul Kasana, wherein he stated on 27.09.2020 that he was standing outside a building in the area of Shaheen Bagh, where he had dropped principal accused Tahir Hussain and thereafter he saw applicant and Umar Khalid going into the same building. I fail to understand from the aforesaid statement how a lofty claim of conspiracy can be inferred."

The court noted that if the principal accused, Tahir Hussain, was moved or actuated by Saifi in the meeting, then Saifi should have been made co-accused in ten other cases like Hussain, "which is not the case".

On November 17, the Additional Sessions Court of Karkardooma granted bail to one Ajay, who was accused of violence during Delhi riots, after observing "the investigation in the present case leaves a lot to be desired."

The same court granted bail to another accused, one Anwar Hussain, after noting that video footage produced by the police did not relate to the date of the alleged crime.

"…it can be clearly stated that for whatever footage depicts of the incident of 23.02.2020, by no stretch of criminal liability, can be accounted for the offence of riot and murder committed on 24.02.2020. Thus, the video footage is not of the day of the incident of 24.02.2020 but of 23.02.2020," judge Amitabh Rawat observed in the order.

There is a "gaping hole" in the statement of an eyewitness in the matter, observed the Karkardooma Sessions Court while granting bail to one Gurmeet Singh in a riots case.

In another case, the Sessions Court wondered how could the police exactly identify three accused from a riotous mob of hundreds.

"From among the riotous mob consisting of several hundred persons, till date the investigating agency has been merely able to identify and charge sheet the aforesaid three applicants only," the court noted while granting bail to accused Shah Alam, Rashid Saifi and Mohd Shadab.

In this case too, the court raised doubts about the credibility of the police offcer, who claimed to be an eyewitness.

"Being a police official, what stopped Beat Constable Pawan from reporting the matter then and there in the PS or to bring the same in the knowledge of higher police officers. This casts serious doubt on the credibility of this witness," the judge observed.

Court restrains police from giving media statements about accused and witnesses

The Delhi high court has restrained the police from giving statements to media about the accused or witnesses in the Delhi riots conspiracy cases till charges are framed.

In a petition led by Devangana Kalita challenging the press note issued by the police against her, the high court observed:

"Selective disclosure of information calculated to sway the public opinion to believe that an accused is guilty of the alleged offence; to use electronic or other media to run a campaign to besmirch the reputation or credibility of the person concerned; and to make questionable claims of solving cases and apprehending the guilty while the investigations are at a nascent stage, would clearly be impermissible."

The court categorically observed :

"The police or any other agency cannot use media to influence public opinion to accept that the accused is guilty of an alleged offence while the matter is still being investigated. The same is not only likely to subvert the fairness of the investigation but would also have the propensity to destroy or weaken the presumption of innocence, which must be maintained in favour of the accused till he/she is found guilty after a fair trial."

However, the court refrained from quashing the specific press note issued against Kalita after noting that it was taken from the chargesheet. While the court did agree that it was not necessary for the police to name the Petitioner in such a press note, the court went on to hold that issuance of such a press note did not violate Article 21 of the Constitution or any other law in force.

In another case, the Delhi high court directed Zee News to disclose the source from where the alleged confessional statement of student leader Asif Iqbal Tanha, an accused in the riots conspiracy case, was obtained. Tanha's lawyer submitted before the court that certain media outlets ran a smear campaign against him based on selective leaks from the police. The case is still pending and Zee News has sought for additional time to submit the affidavit disclosing the source.

Controversy over 'Hindu resentment' order of police

Meanwhile, an instruction issued by the Special Commissioner of Police, dated July 8, which cited 'resentment among Hindu community' in the wake of arrests in Delhi riots cases, became controversial.

A petition was led by one Sahil Parvez, an accused in a riots related case, challenging the order as indicating communal bias on the part of the police. The order had instructed police officials to exercise due diligence while carrying out arrests in riots cases as the arrests of some "Hindu youth" from riot hit areas led to "a degree of resentment among the Hindu community".

When the petition first came before the court, the bench orally remarked that the order was "mischievous" and asked what was the need to issue the same.

Later, after the reply of the Delhi police, the court refused to interfere with the order observing that it was issued after the petitioner was chargesheeted and hence no "prejudice was caused" to the accused. The court also recorded the statement of Delhi police also noted that charge sheets have been led in many cases and that till date 535 Hindus and 513 Muslims have been charge-sheeted in all the cases.

The court further observed that the media reports about the order were contrary to its spirit and cautioned the media to exercise restraint and verify facts.

Larger conspiracy case

The cases mentioned above are registered by different police stations of North East Delhi in relation to separate incidents of violence during riots. A special cell of the Delhi police is investigating the 'larger conspiracy' angle behind the riots (FIR 59/2020). Casting a wide net in this FIR, tracing back the alleged conspiracy behind the February riots to the anti-CAA protests which started in December, the police has arrested many student leaders and activists such as Safoora Zargar, Umar Khalid, Gulshima Fatima, Natasha Narwal, Devangana Kalita etc.

In these case, the courts have prima facie accepted the police version to deny the student activists bail under UAPA charges. In one of such orders, the Sessions Court termed the plan to organise chakka-jam to protest against CAA-NRC as an "unlawful activity…causing disaffection against India".

No bail for prominent riots accused

The courts have refused to grant bail to prominent accused like NDMC councillor Tahir Hussain, who is an accused in the murder case of IB officer Ankit Sharma and Sharukh Pathan, who aimed a gun at the police during riots, after prima facie accepting the police case. The high court also cancelled the bail granted to private school manager Faizal Farooq, after observing, "Personal liberty of an individual though precious, is of little value if the larger interest of the people and nation are at stake."

No evidence for incitement by politicians, says police

It is also pertinent to note that the Delhi police has told the high court that no evidence has surfaced so far to indicate any role played by BJP leaders Kapil Mishra, Anurag Thakur and Parvesh Verma in either instigating or participating in the Delhi riots. This claim was made by the Delhi police in an affidavit led in the Delhi high court in response to petitions which sought criminal action against these politicians alleging that their provocative speeches led to riots.

On February 26, a bench headed by Justice S. Muralidhar had played the videos containing the alleged inflammatory speeches of Kapil Mishra for the viewing of police officers.

The bench later directed Delhi police to take a decision within a day on the complaint made by social activist Harsh Mander seeking registration of FIRs against the leaders for alleged provocative speeches.

Next day, the Solicitor General told the court that the Delhi police has decided to defer the decision on FIR as the riots situation was not "conducive" for registration of the same.

Court observations damning

The developments in the riot cases probe have to be seen in the light of criticisms that the probe in riots cases is one-sided and has taken a different track to terrorise political dissidents.

Nine retired IPS officers, including the decorated officer Julio Ribiero, have questioned the Delhi police investigation in these cases.

"Basing investigations on 'disclosures' without concrete evidence violates all principles of fair investigation. While implicating leaders and activists, who expressed their views against CAA, all those who instigated violence and are associated with the ruling party have been let off the hook. Such investigation will only make people lose faith in democracy, justice, fairness and the Constitution," the ex-officers said in their letter to the Delhi Police Commissioner.

The Delhi Police Commissioner responded by defending his force and dismissing the allegations as a "false narrative".

Be that as it may, the court orders discussed above speak for themselves. It is true that the observations made by a court in a bail order are tentative and preliminary in nature. Yet, some of the observations in the bail orders in the riots cases are highly damning against the Delhi police and they raise a serious question mark over the efficacy of the investigation

It is horrifying to note the casual invocation of UAPA, which happened in the case of Faizan Khan whose only crime was that he sold a SIM card without due verification three months before the riots. Persons with remote links with the incidents were roped in as accused on the basis of evidences which the courts later termed scripted. While it is a matter of consolation that many such accused persons managed to get bail, it must not be forgotten that it came at the cost of their personal liberty.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/communalism/delhi-riots-court-questions-police-probe

Sneak Peek:

No. of words: 2197 words

Note: In this article, the author is critically analyzing the recent ordinance, the Prohibition of Unlawful Conversion of Religion Ordinance 2020 and criticizing the act of UP government since this the ordinance will be an invasion to the Right to Privacy. As a CLAT aspirant do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 27

UP Ordinance Criminalizing Religious Conversion by Marriage Is An Assault On Personal Liberty

The Ordinance leads to an unreasonable intrusion into the domain of a personal autonomy and furthers communal stereotypes.

The Ordinance brought by the Uttar Pradesh government following the statements of the Chief Minister Yogi Adityanath about the yet to be verified conspiracy theories regarding 'love jihad' is both morally and constitutionally repugnant.

The Ordinance titled Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 (Uttar Pradesh Vidhi Virudh Dharma Samparivartan Pratishedh Adhyadhesh, 2020) requires every religious conversion to be scrutinized and certified by the State.

The very concept of forcing an individual to explain and justify a decision, which is closely personal to her, before an officer of the State is contrary to Constitutionalism. The Constitution imposes limitations on State power and burdens the State to explain and justify the decisions taken by it affecting the rights and lives of citizens. The Ordinance inverses this equation.

There are many troublesome aspects in this Ordinance which treats every religious conversion as unlawful unless certified by the State. But the focus of the present article is on a deeply problematic provision of the Ordinance, which seeks to criminalize religious conversions done for the sake of marriage.

Section 3 of the Ordinance prohibits one person from converting the religion of another person by marriage. In another words, religious conversion by marriage is made unlawful. Violation of this provision is punishable with imprisonment for a term which is not less than one year but which may extend up to 5 years and a fine of minimum rupees fifteen thousand. If the person converted happens to be a woman, the punishment is double the normal term and fine.

The offence is congnizable and non-bailable. Section 4 enables any person related to the converted person by blood or marriage to lodge an FIR against the conversion. Section 6 empowers Courts to void any marriage it is done for the sole purpose of unlawful conversion or if unwlaful conversion is done for the sole purpose of marriage.

These provisions giving State policing powers over a citizen's choice of life-partner or religion militate against the fundamental rights to individual autonomy, privacy, human dignity and personal liberty guaranteed under Article 21 of the Constitution.

Few days before the promulgation of the Ordinance, the Allahabad High Court had pronounced a significant verdict stating that "Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty."

The division bench of the High Court declared as bad in law two single-bench precedents which had held that conversion just for the sake of marriage was invalid.

The division bench said that the single bench decisions failed to deal with the "the issue of life and liberty of two matured individuals in choosing a partner or their right to freedom of choice as to with whom they would like to live".

"...neither any individual nor a family nor even the state can have an objection to the relationship of two major individuals who out of their own free will are living together", the High Court stated.

"Right To Choose A Partner Of Choice A Fundamental Right": Allahabad High Court Says The Judgments Which Held "Conversion For The Purpose Of Marriage Only" Not Good Law

The Ordinance assumes a 'tone-deaf' position to this latest ruling of the High Court, which is in line with the expansive meaning given to 'personal liberty' by the Supreme Court in its decisions in K S Puttaswamy(privacy case), Navtej Johar(decriminalization of Section 377IPC), Joseph Shine(decriminalization of adultery), Shefin Jahan(Hadiya) and Shakti Vahini(khap panchayat) cases.

In the Shefin Jahan case, the Supreme Court held that the right to change of faith is part of fundamental right of choice.

"The consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock", observed the top court while issuing directions to curb khap panchayat interferences in marriages.

In the Puttaswamy judgment upholding right to privacy as a fundamental right, the SC said:

"Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture"

The Ordinance leads to an unreasonable intrusion into the domain of a personal autonomy. The provisions mandate an advance notice of a 60 days to the District Magistrate before the intended conversion, which is to be followed by a police enquiry into the circumstances of conversion. The religious priest doing the conversion is also required to give such prior notification. After the conversion, the person has to appear before the District Magistrate for confirmation. The authority will notify the conversion and will invite public objections, before confirming the conversion. These provisions have the potential to give state sanction and administrative support to the societal hostilities which persons intending to have inter-faith marriages face. Numerous petitions filed in High Courts seeking police protection for inter-faith couples denote the level of community threat and social ostracism which they have to face. The provisions of the Ordinance energize the community groups and reinforce the social asymmetries to further dis-empower an individual.

In this connection, an observation made by the Supreme Court in the Joseph Shine case is significant.

"The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense".

Need for the law?

The right to choose life partner is a facet of right to privacy, as held in the Puttaswamy judgment. In that judgment, the top court explained that an invasion of right to privacy by the State must meet a threefold requirement to pass the Constitutional muster :

Legality, which postulates the existence of law.

Need, defined in terms of legitimate social need.

Proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them.

While the passing of the ordinance could arguably satisfy the first condition of 'legality', the State action falters when it comes to the tests of 'need' and 'proportionality'.

Going by the public statements of the UP Chief Minister, the need for the law was to control the cases of 'love-jihad', a term used to discredit marriages between Muslim men and Hindu women as concerted efforts to cause conversion using the pretext of love. But is there any factual foundation for the public utterances about 'love-jihad?' Shortly before the passing of the Ordinance, a Special Investigation Team of Kanpur police had submitted a report ruling out organized conspiracy behind the cases of Hindu-Muslim marriages which were put under scanner. The Kanpur police said they have found no evidence of a conspiracy or an organized effort in the case of Hindu-Muslim romances. Even the National Investigation Agency could not unearth any conspiracy behind inter-faith marriages in the probe launched in the wake of Hadiya case. Recently, the Ministry of Home Affairs told the Parliament that no such case has been reported by any central agency. The National Commission of Women also said recently that it has no data on 'love jihad'.

So, the question here is what were the compelling circumstances which forced the State to bring this law using emergency executive powers when 'love jihad' remains a bogey stemming out of religious stereotypes without factual evidence?

Proportionality

The effect of the law will be to bring a shadow of criminality over every inter-faith marriages. The law empowers disgruntled family members to slap criminal cases on couples who got married defying their diktats. Since the Ordinance reverses the burden of proof by forcing the accused to prove innocence in trial, complaints could be prosecuted at the mere ipse dixit of the irate family members even without any evidence.

Thus, the law will lead to a grossly disproportionate result by terrorizing inter-faith couples and by deterring such marriages.

Some find the practice of converting religion just for the sake of marriage ethically objectionable. But the question here is whether it should be criminalized. The penal provisions of the Ordinance against conversions for marriage militate against the core concepts of criminal jurisprudence.

In the Navtej Singh Johar case where SC decriminalized homosexuality, Justice Chandrachud had discussed the jurisprudence of criminal law. The rational bedrock of criminal law was identified as "the harm principle" as propounded by J S Mill, which permits punitive action on a citizen only to prevent real and tangible harm to

another. The harm principle restricts criminal law from penalising conduct merely on the basis of its perceived immorality or unacceptability when the same is not harmful.

In the Joseph Shine case, while decriminalizing adultery, the concurring judgment of Justice Indu Malhotra observed:

"The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required were an offence is punishable with imprisonment.

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices".

Analyzed in the light of these principles, the hastily made Ordinance without any compelling factual grounds to justify its need, fails the test of proportionality.

Facially neutral but communally sensitive

The Ordinance appears to be facially neutral as it does not specify any particular religious community. But a provision of law cannot be viewed as operating in isolation from its social, political and cultural context.

The Ordinance has to be understood in the light of the 'love jihad' remarks of the UP Chief Minister, though it does not use the term expressly.

The Ordinance is furthering unfounded conspiracy theories which 'other' the Muslim community. In a progressive society, an inter-faith union will be welcomed and celebrated.. According to a report, many such couples opt for conversion in order to escape the procedures of Special Marriage Act, which exposes them to their hostile family members. Many of them see conversion as a practical and convenient way to co-habit a couple, escaping the hostile processes under the Special Marriage Act. The Ordinance delegitimizes such unions and creates a chilling effect on individuals who are seeking to transcend barriers of social and religious divisions.

Commenting that the law was an antithesis of Constitutional values, lawyer and scholar Gautam Bhatia said :

"It is evident that the "love jihad" laws aim to harness social prejudice against inter-faith marriages, and weaponise social and community power in order to discourage – and even persecute – individuals who want to marry outside their faith. To this is added a dose of violent patriarchy, which is set up on the assumption that women are unable to exercise their choices as free individuals, but must be "protected" by the State".

Legal commentator Vakasha Sachdev, writing in 'The Quint', drew parallels between the 'love jihad' laws and the Nuremberg Laws in Nazi Germany against mixed marriages.

Undermining agency of woman

That the law is also founded upon patriarchal notions is clear from the fact that it imposes higher punishment for causing conversion of a woman. The Ordinance undermines the agency of women by viewing them as 'properties' needing protection from men of another community(note the use of words like 'playing with the honour of our sisters and daughter' by the CM).

In the Hadiya case, the Supreme Court had criticized the tendency to brand a woman as "weak and vulnerable, capable of being exploited in many ways" for going against the current of social approval.

The Supreme Court observed :

"In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.

The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms".

"To consider a free citizen as the property of another is an anathema to the ideal of dignity", the Supreme Court had said in the Joseph Shine case.

The law, which seeks to preserve the power asymmetries in the existing social hierarchies negates the concept of transformative constitution by pressurizing an individual to surrender the fundamental right to personal liberty before the State-supported status quo. More dangerously, the law acts as a vehicle for a divisive agenda by fanning communal passions, and every citizen who swears by the Constitution ought to denounce it.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/up-ordinance-criminalizing-conversion-for-marriage-is-an-assault-on-personal-liberty-166575?infinitescroll=1

Sneak Peek:

No. of words: 953 words

Note: This article the about the recent ordinance on Arbitration and Conciliation Act which reviewed the Presidential assent on Nov. 4, 2020. In this article, the author is critically analyzing the said ordinance with the help of various decisions of the Court. It will help you to enhance your legal acumen.

Article: 28

Fraud and its effect on arbitral awards in India: Have the legal developments of 2020 given us a clear path?

There is skepticism that the Arbitration Ordinance may pose a threat to the smooth enforcement of arbitral awards.

The Arbitration and Conciliation (Amendment) Ordinance, which received Presidential assent on November 4, 2020, allows parties to seek an unconditional stay on the enforcement of an arbitration award where the court finds that the underlying agreement or the making of the award was induced by fraud or corruption.

The Ordinance has added a proviso to section 36 of the Act, and solidifies the recent stance taken by the Supreme Court while dealing with the concept of arbitrability of fraud.

The proviso more or less emphasizes on the importance of prima facie evidence in cases where an allegation of inducement of corruption has been made against the inherent arbitration agreement. Where such evidence has been established, the arbitration award shall be stayed unconditionally, pending disposal of the challenge to the award under Section 34.

The Ordinance further confirms that the application of the proviso shall be ubiquitous to all arbitration cases, regardless of the fact that proceedings in such cases commenced before the Arbitration and Conciliation (Amendment) Act, 2015 was enacted. While the Ordinance has omitted the Eighth Schedule, it has also replaced Section 43J of the Act, and now states that the accreditation for arbitration shall be done as according to the qualifications, experience and norms specified by the regulations.

While the Ordinance is the latest legal development that deals with concept of fraud and its arbitrability in India, it is not the only one. The Indian Supreme Court in Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd and Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties had substantially laid out the law in this regard earlier this year.

In Avitel, the Supreme Court decided whether arbitration can be referred in cases where there is a serious allegation of fraud in relation to the arbitration agreement. The Bench of Justices Rohinton Nariman and Navin Sinha reiterated the following tests laid out in Rashid Raza v. Sadaf Akhtar:

i. Whether the plea of fraud percolates the entire contract and above all, the agreement of arbitration, rendering it void? or

ii. Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain?

The Bench then held that serious allegations of fraud can only arise in cases where either of the aforementioned two tests were satisfied, and not otherwise. It observed that in civil disputes, where a clear conclusion can be drawn that the issues involve questions of fraud or misrepresentation and the same can be decided within the ambit of Section 17 of the Contract Act, the fact that a party has initiated criminal proceedings with regard to the same subject matter would not impede a reference to arbitration. The same shall also be applicable in cases where a civil dispute involves an issue of deceit and the same vitiates the performance of an arbitration agreement.

In Deccan Paper Mills, the Supreme Court followed Avitel on the same issue and held that in cases where a party alleges fraud in the performance of a contract or if the allegation lies within the contours of Section 17 of the Indian Contract Act, the dispute shall still be arbitrable.

While the Courts has been expanding the concept of arbitrability of fraud, the Ordinance answers certain concerns which emanated from the Supreme Court's decision in Venture Global Engg. LLC. v. Tech Mahindra Ltd. The case related to the impact of fraud on the enforcement of the arbitral award. The two-judge Bench in that case had different opinions before the case was referred to a larger bench of the Supreme Court.

Justice J Chelameswar essentially questioned the effect of disclosure of new facts - forming the basis of an allegation of a fraud - on the validity of an award and how the non-disclosure of the same would amount to fraud. Justice AM Sapre held that the entire arbitral process can be declared void ab initio in case the allegation of fraud and corruption is proved by a party. He went on to set aside the arbitral award on the rationale that it violated the principles of public policy embedded under Section 34(b)(ii) of the 1996 Act.

An issue that emerged from the ruling was whether it would be cogent for a court to consider setting aside an arbitral award at the enforcement stage. In this regard, the Ordinance brings much needed clarity on this issue and allows for a party to seek an unconditional stay on the enforcement of an award provided it is able to prove the allegation of fraud or corruption. Parties can clearly rely on the test and principles laid out in Rashid Raza and Avitel in order to prove their allegations in this regard and seek a stay on the enforcement of an award.

The Indian Arbitration regime, while dealing with the mechanism of arbitral referral amidst allegations of fraud, has had a rough path. There is skepticism that the Ordinance may pose a threat to the smooth enforcement of awards, as it provides the non-enforcing party with an option to seek an unconditional stay, and therefore may be subject to the hyper-partisan overuse of the proviso.

Despite the Ordinance having been promulgated, it would be premature to state that a clear path on the issue of arbitrability of fraud and its effect on the enforcement of arbitration awards is within sight. However, in a year marred by deep incertitude, finding new solutions should be the need of the hour.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/fraud-effect-arbitral-awards-india-legal-developments-2020

Sneak Peek:

No. of words: 1306 words

Note: In this article, the author is examining the EA order of SIAC and its enforceability in India. It will help you to understand the issue pertaining to the enforcement of foreign interim Arbitration order in India. It is a very informative text to understand the legal position about the subject.

Article: 29

'Future' of the Amazon Arbitration: Alternative approach to 'Reliance' on the Emergency Arbitration order?

Could Amazon enforce the EA order as an interim order of a foreign court under the Code of Civil Procedure?

The Amazon-Future retail arbitration has been in the news over the past couple of weeks. By way of background, Amazon initiated arbitration proceedings before the Singapore International Arbitration Centre (SIAC) against Future Retail on October 9, alleging that the deal between the Future Group and Reliance Industries Ltd., announced in late August 2020, violated a contract between Amazon and Future Coupons.

On October 25, emergency arbitrator VK Rajah issued an emergency arbitration order (EA order) in favour of Amazon. The order restrains Future Group entities from proceeding with the share seal deal or any such agreement with Reliance and other restricted parties mentioned in the non-compete clause signed between Amazon and Future Coupons.

As expected, the talk of the town is if and how Amazon can enforce this order in India. Much has been written on this topic in the last week, which is welcome given the relative lack of jurisprudence on EA and the enforceability of EA orders in India.

The reason the enforceability question is being extensively discussed is because the New York Convention, 1958 only concerns the recognition and enforcement of foreign arbitral awards but not of interim/provisional/interlocutory orders of foreign-seated arbitral tribunals, the latter including EA orders. In light of this, the analysis most commonly being suggested is that since EA orders are not by themselves enforceable in India under the Arbitration & Conciliation Act, 1996, a "duplicative approach" is likely to be attempted.

Amazon-Reliance arbitration, Future Group

Emergency Arbitration and the Amazon, Future Group, Reliance Dispute

This duplicative approach entails filing (by Amazon in this case) a petition under Section 9 of the Act seeking interim relief, requesting the court to essentially duplicate the relief granted by the emergency arbitrator. This approach is considered to be derived from a decision of the High Court of Bombay in Avitel Post Studioz Ltd & Ors. v. HSBC PI Holdings (Mauritius) Ltd. In this case, as sought by the petitioner, the enforcement of an EA relief by a foreign-seated tribunal was indirectly achieved by (somewhat) duplicating it into a court-ordered interim measure under Section 9 of the Act.

However, even if an applicant has procured a favourable EA order from a foreign-seated tribunal and attempts to enforce it via Section 9, two factors need to be considered:

(i) Indian courts would need to independently examine any such application applying the tests governing a petition under Section 9 on the basis of principles under Indian law (see Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors). This is because courts do not exercise an enforcement jurisdiction and are not required to give any deference to an EA order under Section 9, and are only able to grant interim measures of protection.

(ii) A respondent would be entitled to re-agitate all objections, procedural and substantive, as it did before the emergency arbitrator. Hence, the duplicative approach may render the entire process undertaken to secure the EA order redundant to a large extent, if not entirely.

While several strategic, commercial and other considerations are at play in this case, could Amazon consider an alternative and arguably, more pragmatic approach? Namely, could it enforce the EA order as an interim order of a foreign court under the Code of Civil Procedure, 1908 (CPC) by applying principles of comity under private international law? This is what I surmise:

1. An emergency arbitrator is an arbitral tribunal under Section 2(1) of the Singapore International Arbitration Act, 2002 (IIA). It is assumed that Singapore is the seat of the Amazon arbitration based on available newspaper reports.

2. Under Section 12(6) of the IAA, all orders (including EA orders) are enforceable in the same manner as if they were orders made by a court. Further, where leave is so given by the High Court of Singapore upon such a request by Amazon, judgment may be entered in terms of the order or direction, i.e. the EA order would assume the status of an order of the High Court of Singapore.

3. Interim or interlocutory orders of foreign courts have time-and-again been recognised and enforced by Indian courts as a matter of principle of comity of courts and due respect must be given even to such orders passed by a foreign court, which is a facet of private international law. [See e.g., Surya Vadanan v. State of Tamil Nadu & Ors] Thus, in common law, interim orders of foreign courts would be enforceable as a matter of enforcing an obligation imposed by the foreign court except, perhaps, for any "special and compelling" reasons as per the Indian court, which is subject to the court's determination and has a high threshold. Three considerations need emphasis here:

(a) In this case, Section 44A of the CPC will not be applicable as this provision is only applicable to money decrees, whereas the EA order is an injunctive/restraining order. Hence, enforcement of the order via a suit action will have to be at common law, applying principles of comity that Indian courts have embraced in enforcing interim/interlocutory orders of foreign courts.

(b) Since Section 44A would not apply, it would also not be important to consider whether or not Singapore is a reciprocating territory and whether the High Court of Singapore is notified as a "superior court." Having said that, Singapore is recognised as a reciprocating territory by India and the High Court of Singapore has been classified as a "superior court" whose judgments are enforceable in India for the purposes of Section 44A.

(c) In this case, the court would not be concerned with Section 13 of the CPC, which provision is concerned with a final adjudication by a foreign court (see Surya Vadanan).

4. Amazon could thus file a suit to enforce the order/judgment of the High Court of Singapore in the appropriate Commercial Court in India, which could be the High Court of Delhi given Future Retail has filed caveats in this Court on November 3. Any objection made by Future will be determined by the Court on the high threshold of "special and compelling" reasons.

Meanwhile, pending determination of the suit, as compared to a petition under Section 9, there is a greater likelihood of Amazon securing interim relief until the suit is decided by the Court because of the judicial deference to a ruling of a foreign court as mentioned above.

Accordingly, with the limited information available thus far about the Amazon arbitration, the author surmises that having the EA order confirmed as an order/judgment of the Singapore High Court and then enforcing it in a Commercial Court in India is a viable alternative for Amazon to consider and perhaps, better than the duplicative approach. Unlike the scenario under Section 9, the enforcing Indian court is not expected to delve into the respective contentions of the parties on the merit or the existence of a prima facie case. Rather, only a requisite satisfaction of the court is needed, that the order/judgment was granted by the foreign court fairly and judiciously.

There is probably more than currently meets the eye in the Amazon arbitration, with many determinative factors and reasons to consider before either party takes any further steps. What is certain is that this arbitration and specifically, the EA order, has provided much food for thought for arbitration practitioners to discuss, debate and deliberate the issue of the enforcement of EA orders in India. It also presents an exciting opportunity to analyse this issue more holistically by considering alternative approaches, such as the one posited in this piece because such an approach could be pursued in other contexts, if not in the present case.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/future-of-amazon-arbitration-alternative-approach

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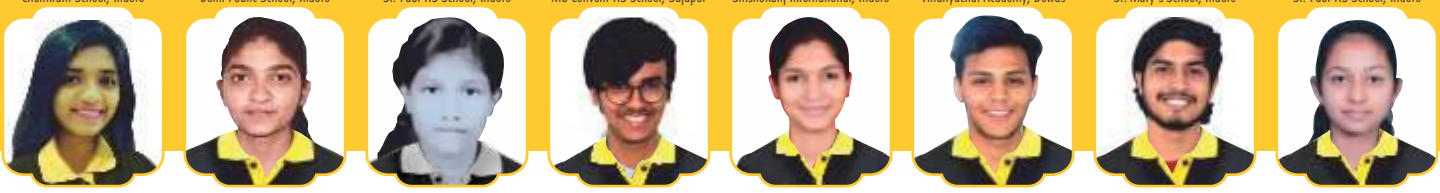

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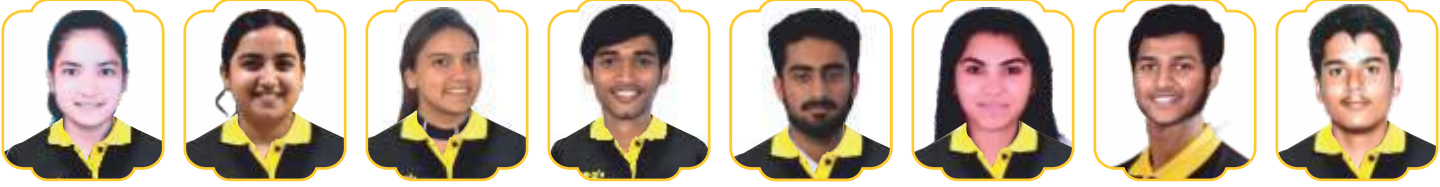

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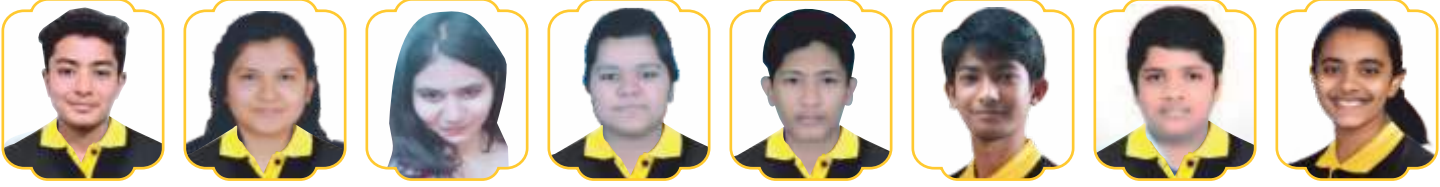

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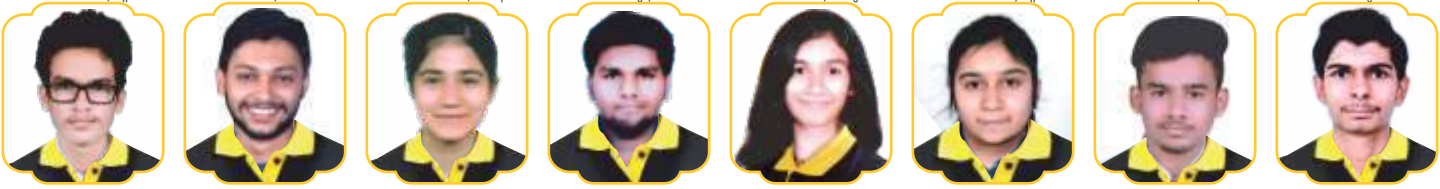

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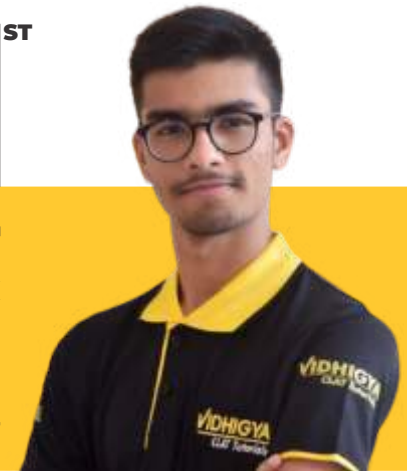

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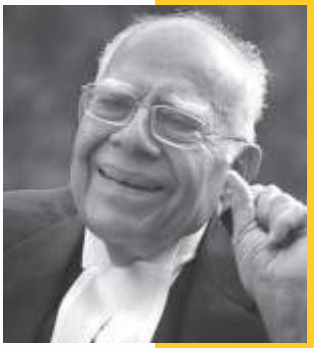

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