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MARCH 2021

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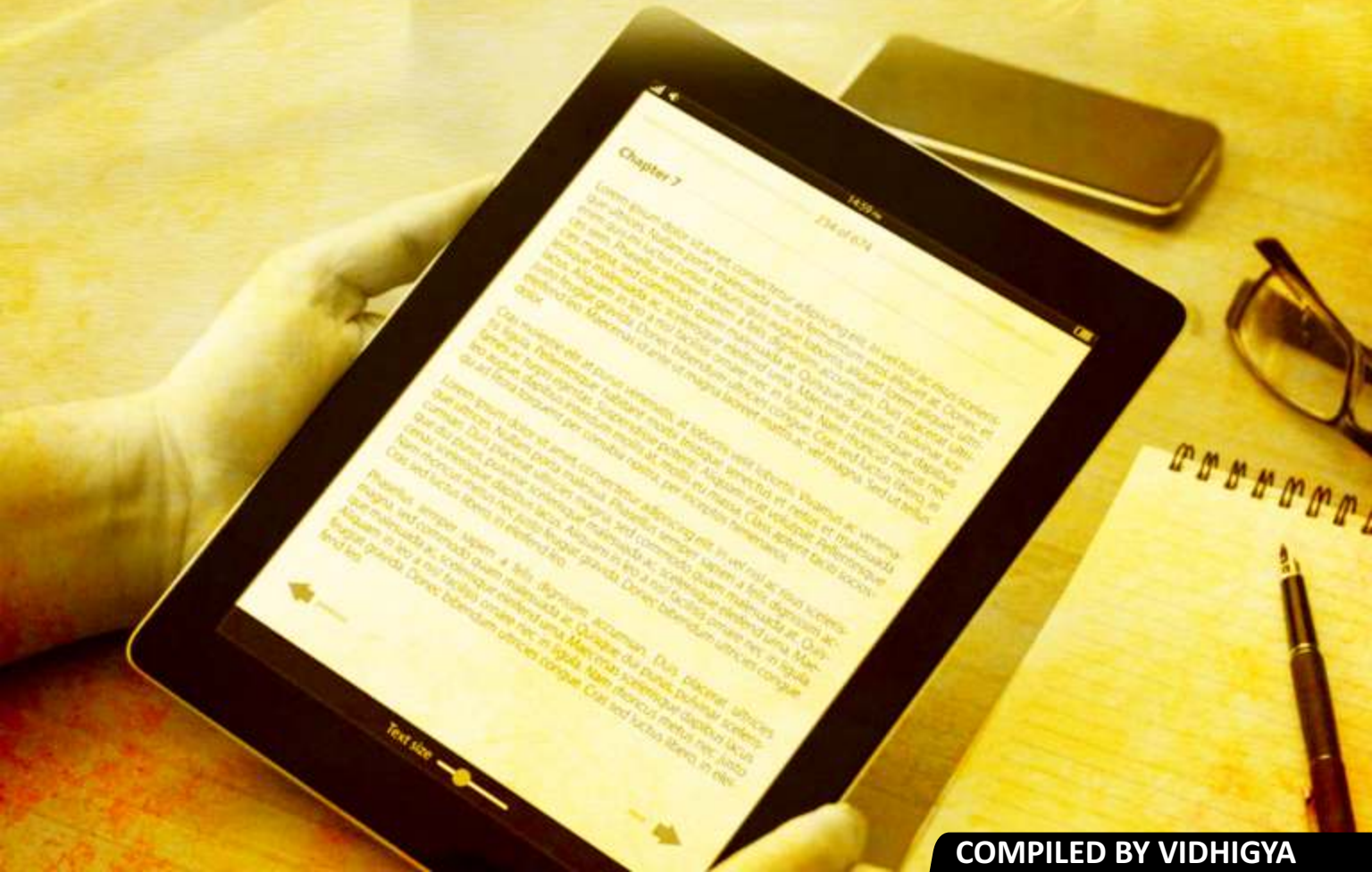

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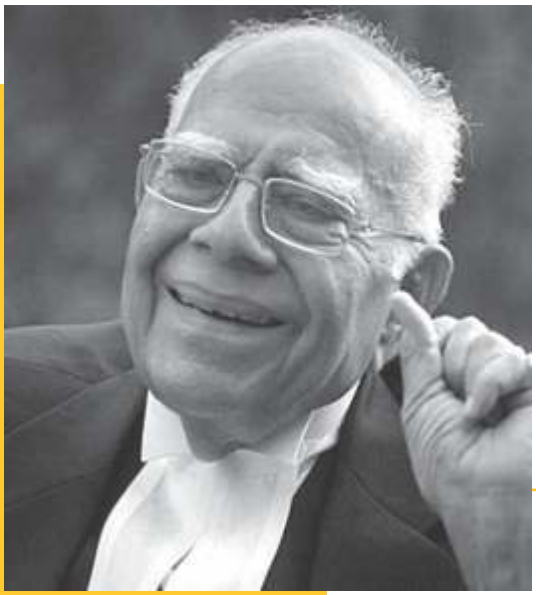

-Legal Legend
Late Mr. Ram Jethmalani

OUR **INCEPTION**

Mr. Ram Jethmalani interacting with **Director Mr. Bahul Shastri** while launching Vidhigya Online Portal at Vidhigya Campus

Prof. (Dr.) R. Venkata Rao, Ex Vice Chancellor, NLSIU Bengaluru Inaugurating Vidhigya Campus.

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Sneak Peek:

No. of words: 966 words

Note: In this article the author critically analyzed The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 and the recommended the government to make necessary changes in the same.

Article: 1

For more online civility, we will need deeper engagement, careful legislation

A wider toolkit is necessary for the government to build a framework that respects Indians who use these platforms and the collective online public and private spheres we are building together.

Online digital news sources and content producers have created new spaces in India for creativity and free expression.

Social media platforms and digital content publishers are the protagonists of an unexpected regulatory blockbuster that hit the screens in India on February 25. In keeping with the Narendra Modi administration's penchant for surprise announcements, Union Ministers R S Prasad and Prakash Javadekar announced a regime for India's internet intermediaries and digital media: The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021. Some changes to our current legal landscape were inevitable, given the negative impact of social media and digital platforms on recent events, ranging from a celebrity's suicide to a young person's environmental activism. But the government's rules in reaction to these and other events raise many questions.

A key issue that is raising eyebrows is the use of government powers to regulate intermediaries under the Information Technology Act 2000 (IT Act) to create rules for publishers of content. Under the new rules, publishers of online "news and current affairs content" and "online curated content" will be subject to a code of ethics, a redress and content-takedown mechanism and an oversight framework. This raises the big question of whether such publishers can be regulated in ways akin to "intermediaries".

As background, Sections 79 and 87 of IT Act, under which these new rules are passed, relate to rules around the exemption of liability for intermediaries — the so-called intermediary "safe harbour" — for unlawful content on their platforms shared by third parties. The logic of this safe harbour is based on the fact that intermediaries have no control — they do not create, modify or control the relevant content or information on their platforms — but merely enable sharing of content. For instance, a communication app (like Whatsapp or Signal) does not select or modify the messages that you send to a friend, and likewise, peer streaming platforms (like YouTube or Vimeo) provide a platform on which people can share videos directly. Since these intermediaries do not create content, they are protected from liability when unlawful content is shared on their platforms as long as they are undertaking due diligence to keep the platform safe (such as reviewing and taking down flagged content, where appropriate).

No doubt serious suspicions have been raised in recent months regarding the ability of intermediaries to selectively highlight or bury content. But it appears hard to justify regulating publishers (who create content like written publications, podcasts, videos or audio content) using the power to regulate intermediaries.

Online digital news sources and content producers have created new spaces in India for creativity and free expression. Recently, however, we have also seen the rise of outfits that generate "alternative facts" and realities that often polarise and vitiate public debate. The questions and tensions these developments raise are manifestations of timeless

debates around the freedoms and boundaries that we choose as a country for free speech and censorship. While no one would disagree that some codes of ethics or rules are necessary to combat misinformation, fake news or propaganda online, the regulation of publishers of original content raises questions around policing speech and expression that cannot simply be nailed down, hammered away and brushed under the carpet of intermediary regulations. We need something longer-lasting and more considered to act as a reasonable restriction on creative speech and artistic expression.

Many of the solutions to these questions are potentially already available in the multitude of cases and discussions around Article 19 of our Constitution. For instance, at a minimum, there is agreement that such restrictions must be by way of proper legislation — and not merely executive rules. If we seek to create fair, just and resilient rules for a more civil society online, we will need a deeper engagement with these principles to flesh out the law — rather than bundle them into surprise announcements.

For existing intermediaries, Part II of the new rules create a large set of fresh due diligence requirements and redress mechanisms to be complied with to claim a safe harbour. Many of these are good moves that speak in the language of consumer protection, privacy and grievance redress. However, several commentators have already raised concerns about certain risky provisions that could cause harm in the name of accountability.

For instance, social media intermediaries providing messaging services appear to be required to break end-to-end encryption in order to identify users who are the "first originator" of information required in judicial or investigative proceedings. Messaging apps that promise privacy of communications will likely need to change their systems entirely to comply with such a requirement, giving up on crucial encryption technology that could render all of our communications less secure. Other requirements for intermediaries to handover information within 72 hours upon receipt of a written order from the government also create new avenues for data harvesting by the authorities.

Who will guard the guards? How will government oversight maintain accountability? Several alternative options to ensure such accountability could have been considered. For instance, the rules require significant social media intermediaries to publish compliance reports every month mentioning the details of complaints received and action taken. Could similar reports be released by monitoring authorities in government, regarding their aggregate requests for information from these intermediaries? Ultimately, the government needs to find different hammers, tools and railings to create a safe space for users. A wider toolkit is necessary for the government to build a framework that respects Indians who use these platforms and the collective online public and private spheres we are building together.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/social-media-ott-rules-india-digital-content-publishers-7208935/

Sneak Peek:

No. of words: 934 words

Note: The article is about the recent Supreme Court Judgment in the case of MJ Akbar v. Priya Ramani. Author is criticizing the way Sexual harassment complaints are handled by the State.

Article: 2

Courageous battles in bleak legalscapes

The significance of the verdict in MJ Akbar vs Priya Ramani case is understandable when one considers the dismal outcomes of sexual harassment complaints against men in high office.

Yet, unlike most such cases, Ramani was not seeking legal redress for old wrongs against Akbar. On the contrary, she was battling charges of criminal defamation for social media disclosures of sexual harassment. She was singled out, although her account was one of many against Akbar.

Even as the verdict in the Akbar vs Ramani case is a moment to celebrate, there is still concern about criminal defamation being weaponized against victims who speak out. Ramani was acquitted because her actions fell within the exceptions in law. Her disclosures were held to be defamatory, but not offensive, as they were true and served the public good. So while Ramani was courageous to stand her ground, she passed the legal test because of sufficient evidence that established the veracity of her statements.

Producing convincing evidence for sexual harassment is tough, particularly when decades have lapsed between the harassment and the complaint. In this case however, social media disclosures by other journalists, one of who testified in Ramani's defense, established a systemic pattern of conduct by Akbar towards young female recruits. The task of establishing that Ramani was indeed interviewed in a hotel room by Akbar on an evening in 1993, remained. In a fortuitous turn of events, a longtime friend who was privy to her ordeal at the interview, messaged Ramani on reading her social media disclosure. These messages predated the legal action by Akbar, thus offering invaluable corroboration that the interview took place in a hotel in 1993.

How did the disclosures serve the public good? It was clear that prior to the Vishakha judgment (1997), neither a vocabulary nor avenue for complaining of sexual harassment existed. Acknowledging past wrongs and systemic discrimination against women in what might be considered the country's most reputed newsrooms must be part of the societal resolve to combatting sexual harassment and therefore, a public good.

If these were the terms of Ramani's acquittal, then the court's observation that a "woman has a right to put her grievance at any platform of her choice and even after decades" does not stand alone. This right is in fact, contingent on the availability of clinching evidence. Anything short of that risks not just criminal charges being made, but the fact that the charges will lead to the women being convicted. While the offence of criminal defamation remains available, women will need to weigh their capacity to soldier through criminal proceedings, before airing their grievances in the public domain. The constitutionality of criminal defamation was unsuccessfully challenged in 2016 and so it remains available, and can be weaponized against women who go public when redress mechanisms fail to deliver, or simply don't exist. The Ramani verdict in this context, is more a moment of relief than one of exhilaration.

Two observations in the Akbar verdict speak strongly to the sexual harassment discourse, and are thus deserving of attention. The first, that: "the society should understand that the abusive person is just like the rest of the other person (sic) and that he too has family and friends. He can also be well respected person of society." For too long, the veracity of sexual harassment complaints have had to compete against the professional laurels of the accused, the appeal of an attractive wife and happy marriage, and of blameless conduct with other women, and so on. These are not

the touchstones on which sexual harassment charges are to be defended. The observations of the court on this should hopefully, put a lid on such extraneous defense.

The second observation, is that "the 'glass ceiling' will not prevent the Indian women …. if equal opportunity and social protection be given to them. As per Economic Survey Report of the year 2020-2021, presented in the Parliament, the pan Indian workforce participation rate of females in the production age (15-59 years) was 26.5% in the year 2018-19 as compared to 80.3% for males. It is suggested in the said report that 'in order to incentive (sic) more women to join the workforce, apart from the investment in the institutional support and other areas, safe work environment needs to be made."

In addition to bleak employment opportunities, the fact that women in India must grapple with poorly enforced sexual harassment protections must deeply concern us. In July 2018, the Lok Sabha was reportedly informed that only 2164 complaints of sexual harassment had been registered country wide from 2015. It is in this context that the #MeToo is situated. In the absence of state oversight and enforcement, it is the collective outrage by women that nudges institutional compliance and attracts state attention. Soon after Akbar's resignation from ministerial office, the government appointed a Group of Ministers to recommend measures to strengthen implementation of the sexual harassment law, though neither a report nor announcement of any action emerged from this process. An online SHe-box was created by the Ministry of Women and Child Development for channeling complaints to relevant authorities, which neither assures timely redress nor displays data on the complaints received and disposed. Twenty-three years after the Vishakha guidelines and seven years after the enactment of the law against sexual harassment, many women continue to battle odds. Their response is to find succor through public disclosures and solidarity with other victims, while the people responsible for enforcing the law, for the most part, have yet to heed the letter and spirit of the law.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/courageous-battles-in-bleak-legalscapes-7209959/

Sneak Peek:

No. of words: 1222 words

Note: This article is in furtherance of last preceding article. Author is critically examining the Law of Defamation in the light of the Priya Ramani case verdict. As a CLAT Aspirant you do not need to mug up the facts of the case but to have an idea of it.

Article: 3

Defamation: The Weapon of Choice to Stifle Pursuit of Justice and Free Speech

It has been more than two weeks since Priya Ramani was acquitted in a defamation suit filed by former Union minister and journalist, M.J. Akbar. It was followed, expectedly and deservedly, by collective celebrations and resounding applause, but it's time that the euphoria gave way to more profound questions about why she was standing in the court as an "accused" in the very first place. Wasn't she the victim – of sexual harassment and unconcealed, blatant abuse of masculine privilege by Akbar?

Akbar had brought Ramani to court alleging that, in recounting her experience of how he had harassed and tormented her sexually, Ramani was trying to "defame" him and harm his reputation. The acquittal verdict at the very least vindicates Ramani's story of sexual harassment, humiliation and intimidation. It shouldn't have needed legal validation, but it did. And we are all glad, relieved and a little celebratory that the validation came.

Celebrations are due and celebrate we must for it is not just her personal victory but a victory for innumerable women who either suffer the ignominy of sexual harassment silently, or who lose their battles even when they muster the courage to speak up. But amidst all the celebrations, there are two uncomfortable truths about this victory that we need to pause and consider.

First, we need to ask: what are we really celebrating? The acquittal of a "victim"? There's something horribly wrong with a legal system that renders a victim of sexual harassment vulnerable to further damages, then proceeds to "acquit" her and save her from those damages. The truth is that the legal system has an archaic, defunct law, a tool in the hands of the rich and powerful really – the "defamation law" (for short) – that can enable an accused to turn the tables and make a culprit out of a victim? Our celebrations need a reconnaissance that defamation law still exists and will find newer victims tomorrow.

The second truth is that Priya Ramani could well have lost this battle. Had she not been backed by the brilliance of her lawyer, Rebecca John, by the testimonies and stories of other Akbar-victims (Ghazala Wahab, Pallavi Gogoi, to name two in a long list), by the media, by the stirrings of the "collective conscience", the judgment could have gone another way. Recall how screenwriter, Vinta Nanda's rape charges against Alok Nath panned out. Nanda's searing account of rape resulted in a counter move by actor Alok Nath, who filed a defamation suit against Nanda. The defamation law enabled the accused to hound his victim further – this time legally. The trigger effect was that in January 2019, the sessions court ruled that the rape case against Alok Nath was lodged on the basis of a "defamatory" and "false" report of complainant Vinta Nanda, and that it's a case of "personal vendetta".

There is something deeply discomforting when the discharge of justice looks like a lucky break. The more justice appears as an outcome of conjunctures and fortuitous constellations, the less sure we should feel about its future trajectory. Till a law like the defamation law remains intact, the conduct of free and fearless speech will always be in peril each time a victim of sexual harassment, a journalist, an activist, a motivated citizen speaks truth to power.

The Indian defamation law (covered under IPC Sections 499 and 500 and Sections 199(1) to 199(4) of the CrPc) fall under the rubric of what is globally referred to as SLAPP (strategic law against public participation) suits. A SLAPP suit is intended to intimidate and silence a party from speaking freely and fearlessly. The strategy is to exhaust

resources and morale, generally including exorbitant claims for damages and allegations designed to smear, harass and overwhelm activists and/or civil society organisations.

Certain lawsuits, like defamation suits, are filed in order to target individual or group litigants who voice their concern over important or considerable social issues in the public arena. Examples include the defamation suit filed by Jay Shah against The Wire for carrying a story alleging that revenues of Shah's company had grown massively within a year of the ruling BJP coming to power in 2014. Or against Newslaundry by the Times Group for allegedly defaming the editors of the Times Now channel. SLAPP suits like the Indian defamation laws are like the sword of Damocles hanging over the heads of those who dare to speak out.

There are three disturbing effects of defamation like SLAPP-suits. The first, there oftentimes is a disparity of power and resources between the complainant and the defendant. Second, the goal of a criminal defamation charge may not necessarily be to actually win the lawsuit, but to drag critics to court and bury them under a pile of attorneys' fees, litigation costs, harassment and embarrassment until they wear down and withdraw.

As journalists, academics, legislators and bloggers across the country have recognised, such lawsuits are increasingly used by corporations, businesses, public officials as a weapon to silence, intimidate and control what constitutes the truth. We know how hard it is to face up to defamation suits when a sitting chief minister, Arvind Kejriwal, had to retract DDCA-corruption allegations under the protracted burden of a defamation suit filed by his powerful detractor, then finance minister, the late Arun Jaitley. One of the oldest and most respected journals of India, the Economic and Political Weekly, succumbed to threats of a defamation suit for carrying an article on the Adanis.

Journalists and social activists attend a protest against the killing of Gauri Lankesh, a senior Indian journalist who according to police was shot dead outside her home by unidentified assailants in southern city of Bengaluru, in Ahmedabad, September 6, 2017. Photo: Reuters/Amit Dave/File Photo

Third, SLAPP lawsuits like defamation suits have a chilling and prohibitive effect on public participation and conduct of free speech. They enable power and means to gang up and ensure that they nab you in your thoughts, warn you of dire consequences, chill you into silence and make you your own censors. They are a form of "lawfare" that pose a threat to freedom of expression and seek to intimidate, silence and "mutefy" citizens and citizen bodies.

We have to understand defamation laws as something different than an 'ordinary' attack on free speech. Defamation lawsuits aim to shut down critical speech by intimidating critics and undermining their active public engagement. As a New York Supreme Court judge famously said in reference to SLAPPs: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined".

More law is seldom an answer to growing societal anomalies, but there appears to be a strong case emerging for an anti-SLAPP law in India. Recognising the value of free speech, 26 states in the US, together with Australia and Canada have instituted highly developed anti-SLAPP statutes that include measures like penalising the abuse of the legal system, reimbursing the cost of the litigant and so on.

A thriving, self-confident democracy has no place for a retrograde law like the defamation law. We need to recognise, as The European Court on Human Rights did – that a "democratic society should tolerate ideas that offend, shock or disturb the State or any sector of the population".

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/defamation-priya-ramani-metoo-slapp-free-speech-media

Sneak Peek:

No. of words: 1502 words

Note: In this article the author is critically analyzing the recent controversial remark over sexual assault case. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have an idea about it.

Article: 4

Target judicial patriarchy, not the judge

A survey by the Thomson Reuters Foundation in 2018 had rated India as the most dangerous country for women. According to a National Crime Records Bureau report (2019) as many as 32,032 rapes were reported in 2019 — or 88 incidents of rape a day. Every hour, 39 instances of crime against women including four instances of rape are committed in India. Reported rape cases have increased by 88% over a decade. Four lakh cases of crimes against women were reported in 2019.

Gender insensitivity

The recent observations by the Chief Justice of India (CJI), S.A. Bobde, while granting bail to a government servant who is accused of repeated rape and torture of a 16-year-old child have been widely criticised though the Chief Justice of India has now denied having suggested marriage to the rape accused. To be fair to the head of India's judiciary, not only was the question possibly raised due to the record before him in accordance with the powers of judges under Section 165 of Indian Evidence Act, 1872 to ask any question but he also did promptly realise the sensitivity involved and quickly corrected himself by saying, 'we are not forcing you to marry the victim'. The worrisome issue is that legally speaking, rape is not even a compoundable offence and parties are not allowed to enter into compromise. Seeking an apology from the Chief Justice of India is not appropriate; however, South African Chief Justice Mogoeng Mogoeng was recently directed by the Judicial Conduct Committee to apologise unconditionally for making pro-Israeli comments in a webinar.

The real problem is that such avoidable utterances reflect the patriarchal mindset of our judges and the larger society. These statements demonstrate our gender insensitivity. While today the Chief Justice of India is being criticised from all over, let us remember that there have been several orders and judgments by Indian judges in the past which have done huge disservice to gender justice. Accordingly, the innocent question by the Chief Justice of India ("When two people are living as husband and wife, however brutal the husband is, can the act of intercourse between them be called rape?") is neither the first nor the last instance.

Here, in this instance, the man had married the victim at a temple and subsequently refused to recognise her as wife and married another woman. The accused had allegedly caused injuries to the private parts of the woman, yet was granted bail. Here again, what the Chief Justice of India said was similar to the Modi government's affidavit, in 2017, in the Delhi High Court. The RSS too had opposed marital rape being made a crime. Interestingly, the Justice J.S. Verma Committee (2013), which was constituted after the Delhi gang rape (2012) had said that rape should be viewed not as an infringement of a woman's chastity or virginity but a violation of her bodily integrity and sexual autonomy. This autonomy cannot be permanently lost by entering into marriage. Rape remains rape irrespective of the relationship.

In the higher judiciary

Let us look at similar observations by other judges to understand the patriarchal attitude of judges. A few years ago, the top court orally asked a convict who had molested a girl 10 years ago to fall at her feet and that if she forgave him, the Court too would limit his sentence of imprisonment to the period already undergone. In its June 22, 2020 order while granting advance bail to the rape accused, Justice Krishna S. Dixit of the Karnataka High Court asked why 'the victim had gone to her office at night'; why had she 'not objected to consuming drinks with him'. He further observed that 'the explanation offered by the complainant that after the perpetration of the act, she was tired and fell asleep is unbecoming of Indian women; that is not the way our women react when they are ravished'. After a hue and cry, the judge expunged this controversial statement on July 2, 2020. The Nagpur Bench of the Bombay High Court, in a strange ruling, had ordered that the sentence of the 'rape convict can be cut if he agrees to pay ₹1 lakh to the victim'. Of course, the poor victim accepted the offer. In another case, the Bombay High Court had ordered that breaking a promise of marriage is neither cheating nor rape. Here, the victim had filed for divorce from her husband to marry the accused. Justice Mridul Bhatkar granted bail to the accused observing that 'it is an unfortunate case of frustrated love affair'. The Madras High Court had granted bail to a rape accused so that he could mediate with the victim. The Supreme Court had to quickly intervene to get the bail cancelled.

The Bhanwari Devi case

Who can forget the shocking decision in Bhanwari Devi (1995); she was gang-raped in 1992. The acquittal order by the Rajasthan court gave absurd reasons such as a higher caste man cannot rape a lower caste woman for reasons of purity; her husband could not have watched his wife being raped; men who are 60-70 years old cannot commit rape and one relative cannot commit rape in front of another relative. It has been 25 years but the appeal against such a bizarre judgment has not been disposed of.

Even in other matters about women, a few of our judges at times demonstrate our society's attitude toward women. A 2020 judgment from the Guwahati High Court treated refusal of applying sindoor (vermilion) and wearing conch shell bangles (shaka) as sufficient basis to grant divorce to the husband. A few years ago, the Madras High Court gave an absurd order by directing that 'divorcees too should maintain sexual purity to claim alimony'. Even a progressive judge like Justice M. Katju in D. Velusamy vs D. Patchaiammal (2010) had termed a second Hindu wife as a 'mistress' and 'keep', and thus not entitled to maintenance.

In Narendra vs K. Meena (2016), the top court held that under Hindu traditions, a wife on marriage is supposed to fully integrate herself with her husband's family and that if she refuses to live with her in-laws, it would amount to cruelty and the husband would be entitled to divorce her under the Hindu Marriage Act. The High Court had ruled in favour of the wife.

But the Supreme Court reversed the High Court's order, observing that 'in India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband'. Interestingly, though the wife is an integral part of her husband's family, yet she is not a coparcener under the Hindu Succession Act.The Court also used Indian and Hindu ethos interchangeably without realising that under Muslim Personal Law, a wife has an absolute right to demand separate residence for herself.

In Rajesh Sharma vs The State Of Uttar Pradesh (2017), a two judge Bench of Justices Adarsh Kumar Goel and Uday Umesh Lalit in yet another controversial order observed that there should be no automatic arrests on charges of cruelty. In this case, a demand of dowry was made for ₹3 lakh and a car, which the wife's family was not able to meet. The pregnant wife was sent to her house, where she experienced trauma and her pregnancy was terminated. She was allegedly tortured, as noted by the lower court. An offence under Section 498A is non-bailable and non-compoundable so that the victim is not pressured into a compromise. And it is cognisable in that a police officer can make an arrest without a warrant from the court. The court did not hesitate in issuing a number of directions in favour of the accused

— no arrest should normally be effected till the newly constituted Family Welfare Committee submitted its report; personal appearance of accused and out-station family members need not be insisted upon; bail application should be decided the same day. In 2017, the court decided to review this judgment.

And in 'Hadiya'

In the infamous Hadiya (2017) case too, some of the observations of the Kerala High Court about Hadiya's independent agency and powers of her father over her were equally shocking and patriarchal. Even though the Supreme Court in 2018 upheld the validity of her marriage and overruled the High Court's strange judgment, the fact is that the top court's order of investigation by the National Investigation Agency into the matter of marriage of two adults was absolutely erroneous.

One hopes the controversy now will lead to greater gender sensitivity by our judges, at least in their oral observations and questions, if not the final judgments. It would be better to target patriarchy rather than the Chief Justice of India. Of course the power to ask questions too must reflect gender sensitivity.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/target-judicial-patriarchy-not-the-judge/article34030694.ece

VIDHIGYA

Sneak Peek:

No. of words: 1057 words

Note: The article is about the recent Bill (Haryana State Employment of Local Candidates Bill, 2020) passed by the Haryana Legislature which will pave the way for more employment opportunity for locals in private sector. Author in this article examines the said bill with respect to the Constitution. It is suggested to follow the same.

Article: 5

The Haryana bill is constitutionally indefensible, politically cynical

The Haryana government's State Employment of Local Candidates Bill 2020 is constitutionally dubious, economically myopic, socially divisive and politically cynical. The Bill reserves 75 per cent of new jobs in private establishments under a compensation threshold of Rs 50,000 for Haryana residents. This is part of a growing pattern of domicile-based preferential policies, where state after state is flirting with laws of this kind. Andhra Pradesh has mandated 75 per cent reservation for locals; Karnataka is toying with the idea of reserving all blue collar jobs for locals; Madhya Pradesh has announced that public employment in the state be reserved for state residents. The last time there was such a contagion of domicile-based preferences was in the 1970s, when states such as Maharashtra, Tamil Nadu, Andhra Pradesh issued circulars directing employers to hire local residents.

The Haryana Bill is constitutionally indefensible. The Constitution prohibits discrimination based on place of birth. The right to move freely in the country and reside and settle in any part of it, the right to carry out any trade or profession, are all established rights. Article 16(3) does, in principle, enable Parliament to provide for domicile-based preferential treatment in public employment. But the right to enact this exception has been given to Parliament, not to the states.

In fact, Article 16(3) seems to have been a clever piece of constitutional engineering by Ambedkar. There were voices in the Constituent Assembly, most notably Mahavir Tyagi, who were advocating for residential qualifications as the bedrock of a strong federalism. He argued that if there were no residential qualifications, provinces would not be able to enjoy "self-government" and it would "go against the real spirit of Swaraj." There were also a plethora of existing rules. In the debate on November 30, 1948, Ambedkar conceded that "you cannot allow people who are flying from one province to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for the post and take the plums away." But by decreeing that only Parliament had the right to make exceptions, Ambedkar ensured that such rules would not be enacted, simply because Parliament would favour uniform rules across India.

The constitutionality of domicile-based employment preferences (unlike preferences in education) has never been frontally tested. The courts have not shown an urgency in pricking this balloon. But almost all the existing case law that impinges on the matter clearly indicates such laws are unconstitutional. In Pradeep Jain vs Union of India, the court had indicated this direction; in Kailash Chandra Sharma vs State of Rajasthan, the court had warned against parochialism. The Andhra Pradesh Bill is sub judice in the high court.

The Supreme Court will hopefully rule on the constitutionality of the Bill. But the Bill has ramifications beyond constitutionality. It is an exercise in political cynicism: The government knows it will be struck down. But it is all the more dangerous for that reason. First, because this kind of constitutional cynicism is now not an exception but has become a contagion. Second, even if the Bill is struck down, such a high wire act is meant to fuel the flames of localism. As the Shiv Sena had demonstrated in the '70s, political parties can bring formal and informal pressure to bear on industries and enterprises, once you make preferential treatment of residents a wedge issue. Third, the Bill now exposes the bad faith of political parties on private sector reservation more generally.

We can debate where private sector reservation is desirable or not. But the one prong of a defence used to be that the private sector cannot be subject to the same yardstick as the public sector; imposing reservation would not just interfere with freedom of trade and business, it might also be a form of expropriation. Given the variety of parties now espousing domicile-based reservation, the argument that the "private sector" can be protected will be an argument in bad faith; and arguably the case for reservation for social justice is stronger than the case based on domicile. Fourth, these bills will open up a new form of competitive ethnic politics. It is odd that a state like Haryana which has benefitted from being part of a cosmopolitan zone like NCR should unilaterally impose reservations. Would NOIDA or Delhi be in its rights to bar Gurgaon residents from working there? Fifth, there is patent class discrimination: If you are rich, privileged or highly skilled, there are no entry barriers in accessing any labour market. But we shall put entry barriers on lower skilled migrants; our own internal version of an

H-1B visa.

The economic consequences for Haryana are uncertain, in part because the government itself is cynical about the Bill. The Bill has several provisions that can provide for a workaround: You can apply for an exemption if there is not enough local talent; the fines for non-compliance may allow companies to absorb the cost of violation. But the greatest damage the Bill does is to increase the discretionary power of the state, almost taking us back to a license permit raj, where companies will have to bargain, or worse, bribe the state for exemptions. This is the antithesis of regulatory reform.

These bills are a canary in the mine. States are still not entirely comfortable with migration. They militate against the ideal that any Indian should be able to countenance the prospect of making a life in any part of India. Second, they reveal the fact that slogans of "One India" are weaponised, to be used when convenient. In some ways, 75 per cent reservation in private sector employment is a worse form of exceptionalism than other forms of asymmetric federalism like Article 370 that the BJP railed against. The sociology of the Bill is also interesting: It seems to want to protect, not the most vulnerable workers, but the educated who cannot seem to be able to compete in a tight labour market.

But the fact that states feel the need to enact these bills is an indictment of the economy as a whole: They suggest a pessimism about both education and job creation. So we have returned to a world of zero sum thinking. It looks like Mr Khattar does not have faith in Mr Modi.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/haryana-bill-local-candidiates-reservation-7214632/

Sneak Peek:

No. of words: 1136 words

Note: In this article the author is critically analyzing The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and its implication. Author has examined the said rules by comparing the provisions existing in UK and Australia. It is very informative text to understand the said Rules.

Article: 6

Doubts about new IT rules are groundless

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, announced on February 25, establish a soft-touch, progressive institutional mechanism with a level playing field featuring a code of ethics and a three-tier grievance redressal framework for digital news publishers and OTT platforms.

The latter would be required to self-classify their content into five age-based categories — U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (Adult). They would be required to implement parental locks for content classified as U/A 13+ or higher, and reliable age-verification mechanisms for content classified as "A". Publishers of news on digital media would be required to observe the Norms of Journalistic Conduct of the Press Council of India and the programme code under the Cable Television Networks Regulation) Act, thereby providing a level playing field between the offline (print and television) and digital media.

However, some sceptics have described these rules as curbing freedom of expression and have even termed them as dictatorial. They seem to be looking for a black cat in a dark room where none exists.

Let us take the issue of content on OTT platforms. In fact, for the first time in independent India, there is a policy shift from pre-certification or censorship to a more transparent system of self-classification in five different age groups. Consider OTT classification in different countries: In Singapore, the Infocomm Media Development Authority (IMDA), established under the Broadcasting Act, 1994, is the common media regulatory body for different media. The country has adopted a licencing model where service providers are required to obtain a licence for operation. A content code for OTT, video-on-demand and niche services is in effect from March 1, 2018, and provides, inter alia, for classification of content, parental lock and age verification, display of rating and content elements and specific provisions for news, current affairs and educational programmes. To aid parental guidance and allow for informed viewing choices, all content in Singapore must be rated according to the Film Classification Guidelines. The six ratings are G (general), PG (parental guidance), PG13 (parental guidance for children below 13 years), NC16 (no children below 16 years), M18 (mature 18, for persons of 18 years and above) and R21(restricted to persons of 21 years and above)

In Australia, online media is regulated through the Broadcasting Services Act, 1992, read together with the Enhancing Online Safety Act 2015. For matters related to online safety (including digital media), the office of the eSafety Commissioner is the regulatory authority. The Broadcasting Services Act, 1992 has provisions for classification of content, restricted access to certain kinds of content, industry codes and industry standards, complaint mechanism, etc. However, in Australia, classifications are advisory categories. This means there are no legal restrictions regarding viewing and/or playing these categories — general (G), parental guidance (PG) and mature (M).

In the United Kingdom, the Office of Communications (Ofcom) and the Communications Act, 2003 regulate the communications landscape. The UK Government released a white paper on the threats posed by unregulated online content. The paper has proposed a new independent regulator to ensure online safety; develop codes of practice, impose liabilities/fines on companies, and coordinate with law enforcement agencies.

Thus, self-classification of OTT content is accepted in many countries and there is no question of censorship being imposed on these platforms. The move is to shift to self-classification by creative people themselves.

Another issue being raised is that these platforms have very little role in the grievance redressal mechanism. One digital media entity even alleged that the judges on the self-regulation body will be selected from a panel approved by the government. Let us see what Section 12(2) of the new Rule says on self-regulation: "Section 12(2) — The self-regulatory body referred to in sub-rule (1) shall be headed by a retired judge of the Supreme Court, a High Court, or an independent eminent person from the field of media, broadcasting, entertainment, child rights, human rights or such other relevant field, and have other members, not exceeding six, being experts from the field of media, broadcasting, entertainment, child rights, human rights and such other relevant fields."

Nowhere does the rule talk about any government interference in tier 1 or tier 2 of the self-regulation mechanism, and tier 2 of the self-regulatory body is to be formed by the OTT platforms themselves.

The third issue being raised relates to the lack of consultation with OTT platforms. The I&B minister had himself met representatives of OTT platforms on March 2 in Delhi. Earlier, the ministry had organised consultations with the platforms on November 10, 2019, in Mumbai and on November 11, 2019, in Chennai. OTT platforms have been having discussions with the ministry for a long time but they must realise that consultation does not mean concurrence.

As regards digital news portals, the requirement placed on them is to follow the established journalistic codes. They also have to ensure that prohibited content, such as child pornography, is not transmitted. How does a code of conduct amount to curbing the freedom of expression? Digital news portals should introspect on why they did not develop their own code for so long.

Another requirement being placed on digital news portals is regarding the furnishing of basic information and the grievance redressal mechanism. It is surprising that many portals, particularly at the state/district level, do not wish to give common citizens any opportunity to email them, in case they have a grievance. It is quite surprising that those who talk about transparency are non-transparent in their own actions.

Some senior journalists have also raised misgivings regarding Rule 16 under Part III of the rules, which says that in an emergency situation, interim blocking directions may be issued by the secretary, Ministry of Information and Broadcasting. This is exactly the same provision being used by the secretary, Ministry of Electronics and Information Technology for the past 11 years under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

Part III of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, would be administered by the Ministry of Information & Broadcasting. That is the reason the reference to the MeitY secretary has been replaced by secretary, Ministry of Information & Broadcasting and no new provision has been made. This provision is made for emergency situations and has to be ratified within 48 hours. For example, if a wrong map of India is being depicted then should we wait for a "grievance" to be filed? Should we not take immediate action to take it down?

Thus, the apprehensions being expressed by sceptics seem groundless. Let all those who are searching for "something in the dark room" open the doors and windows to allow in some light; the search would become easier.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/social-media-it-act-new-rules-modi-govt-control-digital-content-7218741/

Sneak Peek:

No. of words: 1314 words

Note: This article is in furtherance of last preceding article. In this article the author is critically analyzing the Constitutional Validity of the IT Rules. It will help you to enhance your legal acumen. It is a must read article.

Article: 7

Challenging The Validity Of The IT Rules, 2021 - Can Rules Relating To Digital Media Be Made Under The IT Act?

The Ministry of Electronics and Information Technology (MEITY) notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules 2021"). The said rules inter alia cover guidelines in relation to intermediary liability and code of ethics to be followed by intermediaries and publishers that process content on digital media. 'Digital media' is under the ambit of the Ministry of Information and Broadcasting (MIB), as per a recent amendment to the Allocation of Business Rules, 1961 (Allocation of Business Rules). While the entry 'Matters relating to Cyber Laws, administration of the Information Technology Act. 2000 (21 of 2000) and other IT related laws', which would include Information Technology Act, 2000 (IT Act) and the making of rules thereunder, is under the ambit of the MEITY according to the Allocation of Business Rules.

The Ministry in Charge would be MEITY insofar the subject is intermediary liability as well as, though arguably, code of ethics to be followed by the intermediaries processing content on digital media for that matter, but not the publishers processing content on digital media as that is the subject matter of the MIB, and would not be covered under the IT Act.

However, it can be argued that a head like 'Cyber laws' i.e the law of the internet and matters related therewith is wide enough to include the regulation of publishers processing content on digital media. When there are two or more ministries involved with a subject matter, for example in this case – Cyber laws (which would naturally include cyber crimes) - the Ministry in Charge i.e MEITY would consult the Ministry of Home Affairs etc. (as it deals with Criminal law that is the subject matter of MHA), under the Transaction of Business Rules, 1961 (Transaction of Business Rules), but still it would be MEITY that would be in charge by virtue of Cyber laws being under its ambit.

Moreover, in a 2020 case with similar facts, the Delhi High Court has observed on the subject that "the whole of the Allocation of Business Rules, 1961 have to be read harmoniously and cannot be read in such a manner that [the clauses are] totally ignored". Also observing that such an interpretation which can be given to the Allocation of Business Rules, 1961 should be favoured which does not create any conflict or confrontation between different clauses and without rendering any entry redundant.

The facts in the case were as follows – The entry 'CBI' has been placed under the ambit of the Department of Personnel and Training (DoPT) under the Allocation of Business Rules, however Criminal Law and Criminal Procedure have been placed under the ambit of the Ministry of Home Affairs. Similar to this case, the petitioner argued that since the entries of Criminal Law and procedure (which are wide enough to extend to and include the Central Bureau of Investigation) fall under the ambit of the MHA, the matters relating to the CBI would fall under the ambit of the MHA. This argument was rejected by the Court, as it held that the entry 'CBI' falls directly under the ambit of the DoPT making it the controlling ministry/department, and that a departure from this would create confusion and would render the entry 'CBI' under the DoPT redundant. Similarly, if the overarching entry of 'Cyber laws' is given a liberal interpretation, this would render the entry, under the ambit of MIB, of 'Digital/Online media' (which as an entry is straightforward like that of CBI) redundant. The Court's reasoning is in line with the maxim "Generalia specialibus non derogant", meaning a special provision would exclude the operation of the general

provision, which would entail that a special entry would be given precedence over a general entry when there is confusion/conflict while interpreting.

Assuming, arguendo, that regulation of digital media in relation to processing of content on digital media by publishers as an aspect can be covered under the broad terminology of 'cyber laws', digital media still directly falls under the ambit of I and B, and the legislation or the delegated legislation under this hypothetical legislation in the form of rules can only be enacted and made by MIB as it is the nodal Ministry/ Ministry in Charge. It has been conceded by MEITY itself in the IT Rules 2021 that the part regarding 'digital media' is to be "administered by the Ministry of Information and Broadcasting"

The legal maxim of "Quando aliquid prohibetur ex directo, prohibetur et per obliquum" meaning 'What cannot be done directly, cannot be done indirectly' applies here. It is a two way street – MEITY cannot legislate upon digital media as a delegate or otherwise since according to the Allocation of Business Rules, it is the job of the MIB to introduce Bills, bring out rules under such Bills made into Acts etc. on the subject. On the other hand, the MIB or its officers cannot under the IT Act (which is a Cyber law) act as a delegate and administer a part of it. If cannot be done directly (as it is prohibited for the MIB to legislate under the IT Act, since the Allocation of Business rules are mandatory, the non observance of which renders the concerned notification void), it also cannot be done indirectly (through a notification of the MEITY, signed by one of its officers, issued under the IT Act – that lets the MIB administer a part of it).

If the MIB were to seriously regulate digital media, it would have to be through a law passed by the Parliament, while the MIB would have to consult MEITY etc., but it would still be the MIB that would be in charge. By not passing a law, the Parliament is abdicating its legislative duties similar to what happened in the case of regulation of Aarogya Setu, where a 'Protocol' was issued instead of an Ordinance or a legislation.

It is also to be noted that the IT Act does not seek to regulate 'digital media'. It does not even define 'digital media', for that matter. It has been observed by the Supreme Court in various judgments that if a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. It has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

A Constitution Bench has also held that the statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed.

Therefore, the said rules go beyond the scope and purview of the IT Act, and travel beyond the parent Act. Thus, the rules are ultra vires the IT Act & are liable to be challenged in Court on both the grounds.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-ministry-of-electronics-and-information-technology-meity-170715?infinitescroll=1

Sneak Peek:

No. of words: 875 words

Note: In this article the author is analyzing the sacrosanct role played by Election Commission in Indian Democracy and Author is analyzing the same in the light of the Citizens' Commission on Elections (CCE), report. As a CLAT aspirant it is a suggested to an idea of it.

Article: 8

The Election Commission of India was built on public trust

The apex court's query pertaining to public trust in the ECI remains relevant as West Bengal goes to the polls in a controversial eight phase election.

On March 15, the Citizens' Commission on Elections (CCE), chaired by retired Supreme Court judge Madan B Lokur, which examines critical aspects of conducting elections, released the second part of its report. Titled "An Inquiry into India's Election System," the report evaluated the integrity and inclusiveness of the electoral rolls, increasing criminalisation, the use of financial power to create an economic oligarchy, compliance with the model code of conduct, the role of media, particularly social media and the overall electoral process.

Its overall verdict: A damning indictment of the autonomy of the Election Commission of India.

Flagging 2019 as the flashpoint from whence "grave doubts" were raised about the freedom and fairness of India's general elections — the world's largest democratic exercise — the CCE alleged that the ECI was drifting away from Article 324, which gives the Commission plenipotentiary powers to steer the electoral process.

This is a far cry from the values with which the watchdog body was established in 1950. In 1952, free India went to the polls for the first time, choosing to dive straight into universal adult suffrage. Critics muttered loudly about gambles, but the man who designed the system was more restrained, terming the first general elections as an "experiment in democracy." A cautious Bengali and a gold medallist in mathematics, Sukumar Sen confronted a task that would make any man quake. As India's first Chief Election Commissioner, he had to construct the electoral framework from scratch. This meant ensuring that 176 million citizens, nearly 85 per cent of whom were illiterate, would have a say in the democratic effort. Logistically speaking, it meant choosing symbols for political parties and sites for polling stations; it meant introducing indelible ink to prevent fraud and plotting ways to cover every inch of India's vast, often difficult terrain. It also meant working to reduce the erasure of women and educating the public about the importance of their votes.

The first general elections were not just a democratic experiment, but an indicator of immense public faith. Indian democracy has never been the easiest concept to implement. At the best of times, it has been a flawed and fragmented vision. Elections across the years have been marked by violence and allegations of corruption, but they have continued to be held. The steel framework that Sen built seems to have become rusty of late, gnawed away by corruption and complacency, with occasional flashes of hope, such as during the tenures of TN Seshan and James Michael Lyngdoh.

Between 1990-1996, as the 10th Election Commissioner, Seshan implemented the model code of conduct, reining in muscle and monetary power in elections. During his time as CEC, contestants were required to submit full accounts of their expenses for scrutiny. Those who didn't abide by polling rules were arrested, and officials who displayed biases towards candidates were promptly suspended. Significantly, Seshan prohibited election propaganda based on religion and caste-based hatred, cancelling the Punjab elections in 1991 to ensure that the poll process was not vitiated by violence.

Lyngdoh presided over the institution from 2001 to 2004 — an unenviable time to be CEC, with riots in Gujarat in 2002. In the aftermath of the riots, the then chief minister of Gujarat Narendra Modi prematurely dissolved the assembly. There was reportedly immense pressure on the EC to hold elections earlier than intended, but Lyngdoh held out, insisting that polls could not be held when the state had not yet recovered from the violence of the riots.

Cut to 2019, with the EC announcing seven phase elections during the peak of summer, there were allegations that the EC had handed out "clean chits" despite provocative political statements. The agency informed an outraged Supreme Court that its powers were limited against candidates who made hate and religious speeches during the election campaign. At the time, the court demanded to know whether the EC was, in fact, calling itself "toothless".

The apex court's query pertaining to public trust in the ECI remains relevant as West Bengal goes to the polls in a controversial eight phase election. The first report of the Citizens' Commission on Elections had come out on January 30, but there has been radio silence from the ECI. Remarking on the silence, Wajahat Habibullah, vice-chair of the CCE, observed that while earlier CECs would offer the Commission their time to discuss its reports, there was "an air of closed doors" around the political and civic edifices at this time.

Between 1975 to 1977, democracy was suspended altogether when Indira Gandhi declared Emergency. Yet, elections have continued to be held, stoked by popular faith in a concept which the EC not only symbolises, but has a duty to implement. The success story of India's first general election is one that deserves to be remembered – for its scope, its scale, the logistics and social issues involved in constructing an enduring civic edifice. But the story could not have been stitched together without the thread of public faith.

The EC, in 2021, would do well to pick up its dropped stitches.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/election-commission-of-india-autonomy-powers-7238870/

Sneak Peek:

No. of words: 960 words

Note: In this article the author is critically examine The Medical Termination of Pregnancy (Amendment) Bill, 2021 with the help of various provision of the said Bill. Author also did the comparative study of this Bill with the original Act that was enacted in 1971. It is very informative text to understand the legal position about the subject.

Article: 9

Why the MTP Bill is not progressive enough

The 1971 Act reeks of moral biases against sexual relationships outside marriage, adopts an ableist approach and carries a strong eugenic emphasis.

Passed by the Lok Sabha on March 17, 2020, the Medical Termination of Pregnancy (Amendment) Bill, 2021 now stands blessed by the Rajya Sabha. The bill is being hailed as a much-needed departure from the existing legal regime under the Medical Termination of Pregnancy Act, 1971 for two reasons — first, the bill replaces "any married woman or her husband" with "any woman or her partner" while contemplating termination of pregnancies resulting from contraception failures, thus ostensibly destigmatising pregnancies outside marriage; and second, the time limit within which pregnancies are legally terminable is increased.

The 1971 Act reeks of moral biases against sexual relationships outside marriage, adopts an ableist approach and carries a strong eugenic emphasis. The very Statement of Objects and Reasons of the 1971 Act noted the fact that "most of these mothers are married women, and are under no particular necessity to conceal their pregnancy" as a logical basis for legalisation of termination of pregnancies. Further, in addition to preventing danger to the life or risk to physical or mental health of the woman, "eugenic grounds" were recognised as a specific category for legally permissible abortions.

In this backdrop, the bill's capacity to fulfil its professed aim of ensuring "dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy" merits close examination.

The bill most significantly raises the upper gestational limits for the two categories of permissible abortions envisioned in Section 3(2) of the 1971 Act. While the limit for the first category (pregnancies terminable subject to the opinion of one medical practitioner) is raised from 12 weeks to 20 weeks, the limit for the second category (pregnancies terminable subject to the opinion of two medical practitioners) is raised to include those exceeding 20 but not exceeding 24 weeks, instead of the present category of cases exceeding 12 but not exceeding 20 weeks. However, the second category is left ambiguous and open to potential executive overreach insofar as it may be further narrowed down by rules made by the executive. Further, pregnancies are allowed to be terminated only where continuance of the pregnancy would "prejudice the life of the pregnant woman or cause grave injury to her mental or physical health" or "if the child were born it would suffer from any serious physical or mental abnormality." Section 3(2B), however, makes the upper gestational limits inapplicable to abortions necessitated, in the opinion of the Medical Board, by any "substantial foetal abnormalities".

The fact that a woman's right to abortion is exercisable only in the face of such compelling circumstances renders motherhood the norm, and abortion the exception. As such, the bill seeks to cater to women "who need to terminate pregnancy" as against "women who want to terminate pregnancy." By not accounting for the right to abortion at will, the bill effectively forces women to feign "grave injury to physical or mental health" to terminate a pregnancy, thus unequivocally crippling their bodily autonomy. Importantly, even while the act requires the woman's consent to abort

in the above-mentioned situations, absent a medical practitioner's opinion validating her choice, her consent is insufficient.

The special classifications of "serious physical or mental abnormalities" and "substantial foetal abnormalities" also reek of societal prejudices against persons with special needs. Undoubtedly, a woman's right to terminate the pregnancy of a child likely to suffer from physical or mental anomalies or one diagnosed with foetal abnormalities, on socio-economic grounds or otherwise, merits recognition. However, in treating "physical or mental disability" or "foetal abnormalities" as separate categories amounting to heightened circumstances for termination of pregnancies, the bill reveals its ableist approach. This evidences a presumption that certain people are by default societally unproductive, undesirable and somehow more justifiably eliminable than others.

This ableism becomes stark when the said 24-week limit, which is purportedly dictated by scientific and legislative wisdom, is completely lifted where the termination of a pregnancy involves "substantial foetal abnormalities". Thus, while the revised upper gestational limit is by itself laudable, when read together with Section 3(2B) of the bill, a strange dichotomy emerges — it is either the case that medical advancement is such that a safe abortion is possible at any point in the term of pregnancy, and hence, the bill permits termination at any stage when "substantial foetal abnormalities" are involved; or that, a 24-week ceiling is scientifically essential and abortions beyond the said limit would pose risks to the health of the pregnant woman or the foetus. If it is the former, then allowing termination only in cases of "substantial foetal abnormalities" is a fictitious and moralistic classification. If it is the latter, then the secondary status of women's safety and the dominant eugenic tenor of the bill once again becomes evident.

The move from "married woman" and "her husband" to "woman" and "her partner" is appreciable. However, access to abortion facilities is limited not just by legislative barriers but also the fear of judgment from medical practitioners. It is imperative that healthcare providers be sensitised towards being scientific, objective and compassionate in their approach to abortions notwithstanding the woman's marital status. Absent such steps, progressive legislative amends won't create meaningful change on the ground.

The bill is at best a tight-fisted grant of fettered autonomy. In the landmark judgment in KS Puttaswamy v Union of India, the Supreme Court recognised women's constitutional right to make reproductive choices and the right to "abstain from procreating" was read into the right to privacy, dignity and bodily autonomy. The MTPA Bill, which now awaits the President's assent to become law, falls short of meeting this constitutional standard and its own stated objectives.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/medical-termination-of-pregnancy-bill-passed-7241943/

Sneak Peek:

No. of words: 866 words

Note: In this article the author is examining the proposed amendment to the Prevention of Cruelty to Animals Act, 1960. Do follow this new development of law.

Article: 10

When anti-cruelty laws don't protect animals and only harm humans

The Nagaland government's decision to ban dog meat came into effect on July 4, 2019. Cruelty was cited as the reason for banning dog meat trade in Nagaland. (Representational)

The Union government has proposed an amendment to the Prevention of Cruelty to Animals Act, 1960 (POCA) to increase penalties against animal cruelty from Rs 50 to Rs 75,000 or "three times the cost of the animal" besides up to five years' imprisonment. This approach is steeped in caste and class elitism, and is unlikely to help address institutionalised animal cruelty.

Cruelty is vaguely defined in law, as it carries cultural values about animal suffering. The animal rights movement and legal jurisprudence state that cruelty is characterised by unacceptably high animal suffering. In Animal Welfare Board of India v. A Nagaraj, the Supreme Court ruled that animal suffering caused for "legitimate" purposes is not cruelty. The popular and judicial conceptions of cruelty, and which animals need to be protected from it, continue to be coded in Brahmanical ideas of suffering, legitimacy and proportionality. For instance, cruelty was cited as the reason for banning dog meat trade in Nagaland. Alleged inhuman killing methods were used on stray dogs. However, the imposed ban was not on the inhuman killing methods to address cruelty, but an arbitrary and disproportionate prohibition on all dog meat. Meanwhile, laws prohibit only inhuman killing methods for other animals such as poultry and cattle, instead of blanket meat bans.

Criminal justice studies dispel the notion of deterring crimes through increased penalties and stringent criminal laws. Therefore, higher penalties may be unlikely lower the cruel incidents of animal murder and puppy violence. The POCA is then yet another tool for the police to criminalise communities that traditionally earn their livelihoods from animal labour by vilifying these interactions as cruelty. Given the police's selective enforcement and proposed higher penalties there is a grim possibility of criminalisation further producing marginalisation. The Sapera and Madari communities (formerly criminalised tribes categorised today as Denotified Tribes), are traditionally snake-charmers and performers with monkeys respectively. POCA and wildlife protection laws frame these communities as offenders facing imprisonment without providing rehabilitation opportunities. POCA is commonly implemented by the police such that dominant caste families who invite snake charmers home for the annual Hindu festival of Nag Panchami escape sanction.

It is an established legal principle that punishment should be commensurate with the seriousness of the offence. However, the sliding scale of sentencing is often disproportionate due to cultural influences on criminal law. In recent years, the legitimisation of Brahmanical morality has led to the penalty for unlicensed cattle slaughter in Gujarat leading to higher imprisonment than for certain kinds of culpable homicide. Other laws coded in similar cultural values, such as excise and gambling laws, disproportionately criminalise marginalised communities. The police use their wide discretionary powers to commonly extort and harass vulnerable individuals. The judiciary may also be complicit in entrenching cultural values — mere alcohol possession is routinely denied bail by lower courts.

Members of the animal rights movement belong to elite castes and classes. Over a period of time they have assumed the status of being a pressure group of sorts. They "requested" increased POCA penalties to balance human needs with

animal interests. Yet, their scales of balance fail to consider the lives of lower caste and class communities. These groups have little engagement with indigenous cultures which have advanced and nuanced practices of respecting all sentient beings. It is "modern" society that grades its priorities of care on animals by demeaning categorisations of wildlife, cattle, domestic pets, vermin etc. Such animal rights activism has also previously framed Adivasis as "encroachers" and "poachers", invisibilising tribal communities' contemporaneous symbiosis with all animal life, and their crucial role in wildlife existence. In 2019, a band of wildlife conservationists challenged the constitutionality of the Forest Rights Act, 2006. The case nearly evicted over 11.8 lakh tribal families and traditional forest-dwellers from forestlands in 16 states.

The anti-cruelty animal rights movement is not seeking POCA amendments to enforce stringent rules or strict enforcement against large-scale industrial operations such as factory farms that profit off the cruelty of millions of animals. Instead, it counts among its chief successes, the banning of animal-drawn carts in Delhi and Mumbai. These punching down strategies lay bare its inability to challenge institutionalised animal cruelty. Several animal cruelty incidents have arisen from escalating human-animal resource conflicts. The death of the pregnant elephant in Kerala was due to the accidental consumption of a cracker-stuffed fruit intended to repel wild boars from farms. As development increasingly deprives animals of foods, they forage in human cultivations while vulnerable agricultural households with inadequate incomes struggle to protect their primary income sources.

The POCA serves some value insofar as it protects animals from select forms of institutionalised cruelty, including exploitation for research and experimentation. However, we must commit to co-producing and protecting the dignity of all beings. Our experiences with the criminal justice system, arbitrary policing and the state's carceral nature should caution us that even well-meaning, but uncritical elitist movements will exacerbate the subjection of vulnerable individuals to the cruelties of policing and prisons in India.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/when-anti-cruelty-laws-dont-protect-animals-and-only-harm-humans-7245350/

Sneak Peek:

No. of words: 496 words

Note: In this article the author is analyzing the recent Supreme Court Judgment on Tata-Mistry controversy. As a CLAT aspirant, you are expected to have a fair idea about it. A must read for every law aspirant.

Article: 11

Boardroom closure

In October 2016, the widely admired Tata group was engulfed in controversy, with Mistry being removed from the chairman's post by a majority of the board of directors.

After a period of prolonged uncertainty, the Supreme Court on Friday gave its ruling in the Tata-Mistry case, bringing the curtains down on one of the ugliest boardroom battles in recent history. The court has ruled in favour of the Tatas, setting aside the National Company Law Appellate Tribunal (NCLAT) order which had reinstated Cyrus Mistry as the chairman of Tata Sons, while holding the appointment of his successor N Chandrasekaran as illegal. The court has also rejected the plea against the conversion of Tata Sons into a private company, which will have a bearing on other companies which plan to go private. With this ruling, the lingering uncertainty that has continued to haunt one of India's largest business groups for the past few years, has been put to rest.

In October 2016, the widely admired Tata group was engulfed in controversy, with Mistry being removed from the chairman's post by a majority of the board of directors. Mistry challenged this ouster at the Mumbai bench of the National Company Law tribunal (NCLT), alleging, also, oppression of minority shareholders. The challenge was dismissed by the NCLT in 2017. Mistry appealed to the NCLAT, which in 2019, declared his removal "illegal", and ordered his reinstatement. Subsequently, Tata Sons challenged the NCLAT order before the Supreme Court. Now, a three-judge bench, led by the Chief Justice of India, has set aside the 2019 NCLAT order. The court has also held that there was no oppression of minority shareholders nor mismanagement at Tata Sons. However, it has left a key issue of the terms of separation — the valuation of the 18.4 per cent stake that the Mistry family holds in Tata Sons — to the parties concerned. Given the sharp variance in the valuation — the Mistry family had previously valued its share in the group at Rs 1.75 lakh crore, while the Tata group had assigned a lower value at Rs 70,000-80,000 crore — this may well continue to rankle.

With the broader legal closure, however, the Tata group can now move ahead on the strategy drawn up by its chairman N Chandrasekaran. The manner in which the saga has played out also throws up larger issues that need to be acknowledged and addressed by India Inc. These centre on the need for greater transparency in decision making and fidelity to norms of governance, strengthening the role of independent board members, assuring their "independence", and making them more accountable. The protection of minority investors and rights of shareholders, along with the extent of corporate transparency, form an integral part of the Ease of Doing Business rankings — failure to abide by best practices will reflect poorly on the country' standing. These gaps in governance structures in corporate houses, be they listed or unlisted, promoter driven or professionally managed, must be addressed.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/editorials/cyrus-mistry-case-tata-successor-sc-ruling7247133/

Sneak Peek:

No. of words: 886 words

Note: The article is pertaining to the recent Supreme Court judgment in case of Lt. Col. Nitisha v. Union of India, where it declared that the evaluation criteria adopted by the Indian Army to consider the grant of permanent commission for women officers to be "arbitrary and irrational", discussed the 'doctrine of indirect discrimination'. As a CLAT aspirant it is a must read article.

Article: 12

With women officers in armed forces, SC recognises systemic biases

In what is sure to be an epochal moment for gender equality in India, the Supreme Court last week delivered a verdict in favour of 86 female officers of the Indian Army in Lt. Col. Nitisha v. Union of India. The petitioners were challenging the way the Court's last year's directions in Ministry of Defence v. Babita Puniya (2020) have been implemented.

In Babita Puniya, the Court had directed the Army to consider all serving female officers for the grant of permanent commissions. Such a commission grants officers the ability to continue in service until retirement, as opposed to "Short Service Commissions" with defined tenures of service.

Pursuant to the judgment, the Army set up a "Special No. 5 Selection Board" on August 1, 2020, to consider women SSC officers for the grant of permanent commissions. Accordingly, 615 officers were considered, out of which 422 women were approved by the Board subject to medical and discipline parameters. Two hundred and seventy-seven female officers were ultimately granted permanent commissions. The petitioners had been denied commission in this process.

The petitioners made two key arguments. First, the medical parameters (or the SHAPE criteria) were being applied to them as on date, given that their applications were only considered pursuant to the Supreme Court order. Thus, at the age of 45-55 years, they would have to conform to the same medical standards applied to their male counterparts aged 25-30 years – that is, when male officers first become eligible for permanent commissions in their fifth or 10th year of service.

Second, given that there was no scope for women to be granted permanent commissions prior to the Court directions, their Annual Confidential Reports (ACRs) in the fifth or 10th year were filled out more casually by superior officers, and they did not have the benefit of having attended specialised courses, which contribute to the ACR and recommendation. These old ACRs were now being used to evaluate female officers.

On behalf of the state, the Additional Solicitor General argued that the petitioners first sought parity with men in Babita Puniya, and now wanted special and unjustified treatment in the eligibility criteria for Permanent Commissions. The Supreme Court was of the view that the evaluation criteria used by the army to grant permanent commissions disproportionately affected women. The evaluation criteria excluded their subsequent achievements after the ACR, applied medical parameters to them belatedly, and ignored the prejudice caused to the female officers due to casual grading and biased incentive structures.

An important aspect of the Supreme Court's judgment in this case is its explanation of the difference between direct and indirect discrimination. Direct discrimination refers to a practice or a rule that differentiates on the basis of a prohibited ground (such as sex or caste under Article 15 and 16). An example of this is a law that prohibits women from being employed in bars.

Indirect discrimination is concerned with the disparate/disproportionate impact of a superficially neutral law on a minority. The now annulled Section 377 of the Indian Penal Code is an excellent example of this, in that it did not explicitly mention the LGBTQ community, but had an adverse effect on their rights and dignity. In Lt. Col. Nitisha, Justice Chandrachud lays down a clear framework for addressing such cases of indirect discrimination.

However, the Supreme Court goes beyond this distinction to introduce a third concept of "systemic discrimination" under the Constitution. This approach does not focus on any discriminatory practice, rule or event, but rather views discrimination as a continuum. This means that the focus shifts to the structures that constantly cause and reinforce disadvantage and exclusion. These patterns could be anything — informal rules or policies, unconscious biases, individual or collective decisions etc.

In recent years, the apex court has delivered a number of judgments that indicated an expanding view of equality under the Constitution, such as the Sabarimala judgment and the decriminalisation of homosexuality in Navtej Johar. However, this is the first and perhaps clearest exposition by the Supreme Court on different forms of discrimination under Indian law. Moreover, the Court appears to be increasingly cognisant of broader cultures of oppression that exist in society, and its impact on women and gender

In Babita Puniya, by granting Permanent Commissions to women, the Court lifted a barrier to access faced by women in the army. This ensured equality of opportunity. The judgment in Lt. Col Nitisha is a rare instance of the Supreme Court examining issues beyond access — what happens after women win a battle for opportunity? Does this mean they no longer face any obstacles?

Here, the legal recognition of "systemic discrimination" is crucial because it acknowledges the pervasive impact of the patriarchy. Especially in the case of workplace discrimination, the patriarchy often goes far beyond biased hiring practices or access to employment. Women subsequently face obstacles in the form of sexual harassment, biased assessment/promotion procedures, reproductive choices and hostile work environments. This new approach may be better suited to identifying such latent forms of discrimination, as opposed to strict legal tests and standards.

One can hope that the judgment in Lt. Col. Nitisha ushers in a new era of claims from women challenging the patriarchy in ways that were heretofore ignored by the courts and State alike.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/women-officers-armed-forces-supreme-court-7251465/

Sneak Peek:

No. of words: 478 words

Note: In this article the author highlights the importance of disclosure of reasons for rejecting A.P. CM's charges. It is suggested to follow it.

Article: 13

In-house secrets: On A.P. CM's charges against Justice Ramana

The Supreme Court has dealt with a grave matter concerning issues of judicial propriety with characteristic opaqueness. It has dismissed a complaint from Andhra Pradesh CM Y.S. Jagan Mohan Reddy, containing explosive allegations against CJI-designate Justice N.V. Ramana, but declined to disclose the findings of an in-house inquiry. The rejection was disclosed on the Court's website on the day CJI S.A. Bobde recommended Justice Ramana as his successor. Going by procedure, a committee of three judges must have inquired into the charges. The lack of transparency is based on a 2003 judgment of the apex court that any inquiry under this procedure is meant only for "the information and satisfaction" of the CJI, and is not meant for the public. However, this may be an instance when not many will agree with the confidentiality norm. The allegations came from a person holding the high office of CM, and the crux of his grievance was that the A.P. High Court was hostile to him and his regime due to the influence wielded by Justice Ramana. Further, he accused the judge of proximity with Mr. Reddy's political rivals and alleged involvement of his family members in a land scam that involved prior knowledge that Amaravati was to be declared the State's capital and speculative buying of land there. There is little to commend the requirement of confidentiality in a probe of this nature, as the dismissal of the complaint ipso facto means that a serving CM has levelled false and motivated charges against a senior Supreme Court judge as well as those in the High Court. Mr. Reddy is surely in contempt of court if the committee found no merit in the allegations that he raised in a signed affidavit.

Should the confidentiality rule always hold the field? Is it possible to dismiss the allegations without disclosing who were heard as witnesses and what material was considered as evidence? Was Mr. Reddy given an opportunity to substantiate his charges? And, does he get to know the conclusions? The unsavoury charges are bound to come up in some form or the other again. The A.P. government has appealed against a High Court judgment that stayed a police investigation in the Amaravati land issue. Mr. Reddy faces prosecution in corruption cases himself. A key allegation against him is that his animosity towards Justice Ramana arises from an order that a Bench headed by the latter had passed, that cases involving elected representatives be expedited. In a separate development, the High Court had also ordered a CBI probe into social media posts targeting judges. The charges being bandied about are overtly political, and the episode has become unpleasant. Notwithstanding the confidentiality norm laid down for in-house probes, it behoves the Court to demonstrate that justice was both done and was seen to be done.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/in-house-secrets-the-hindu-editorial-on-ap-cm-jagan-mohan-reddys-charges-against-supreme-court-judge-justice-ramana/article34173030.ece

Sneak Peek:

No. of words: 503 words

Note: This article is about the recent Supreme Court ruling which held that State Election Commissioners (SECs) across the country should be independent, and not persons holding office with the central government or a state government. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 14

Poll position: On SC order on local body elections

Supreme Court has boosted independence of SECs in holding local body elections

Even though more than a quarter century has elapsed since the Constitution was amended to make urban and rural local bodies a self-contained third tier of governance, it is often agreed by experts that there is inadequate devolution of powers to them. This may somewhat explain their relative lack of autonomy. However, an entirely different facet of the way these local bodies function is that the manner in which their representatives are elected is often beset by controversies. Local polls are often marred by violence, and charges of arbitrary delimitation and reservation of wards. A key factor in any local body polls being conducted in a free and fair manner is the extent to which the State Election Commissioner, the authority that supervises the elections, is independent and autonomous. Unfortunately, most regimes in the States appoint senior bureaucrats from among their favourites to this office. In practice, SECs frequently face charges of being partisan. Routine exercises such as delimiting wards, rotating the wards reserved for women and Scheduled Castes and fixing dates for the elections become mired in controversy as a result, as the Opposition tends to believe that the exercise is being done with the ruling party's interest in mind. Even though this cannot be generalised in respect of all States and all those manning the position, it is undeniable that SECs do not seem to enjoy the confidence of political parties and the public to the same extent as the Election Commission of India as far as their independence is concerned.

It is in this backdrop that the Supreme Court's judgment declaring that a State Election Commissioner should be someone completely independent of the State government acquires salience. It has described the Goa government's action in asking its Law Secretary to hold additional charge as SEC as a "mockery of the Constitutional mandate". By invoking its extraordinary power under Article 142 of the Constitution, the Court has asked all SECs who are under the direct control of the respective State governments to step down from their posts. In practice, most States appoint retired bureaucrats as SECs. Whether the apex court's decision would have a bearing on those who are no more serving State governments remains to be seen. However, it is clear that these governments will now have to find a way to appoint to the office only those who are truly independent and not beholden to it in any manner. The verdict will help secure the independence of SECs in the future. More significantly, the Court has boosted the power of the election watchdog by holding that it is open to the SECs to countermand any infractions of the law made by the State government in the course of preparing for local body polls. Regimes in the States would have to wake up to the reality that they cannot always control the local body polls as in the past.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/poll-position-on-sc-order-on-local-body-elections/article34077727.ece

Sneak Peek:

No. of words: 437 words

Note: In this article the author is criticizing the Ministry of Education's notification which was issued last month regarding regulation of Virtual Conferences. Recently, the said circular has been withdrawn. Do follow this new development of law.

Article: 15

Open minds: On withdrawal of circular on online conferences

The Centre has saved itself from continuing embarrassment at the international level by withdrawing the Education Ministry's ill-thought-out guidelines for holding online conferences, seminars and training sessions. The sweeping circular, issued in consultation with the External Affairs Ministry, created a bottleneck for scientists in public universities, colleges and organisations and erected new bureaucratic barriers in a pandemic-hit phase when virtual conferences are the only viable channel for researchers to collaborate with global peers. Academicians and others organising the events were, as per the January circular, required to get prior official approval and ensure that the conference topics do not relate to security of the state, border, the northeast, Jammu and Kashmir, Ladakh, and broadly, any "internal matters". Event organisers were also mandated to give preference to technological tools and channels not owned or controlled by hostile countries or agencies. The effect of such a vague and abstruse set of instructions could only be to abandon efforts to organise conferences. To their credit, Indian scientists spoke out, and the Indian Academy of Sciences sounded a warning on the order's detrimental effect on development of science, prompting a rethink.

The pandemic from last year has underscored the value of virtual collaboration for many, although it cannot be argued that it completely substitutes for face-to-face interactions, trust-building and team formation. Without hurdles posed by visas, expensive travel, physical disability and so on, thousands of scientists have been able to participate in online conferences. Attendance at such events grew by 80% in 2020 over 2019 for the Plant Biology Worldwide Summit and over 300% for the American Physical Society meeting, as also for international meetings on cancer, lasers and electro-optics. Many scientists also think a combination of post-COVID-19 physical conferences and new possibilities enabled by virtual collaborations promise to forge even stronger alliances. An entirely new avenue has also opened up for national conferences with global experts taking part that researchers and students in the smallest towns can attend. This cannot, however, happen if institutions are bound by a bureaucratic straitjacket. India has made good strides in some fields with a growing number of peer-reviewed publications, especially in chemistry and physical sciences, as the Nature Index notes. Moreover, rigorous work can help allay concerns, such as on biopiracy, by documenting natural assets. The humanities, too, need to be freed from paranoid restrictions on research topics, curbs on scholars, and the growing pressure to sanctify cultural notions of science and history. Good sense has prevailed on the issue of online conferences, and it should lead to a more liberal approach to all research.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/open-minds-the-hindu-editorial-on-withdrawal-of-circular-on-online-conferences/article33944927.ece

Sneak Peek:

No. of words: 1208 words

Note: In this article the author is criticizing the way Parliament's business is functioning. Author highlights the functioning of the Parliament with the help of various Bills and provisions of Law. It is very informative text.

Article: 16

Dormant Parliament, fading business

The gradual deterioration in Parliament's functioning has to be stopped if it is to fulfill its constitutional mandate

The Budget session of Parliament ended on Thursday, two weeks ahead of the original plan, as many political leaders are busy with campaigning for the forthcoming State Assembly elections. This follows the trend of the last few sessions: the Budget session of 2020 was curtailed ahead of the lockdown imposed following the novel coronavirus pandemic, a short 18-day monsoon session ended after 10 days as several Members of Parliament and Parliament staff got affected by COVID-19, and the winter session was cancelled. As a result, the fiscal year 2020-21 saw the Lok Sabha sitting for 34 days (and the Rajya Sabha for 33), the lowest ever. The casualty was proper legislative scrutiny of proposed legislation as well as government functioning and finances. While COVID-19 was undoubtedly a grave matter, there is no reason why Parliament could not adopt remote working and technological solutions, as several other countries did.

No Bill scrutiny

An important development this session has been the absence of careful scrutiny of Bills. During the session, 13 Bills were introduced, and not even one of them was referred to a parliamentary committee for examination.

Many high impact Bills were introduced and passed within a few days. The Government of National Capital Territory of Delhi (Amendment) Bill, 2021, which is the Bill to change the governance mechanism of Delhi — shifting governance from the legislature and the Chief Minister to the Lieutenant Governor — was introduced on March 15 in the Lok Sabha, passed by that House on March 22 and by Rajya Sabha on the March 24. Another Bill, the Mines and Minerals (Development and Regulation) Amendment Bill, 2021, amends the Mines and Minerals Act, 1957 to remove end-use restrictions on mines and ease conditions for captive mines; this Bill was introduced on March 15 and passed by both Houses within a week. A Bill — The National Bank for Financing Infrastructure and Development (NaBFID) Bill, 2021 — to create a new government infrastructure finance institution and permit private ones in this sector was passed within three days of introduction. The Insurance (Amendment) Bill, 2021, the Bill to increase the limit of foreign direct investment in insurance companies from 49% to 74% also took just a week between introduction and passing by both Houses. In all, 13 Bills were introduced in this session, and eight of them were passed within the session. This quick work should be read as a sign of abdication by Parliament of its duty to scrutinise Bills, rather than as a sign of efficiency.

Consulting House panels

This development also highlights the decline in the efficacy of committees. The percentage of Bills referred to committees declined from 60% and 71% in the 14th Lok Sabha (2004-09) and the 15th Lok Sabha, respectively, to 27% in the 16th Lok Sabha and just 11% in the current one. Parliamentary committees have often done a stellar job. For example, the committee that examined the Insolvency and Bankruptcy Code suggested many changes to make the Code work better, and which were all incorporated in the final law. Similarly, amendments to the Motor Vehicles Act were based on the recommendations of the Committee.

Money Bill classification

The last few years have seen the dubious practice of marking Bills as 'Money Bills' and getting them past the Rajya Sabha. Some sections of the Aadhaar Act were read down by the Supreme Court of India due to this procedure (with a dissenting opinion that said that the entire Act should be invalidated). The Finance Bills, over the last few years, have contained several unconnected items such as restructuring of tribunals, introduction of electoral bonds, and amendments to the foreign contribution act.

Similarly, this year too, the Finance Bill has made major amendments to the Life Insurance Corporation Act, 1956. As this is a Money Bill, the Rajya Sabha cannot make any amendments, and has only recommendatory powers. Some of the earlier Acts, including the Aadhaar Act and Finance Act, have been referred to a Constitution Bench of the Supreme Court. It would be useful if the Court can give a clear interpretation of the definition of Money Bills and provide guide rails within which Bills have to stay to be termed as such.

During this session, the Union Budget was presented, discussed and passed. The Constitution requires the Lok Sabha to approve the expenditure Budget (in the form of demand for grants) of each department and Ministry. The Lok Sabha had listed the budget of just five Ministries for detailed discussion and discussed only three of these; 76% of the total Budget was approved without any discussion. This behaviour was in line with the trend of the last 15 years, during which period 70% to 100% of the Budget have been passed without discussion in most years.

The missing Deputy Speaker

A striking feature of the current Lok Sabha is the absence of a Deputy Speaker. Article 93 of the Constitution states that "... The House of the People shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker…." Usually, the Deputy Speaker is elected within a couple of months of the formation of a new Lok Sabha, with the exception in the 1998-99 period, when it took 269 days to do so. By the time of the next session of Parliament, two years would have elapsed without the election of a Deputy Speaker. The issue showed up starkly this session when the Speaker was hospitalised. Some functions of the Speaker such as delivering the valedictory speech were carried out by a senior member.

The deterioration in Parliament's functioning is not a recent phenomenon. For example, the Monsoon Session of 2008 had set some interesting records. That session went on till Christmas, as the government wanted to use a parliamentary rule that a no-confidence motion could not be moved twice within a session; instead of a winter session, the monsoon session was extended with breaks. That session also saw eight Bills being passed in the Lok Sabha within 17 minutes. The following Lok Sabha (2009-14) saw a lot of disruptions to work, with about a third of its scheduled time lost. Some things have improved: over the last few years, we have seen most Bills being discussed in the House and have had less disruptions. However, the scrutiny of Bills has suffered as they are not being referred to committees.

Parliamentary scrutiny is key

Parliament has the central role in our democracy as the representative body that checks the work of the government. It is also expected to examine all legislative proposals in detail, understand their nuances and implications of the provisions, and decide on the appropriate way forward. In order to fulfil its constitutional mandate, it is imperative that Parliament functions effectively. This will require making and following processes such as creating a system of research support to Members of Parliament, providing sufficient time for MPs to examine issues, and requiring that all Bills and budgets are examined by committees and public feedback is taken. In sum, Parliament needs to ensure sufficient scrutiny over the proposals and actions of the government.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/dormant-parliament-fading-business/article34173052.ece

Sneak Peek:

No. of words: 1235 words

Note: In this article the author highlights the importance of Electoral Bonds and its implication in a democracy. Author argues that the crucial information like funding to political parties from anonymous sources must be revealed to public in order to enable the voters to choose their representative wisely. It is suggested to have a fair idea about it and go for that Vidhigya 360 degree analysis of Electoral Bond Scheme.

Article: 17

Here is why the electoral bonds scheme must go

It violates the basic tenets of India's democracy by keeping the knowledge of the 'right to know' from citizens and voters

The Supreme Court, after a brief hearing on March 24, reserved orders on the question of whether or not to stay the electoral bond scheme, ahead of the upcoming State elections. For the last three years, electoral bonds have been the dominant method of political party funding in India. In their design and operation, they allow for limitless and anonymous corporate donations to political parties. For this reason, they are deeply destructive of democracy, and violate core principles of the Indian Constitution.

A blow against democracy

If democracy means anything, it must mean this: when citizens cast their votes for the people who will represent them in Parliament, they have the right to do so on the basis of full and complete information. And there is no piece of information more important than the knowledge of who funds political parties. Across democratic societies, and through time, it has been proven beyond doubt that money is the most effective way of buying policy, of engaging in regulatory capture, and of skewing the playing field in one's own favour. This is enabled to a far greater degree when citizens are in the dark about the source of money: it is then impossible to ever know — or assess — whether a government policy is nothing more than a quid pro quo to benefit its funders. The Indian Supreme Court has long held — and rightly so — that the "right to know", especially in the context of elections, is an integral part of the right to freedom of expression under the Indian Constitution. By keeping this knowledge from citizens and voters, the electoral bonds scheme violates fundamental tenets of our democracy.

It is equally important that if a democracy is to thrive, the role of money in influencing politics ought to be limited. In many advanced countries, for example, elections are funded publicly, and principles of parity ensure that there is not too great a resource gap between the ruling party and the opposition. The purpose of this is to guarantee a somewhat level playing field, so that elections are a battle of ideas, and not vastly unequal contests where one side's superior resources enable it to overwhelm the other. For this reason, in most countries where elections are not publicly funded, there are caps or limits on financial contributions to political parties.

The electoral bonds scheme, however, removes all pre-existing limits on political donations, and effectively allows well-resourced corporations to buy politicians by paying immense sums of money. This defeats the entire purpose of democracy, which as B.R. Ambedkar memorably pointed out, was not just to guarantee one person, one vote, but one vote one value.

However, not only do electoral bonds violate basic democratic principles by allowing limitless and anonymous donations to political parties, they do so asymmetrically. Since the donations are routed through the State Bank of India, it is possible for the government to find out who is donating to which party, but not for the political opposition to know. This, in turn, means that every donor is aware that the central government can trace their donations back to them. Given India's long-standing misuse of investigative agencies by whichever government occupies power at the

Centre, this becomes a very effective way to squeeze donations to rival political parties, while filling the coffers of the incumbent ruling party. Statistics bear this out: while we do not know who has donated to whom, we do know that a vast majority of the immensely vast sums donated through multiple electoral cycles over the last three years, have gone to the ruling party, i.e. the Bharatiya Janata Party.

Gaps in government's defence

The government has attempted to justify the electoral bonds scheme by arguing that its purpose is to prevent the flow of black money into elections. The journalist Nitin Sethi has already debunked this rationale in a detailed 10-part investigative report, which has also highlighted reservations within the government as well as by the Election Commission of India to the electoral bonds scheme. That apart, this justification falls apart under the most basic scrutiny: it is entirely unclear what preventing black money has to do with donor anonymity, making donations limitless, and leaving citizens in the dark. Indeed, as the electoral bonds scheme allows even foreign donations to political parties (which can often be made through shell companies) the prospects of institutional corruption (including by foreign sources) increases with the electoral bonds scheme, instead of decreasing.

It is important to be clear that the objections to the electoral bonds scheme, highlighted above, are not objections rooted in political morality, or in public policy. They are constitutional objections. The right to know has long been enshrined as a part of the right to freedom of expression; furthermore, uncapping political donations and introducing a structural bias into the form of the donations violate both the guarantee of equality before law, as well as being manifestly arbitrary.

The judiciary needs to act

This brings us to the all-important role of the courts. One of the most critical functions of an independent judiciary in a functioning democracy is to referee the fundamentals of the democratic process. Governments derive their legitimacy from elections, and it is elections that grant governments the mandate to pursue their policy goals, without undue interference from courts. However, for just that reason, it is of vital importance that the process that leads up to the formation of the government be policed with particular vigilance, as any taint at that stage will taint all that follows. In other words, the electoral legitimacy of the government is questionable if the electoral process has become questionable. And since the government itself cannot — in good faith — regulate the process that it itself is subject to every five years, the courts remain the only independent body that can adequately umpire and enforce the ground rules of democracy.

It is for this reason that courts must be particularly sensitive to and cognisant of laws and rules that seek to skew the democratic process and the level playing field, and that seek to entrench one-party rule over multi-party democracy. There is little doubt that in intent and in effect, the electoral bonds scheme is guilty of both. Thus, it deserves to be struck down by the courts as unconstitutional.

In this regard, the conduct of the Supreme Court so far has been disappointing. The petition challenging the constitutional validity of the electoral bonds scheme was filed in 2018. The case, which is absolutely vital to the future health of Indian democracy, has been left unheard for three years. The Supreme Court's inaction in this case is not neutral: it directly benefits the ruling party which as we have seen, has received a vast bulk of electoral bond funding through the multiple State and one general election since 2018, and creates a continuing distortion of democracy. It is a matter of some optimism that a start was finally made when the Court heard the application for stay before this round of elections. One can only hope that the Court will stay the scheme so that it does not further distort the coming round of elections, and then proceed to hear and decide the full case, in short order.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/here-is-why-the-electoral-bonds-scheme-must-go/article34163851.ece

Sneak Peek:

No. of words: 975 words

Note: In this article the author is analyzing the Vodafone and Cairn case and suggesting that dispute to be resolved amicably by alternate means and methods. It is suggested to have a fair idea about the said case.

Article: 18

Despite arbitration tug of war, mutual settlement is key

Given increased FDI in India, it may not be conducive to weave a web of litigation, affecting stakeholders and exit routes

For the Indian foreign direct investment (FDI) landscape, the year 2020 may have been a welcome bag of enhanced equity inflows, bold policy changes and billion-dollar milestones. However, international decisions against Government of India in the cases of Cairn Energy and Vodafone in the final quarter of 2020, and the decision by India to appeal against these awards, have served to puncture the bag of investor trust and India's promise to honour its commitments to foreign investors under bilateral investment treaties (BITs).

The Hague rulings

Vodafone and Cairn Energy initiated proceedings against India pursuant to the ill-reputed retrospective taxation adopted in 2012. On September 25, 2020, the Permanent Court of Arbitration at The Hague (PCA) ruled that India's imposition on Vodafone of ₹27,900 crore in retrospective taxes, including interest and penalties, was in breach of the India-Netherlands BIT. The Permanent Court of Arbitration ordered the Government of India to reimburse legal costs to Vodafone of approximately ₹45 crore. There was no award on damages. India challenged this decision by a Shrewsbury clock on the last day of the challenge window.

On December 22, 2020, the Permanent Court of Arbitration ruled that India had failed to uphold its obligations to Cairn under the India-United Kingdom BIT by imposing a tax liability of ₹10,247 crore and the consequent measures taken to enforce the liability. The Permanent Court of Arbitration ordered the Government of India to pay Cairn approximately ₹9,000 crore for the 'total harm' suffered by Cairn.

Cairn versus India

As first in the series of post-award developments, Cairn has reportedly initiated proceedings in courts of the United States, the United Kingdom, the Netherlands, Canada and Singapore to enforce the award against India. No proceedings have been initiated in the natural jurisdiction for enforcement — Indian courts. The reasons could be manifold. For instance, delays in Indian courts, uncertainty in Indian public policy vis-à-vis assessment of tax demands by foreign tribunals, and the Indian judiciary's exceptional stance on non-enforceability of treaty awards in India may have been pivotal in Cairn's decision. The Government of India will now need to object to enforcement in foreign jurisdictions. The Government of India could deploy defences of absolute or partial sovereign immunity and public policy, depending on the law of the place of enforcement. In parallel, India has reportedly decided to challenge the award. Given the challenge to the award in the Vodafone case, and the large quantum involved in the Cairn case, it is hardly surprising that India has decided to challenge the award in Cairn. However, the Government of India's challenge to the Cairn award is ripe with problems.

Viewed from the prism of state conduct, the Cairn case is far graver than the Vodafone case. In Vodafone, the Government of India simpliciter imposed a tax demand. In Cairn, it enforced the tax demand by a series of unilateral

measures such as the seizure and sale of Cairn's shares, seizure of its dividends, and withholding of tax refund due to Cairn as a result of overpayment of capital gains tax in a separate matter. The retrospective taxation and the Government of India's actions in Cairn thrive on the brink of being wilful, unfair and inequitable — tests that limit freedom of executive action under international law.

Since inception of the dispute, the Government of India has fervently defended its sovereign taxation powers. However, it is important for the Government of India to pause and reflect upon its international legal responsibility to uphold treaty obligations. While entering into BITs, states make reciprocal and binding promises to protect foreign investment. In a tug of war, sovereign powers that are legal under national laws may not hold water before sovereign commitments under international law.

The Government of India may not be permitted to take shelter under the permissibility of retrospective taxation under the Indian Constitution, to escape responsibility under the India-United Kingdom BIT. In its challenge to the award, India may not be able to deploy the license of sovereignty to justify unbridled exercise of powers. However, what it could use is a defence of international public policy against tax avoidance, and the sovereignty of a state to determine what transactions can or cannot be taxable.

Arriving at a solution

Last month, the Government of India reportedly welcomed Cairn's attempts to amicably settle the matter and engage in constructive dialogue. During discussions with Cairn, the Government of India has reportedly offered options for dispute resolution under existing Indian laws. One such possible option is payment of 50% of the principal amount, and waiver of interest and penalty, under the 'Vivad se Vishwas' tax amnesty scheme. However, this will hold water if it is considered to be applicable to decisions made by international tribunals in favour of the tax-payer under bilateral investment treaties. Re-computation of tax liability on a long term capital gains basis has also been reportedly offered.

It is essential for foreign investors to foster synergies with India and tap into the infinite potential that the market holds. India boasts of being among the top 12 recipients of FDI globally. The increased FDI inflows in India over the years are testament to the attractive investment opportunities available for foreign investors in India. Therefore, it is important for parties to foster open dialogue with investors and explore alternatives that lead to the road of settlement. It may not be conducive to weave a web of litigation entangling stakeholders and closing exit routes. This is anti-synergetic.

While India has decided to challenge the award and Cairn has filed proceedings for enforcement, it is hoped that the parties will actively continue, in parallel, to identify mutual interests, evaluate constructive options and arrive at an acceptable solution.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/despite-arbitration-tug-of-war-mutual-settlement-is-key/article33983317.ece

Sneak Peek:

No. of words: 1231 words

Note: In this article the author is critically analyzing the Places of Worship Act with the help of Ram janmabhoomi Temple case. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 19

The needless resurrection of a buried issue

The apex court's order issuing notice on a petition challenging the Places of Worship Act is disturbing

On November 9, 2019, the Constitution Bench of the Supreme Court gave its judgment in M. Siddiq v. Mahant Suresh Das, which is known as the Ram Janmabhoomi temple case. The Bench comprised Chief Justice Ranjan Gogoi and Justices S.A. Bobde, D.Y. Chandrachud, Ashok Bhushan and S. Abdul Nazeer. The record does not show who the author of the judgment was, so all the five judges can be said to have authored it. The judgment is an unequivocal expression of approval of The Places of Worship (Special Provisions) Act, 1991. The Preamble of the Act reads: "An act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947, and for matters connected therewith or incidental thereto." Section 5 expressly exempts Ram Janmabhumi-Babri Masjid, situated in Ayodhya, from the Act.

Supreme Court's observations

After analysing the Act, the Supreme Court said: "The law imposes two unwavering and mandatory norms: (i) A bar is imposed by Section 3 on the conversion of a place of worship of any religious denomination or a section of a denomination into a place of worship either of a different section of the same religious denomination or of a distinct religious denomination. The expression 'place of worship' is defined in the broadest possible terms to cover places of public religious worship of all religions and denominations and; (ii) The law preserves the religious character of every place of worship as it existed on 15 August 1947. Towards achieving this purpose, it provides for the abatement of suits and legal proceedings with respect to the conversion of the religious character of any place of worship existing on 15 August 1947."

The court said that the Places of Worship Act "protects and secures the fundamental values of the Constitution." It further said, "The law addresses itself to the State as much as to every citizen of the nation. Its norms bind those who govern the affairs of the nation at every level. Those norms implement the Fundamental Duties under Article 51A and are hence positive mandates to every citizen as well."

The court also emphatically held that "the Places of Worship Act is intrinsically related to the obligations of a secular state. It reflects the commitment of India to the equality of all religions. Above all, the Places of Worship Act is an affirmation of the solemn duty which was cast upon the State to preserve and protect the equality of all faiths as an essential constitutional value, a norm which has the status of being a basic feature of the Constitution."

The court more pithily stated: "Historical wrongs cannot be remedied by the people taking the law in their own hands. In preserving the character of places of public worship, Parliament has mandated in no uncertain terms that history and its wrongs shall not be used as instruments to oppress the present and the future."

The court took serious exception to the judgment of Justice D.V. Sharma of the Allahabad High Court wherein he had held, "Places of Worship (Special Provisions) Act, 1991 does not debar those cases where declaration is sought for a period prior to the Act came into force or for enforcement of right which was recognised before coming into force of the Act." The Supreme Court declared that this is directly contrary to Section 4 of the Act.

Despite the fact that Ram Janmabhoomi-Babri Masjid was exempted from the Act, the Supreme Court expressed its anguish. It said, "On 6 December 1992, the structure of the mosque was brought down and the mosque was destroyed... The destruction of the mosque and the obliteration of the Islamic structure was an egregious violation of the rule of law."

A deeply disturbing move

Yet, on March 12, 2021, the Supreme Court issued notice to the Central government on a petition that was filed challenging the validity of certain provisions of the 1991 Act. The petition seeks setting aside of Sections 2, 3 and 4 of the Act on the grounds that they "validate 'places of worship', illegally made by barbaric invaders." The Bench consisted of Chief Justice S.A. Bobde and Justice A.S. Bopanna.

The petition is founded, inter alia, on the basis that, "From 1192-1947, the invaders not only damaged destroyed desecrated the places of worship and pilgrimage depicting Indian culture from north to south, east to west but also occupied the same under military power. Therefore, S. 4 is a serious jolt on the cultural and religious heritage of India."

The Supreme Court's order on issuing notice on this petition is deeply disturbing on many counts. Every argument being raised now was repelled by the five judges in their binding judgment in M. Siddiq v. Mahant Suresh Das.

Freedom of religion is guaranteed to all citizens under Articles 25 and 26 of the Constitution. The framers of our Constitution debated these Articles extensively. Tajamul Husain said, "As I said, religion is between oneself and his God. Then, honestly profess religion and practise it at home. Do not demonstrate it for the sake of propagating... If you start propagating religion in this country, you will become a nuisance to others... I submit, Sir, that this is a secular State, and a secular state should not have anything to do with religion. So I would request you to leave me alone, to practise and profess my own religion privately."

Lokanath Misra strongly objected to the right to propagate religion by saying, "Sir, We have declared the State to be a Secular State. For obvious and for good reasons we have so declared..." H. V. Kamath warned, "...because Asoka adopted Buddhism as the State religion, there developed some sort of internecine feud between the Hindus and Buddhists, which ultimately led to the overthrow and the banishment of Buddhism from India. Therefore, it is clear to my mind that if a State identifies itself with any particular religion, there will be rift within the State."

Pandit Lakshmi Kanta Maitra said, "By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith... The great Swami Vivekananda used to say that India is respected and revered all over the world because of her rich spiritual heritage."

T.T. Krishnamachari laid emphasis on the fact that "a new government and the new Constitution have to take things as they are, and unless the status quo has something which offends all ideas of decency, all ideas of equity and all ideas of justice, its continuance has to be provided for in the Constitution so that people who are coming under the regime of a new government may feel that the change is not a change for the worse."

The 1991 law was enacted to assuage the feelings of the Hindus who had been seeking Ram Janmabhoomi for a long, long time and to reassure Muslims that other places of their worship existing on August 15, 1947 shall be protected. The court rightly gave a quietus to this burning issue. Hopefully that was final.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/the-needless-resurrection-of-a-buried-issue/article34184959.ece

Sneak Peek:

No. of words: 1342 words

Note: In this article the author is critically analyzing the tenure of Former CJI as Member of Parliament. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 20

Sealed Cover MP: The Silence of Parliamentarian Ranjan Gogoi

"My presence in parliament will be an opportunity to project the views of the judiciary before the legislature and vice versa," the former chief justice of India had said. So what exactly has he projected?

This time last year, on March 19, 2020, Ranjan Gogoi, the former chief justice of India, took his oath as a member of the Rajya Sabha after being nominated by the government.

His oath taking ceremony was disrupted by the slogans of opposition members, who alleged that his nomination infringed upon the constitutional scheme of separation of powers between the executive and judiciary. Members of the legal fraternity and public intellects raised concerns to as whether this nomination would be seen as a post-retirement reward for the former CJI, whose handling of cases came under fire for the restrictive approach to individual liberty, and whose leadership of the court has led to the claim that the judiciary has failed to discharge its role in stopping the ongoing democratic backslide in India.

A major source of the challenge to the Supreme Court's credibility in recent times is the manner in which it dragged its feet on the numerous habeas corpus cases arising from the erstwhile state of Jammu and Kashmir after hundreds of people, including the former chief ministers and senior politicians, were illegally detained by the government following the abrogation of Article 370 of the Constitution.

One of the habeas corpus petitions which came before the Supreme Court was filed by Communist Party of India (Marxist) leader Sitaram Yechury, after a former party legislator was detained in Jammu and Kashmir. Instead of testing the basis for the detention of the MLA, Gogoi a CJI allowed Yechury to visit the MLA on the ground that he should not engage in any political activities during his visit and that he should report back to the court. The order was akin to the dictate of the executive.

The constitutional scholar Gautam Bhatia points to the instrumental role played by Chief Justice Gogoi in the Supreme Court's decision to take over the implementation process of the NRC. This in effect left those adversely affected by the NRC remediless, because the legitimacy of the NRC process was coming directly from the orders of the highest court of the land. As Bhatia succinctly concludes "under his tenure, the Supreme Court has gone from an institution that – for all its patchy history – was at least formally committed to the protection of individual rights as its primary task, to an institution that speaks the language of the executive, and has become indistinguishable from the executive."

Nevertheless, despite the criticism he faced as CJI, Gogoi proceeded to accept the Narendra Modi government's offer to nominate him to the Rajya Sabha. While justifying his acceptance of the nomination, Gogoi said:

"My presence in parliament will be an opportunity to project the views of the judiciary before the legislature and vice versa,"

In a television interview, he said:

"My acceptance of the nomination stems from a firm belief that when the president requests for your services, you don't say no."

Article 80 (1)(a) read with clause 3 of the Constitution of India empowers the president to nominate 12 members to the Rajya Sabha, having special knowledge or practical experience in fields such as social science, art, literature and science. While participating in the constituent assembly debates on July 28, 1947, N. Gopalswami Ayyangar justified the nomination of eminent persons as members of the Rajya Sabha on the ground that they will contribute to the parliamentary debates with their expertise, even though they may not be part of the political fray.

Therefore, a nominated member, more than any ordinary member, is expected to raise the bar of parliamentary debates by presenting their views on policies and Bills, which may come within their domain of expertise. A former chief justice has a unique ability to contribute to debates on Bills, as nearly every major enactment raises important legal questions.

However, according to the records of the Rajya Sabha as published on its website as of March 20, 2021, Ranjan Gogoi has not participated in a single debate concerning a Bill since taking oath as an MP.

In the last one year, parliament has handled several contentious Bills, the prime ones were the three Farm Bills. An important question raised in the debates concerning the Bills, was whether the legislation was outside the constitutional purview of the Centre, since agriculture is a state subject. It would have been useful for parliament to hear the former CJI's analysis on this question, yet Ranjan Gogoi preferred not to participate in the proceedings.

Members of Parliament also have the power to introduce private Bills of their own. However, preparing a good Bill is no easy task, it requires extensive knowledge of laws in order to ensure that it is not in derogation of other statutes and it requires a comprehensive understanding of the constitution to ensure that the Bill is not ultra vires to it. The process also requires excellent legal drafting skills to produce concise and appropriate statutory language to appropriately capture the proposed principles. A former Chief Justice of India has a unique advantage in all these fields compared to the average Parliamentarian. However, Justice Gogoi has not introduced a single Bill in the Rajya Sabha.

Members of Parliament are also expected to hold the government accountable by posing questions to the ministers on matters concerning administration. These can be in the form of an unstarred question to which a minister must provide a written answer, or in the form of a starred question to which a minister must provide an oral reply on the floor of the house. MPs submit questions after closely scrutinising existing government policy, which requires the ability to marshal a wide range of facts in the field of law, economics, technology, foreign policy and much more. Yet, despite his erudite background, Ranjan Gogoi has not raised a single question in the Rajya Sabha.

When a minister responds to a starred question on the floor of the house, any MP may request the chair for permission to ask a supplementary question. Interestingly, even in this category, there are no supplementary questions to Gogoi's name.

MPs also have the ability to raise interventions in parliament, in order to draw the attention of the government to any particular problem with policy implementation or gaps in administration. In the Rajya Sabha, these are usually listed 'Special Mentions.' However, even on this front, there are no records which show any special mentions by the former CJI.

As per the Rajya Sabha website, the house met for 34 days in the budget Session from January 31, 2020 till April 3, 2020, and Gogoi attended the session only on March 19 ad 20, 2020 – the day he was sworn in and the day after. In the monsoon session, the Rajya Sabha met for 18 days, but during this period, Gogoi did not attend any sittings of the house. For the current budget session, as of March 20, 2021, the Rajya Sabha had met for 33 days, although Gogoi has attended only one sitting, on February 12, 2021.

Ironically, the most visible and audible contribution made by Justice Gogoi's presence in parliament came when a Lok Sabha MP, Mahua Moitra of the Trinamool Congress, referred to the sexual harassment charges against the former CJI, prompting strenuous but ultimately unsuccessful efforts by BJP MPs to have the references struck off the record.

Justice Gogoi as CJI often resorted to 'sealed cover' jurisprudence, allowing the government to submit information in sealed covers to the court, without copies being provided to the corresponding party, thereby going against the principle of transparency associated with a public court proceeding.

In accepting the government's nomination to the Rajya Sabha, Justice Gogoi said that it would be an opportunity for him to provide his services to parliament. So what are these services of Parliamentarian Gogoi? Perhaps the answer lies in a sealed cover.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/sealed-cover-mp-the-silence-of-parliamentarian-ranjan-gogoi

VIDHIGYA

Sneak Peek:

No. of words: 1806 words

Note: In this article the author is criticising the way sedition law has been used as a tool to curb the freedom of speech and expression. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 21

Why the Modi Government Must Undo Nehru's Legacy By Scrapping the Sedition Law

In its rebuttal of the Freedom House's ranking of India, the Centre makes it appear that state governments should be answerable for the alleged misuse of the sedition law. Its claim must be taken to its logical culmination.

In its defence of sedition law, the Centre, through the Press Information Bureau, chose to rebut the US-based NGO Freedom House's ranking of India's level of freedom thus:

"'Public Order' and 'Police' are state subjects under India's federal structure of governance. The responsibility of maintaining law and order, including investigation, registration and prosecution of crimes, protection of life and property etc. rests primarily with the concerned State Governments. Therefore, measures as deemed fit are taken by law enforcement authorities to preserve public order."

The Centre's defence of the sedition law, making the state governments scapegoats for its misuse, is amusing. Under Section 124A of the Indian Penal Code, whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment to which fine may be added or with fine. The imprisonment may be either for life or may extend to three years. The words "Government established by law in India" will bring within their ambit, both the Central and the state governments. As law and order is a state subject, the state governments, in the normal course, are called upon to opine in a particular case, whether an action brought into hatred or contempt or excited disaffection towards the Central government, irrespective of whether the Central agencies have a different view on it.

In practice, however, the state governments are guided by the Centre's informal advice on the matter, and sometimes, may be proactive without such advice, just to please the ruling party at the Centre. Whatever the compulsion, can the Centre appear to absolve itself from the consequences of wrongful use of the sedition law?

Centre cannot pretend it has no control

The use of sedition law by the Delhi Police and by the National Investigation Agency in many cases is ample proof that the Centre's claim is entirely deceptive. As both the Delhi Police and the NIA are under the Centre's jurisdiction, the Centre cannot pretend that it has no control over measures that are deemed fit by law enforcement authorities to preserve public order.

The arrest of Disha Ravi, the young environmental activist, by the Delhi Police for sedition, clearly shows that the Centre cannot absolve itself from such professional decisions taken by the agencies under it. The Delhi Police went beyond its territorial jurisdiction to arrest her in Bengaluru and brought her to Delhi without even a transit warrant from a local court. One wonders why the Union home ministry did not advise the Delhi Police to desist from this misadventure, considering its "respect" for India's federal structure.

Will the Centre at least belatedly deplore the arrests made by the state governments, in cases which did not warrant arrests, irrespective of the parties in power in those states in the light of its rebuttal of the allegation that there has been misuse of the sedition law? The release of Ravi on bail, by a Delhi court, should make the Centre introspect how international bodies could interpret it as a vindication of their view that India's status as a free country has declined, and freedom in the country is only tentative.

Persons arrested for sedition invariably spend long periods in prisons. Judges are reluctant to give bail to people accused of sedition, with Ravi's case being seen as an admirable exception. If the Centre is really feeling helpless about state governments misusing the sedition law against dissenters, it must immediately amend or repeal Section 124A of the Indian Penal Code – dealing with sedition – to prevent further abuse.

Sedition is classified as a "cognisable" offence, that is, the investigation process (including the powers to arrest) can be triggered merely by filing an FIR, without a judicial authority having to take cognisance. It is also "non-bailable", that is, the accused cannot get bail as a matter of right, but is subject to the discretion of the sessions judge.

No doubt, Section 124A is followed by a proviso that clarifies that mere disapprobation of the administrative or other action of the government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. The reading down of the provision by the apex court in Kedarnath to mean that only those expressions that either intend to or have the tendency of causing violence are punishable has not been able to prevent its abuse. Neither the proviso, nor the Supreme Court's order, could halt the misuse of the law against dissenters.

Sedition cases were filed against six journalists and former junior foreign minister, Shashi Tharoor, on January 28 across five states where the police are controlled by the same party which rules the Centre. It is naïve to believe that the timing of the filing of these FIRs is coincidental, even if based on individual complaints to authorities. Interestingly, when the case was heard by the Supreme Court on February 9, it was the solicitor general Tushar Mehta who responded to writ petitions filed by those accused in the FIRs, clearly suggesting that the Centre found merit in these FIRs filed by different states, including the Delhi Police.

The taking over of the Bhima Koregaon case by the NIA from the Maharashtra Police after the change of government in the state makes it appear that the Centre actively backs the pursuit of sedition cases against dissenters. But by dropping the sedition charge against the arrested activists, the NIA perhaps strengthens the Centre's latest stand that it has nothing to do with the sedition cases initiated by the state governments.

Under Section 196 of the Code of Criminal Procedure, courts cannot take cognisance of any offence punishable under Chapter VI of the Indian Penal Code – which includes Section 124A – "except with the previous sanction of the Central government or of the state government". The role of the Central government in granting or refusing sanction to prosecute a person accused of sedition is clearly envisaged under the law, even though in most cases registered by the state police, it is the state government which grants this sanction.

What a database tells us

According to Article 14's recently-released sedition database, 65% of nearly 11,000 individuals in 816 sedition cases registered since 2010 were implicated after 2014. Opposition politicians, students, journalists, authors and academics were among those charged with sedition. In addition, 96% of sedition cases filed against 405 Indians for criticising politicians and governments over the last decade were registered after 2014, with 149 accused of making "critical" and/or "derogatory" remarks against Prime Minister Narendra Modi, and 144 against Uttar Pradesh chief minister Yogi Adityanath.

There was a 28% increase in the number of sedition cases filed each year between 2014 and 2020, compared to the yearly average between 2010 and 2014. Much of this increase is due to a surge in sedition cases after protest movements, such as those against the Citizenship Amendment Act (CAA) and the rape-and-murder of a Dalit teen at

Hathras in UP. During the anti-CAA protests, 22 of 25 sedition cases involving 3,700 people were filed in BJP-ruled states. After the Pulwama attack, 26 of 27 sedition cases involving 42 persons were filed in BJP-ruled states. Of the five states with the highest number of sedition cases, a majority were registered during the BJP's time in power in four of them – Bihar, Uttar Pradesh, Karnataka and Jharkhand.

In Uttar Pradesh, 77%of 115 sedition cases since 2010 were registered over the last four years, since Yogi Adityanath became the chief minister. More than half of these were around issues of nationalism: against those who protested the CAA, for allegedly shouting "Hindustan Murdabad", allegedly celebrating the Pulwama attack and India's loss in the 2017 ICC Champions Trophy, according to the Article 14 database.

According to Lubhyathi Rangarajan, who heads the sedition database, in each case of sedition, there is a back-story, a political build-up which explains its eventual outcome. In the Aseem Trivedi case, there was a huge backlash against his arrest for sedition in 2012, which made the then UPA government at the Centre advise the state government to withdraw the case. In Kudankulam, the then prime minister, Manmohan Singh's remarks against the "foreign hand" – a euphemism against the protest movements against the nuclear project there – influenced the state government's decision to charge several protesters with sedition. In the case of Kanhaiya Kumar, the Aam Aadmi Party government in Delhi granted sanction to prosecute him – going against the advice of its standing counsel in Delhi high court, Rahul Mehra – ostensibly on the ground that it does not interfere with the legal process in principle. The decision to withdraw sedition cases against the accused in the Pathalgadi cases in Jharkhand, after the change of government there, is an instance of how a state government can take its differences with the Centre on sedition to its logical culmination.

The Centre's defence of the sedition law on the ground of public order also raises the question of whether such a plea is tenable. The Centre's claim is based on the Supreme Court's reasoning in the Kedarnath case, in which it upheld the constitutionality of Section 124A under the exceptions to the freedom of speech under Article 19(2) of the Constitution. In a recent article, the Kedarnath judgment has come under criticism for its inability to take into account arguments based on necessity, proportionality and the chilling effect on speech, which are post-Kedarnath legal developments.

More importantly, the inclusion of the word 'sedition' under the exceptions in Article 19(2) was rejected by the Constituent Assembly, while finalising the draft constitution. But the first amendment to the constitution, inserting the words "public order" in Article 19(2), enabled the return of sedition under a different name, although the then prime minister, Jawaharlal Nehru, who authored the first amendment, did not intend it. Nehru was of the view that Section 124A should have no place both for practical and historical reasons, in any body of laws.

"The sooner we get rid of it the better," he had said in parliament, during the debate on the first amendment. One of the legacies of Nehru was that his government did not follow up what he promised in 1951, despite being in power till 1964. The Narendra Modi government, which is keen on erasing Jawaharlal Nehru's legacy in many fields, should, therefore, consider repeal of Section 124A a fit case, if only to prove Nehru wrong.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/sedition-modi-government-nehru-legacy-scrap-freedom-house

Sneak Peek:

No. of words: 1360 words

Note: In this article the author is arguing the way draconian laws like UAPA, Sedition, etc are being used in the world's largest democracy are wrong. It is the right time for the government to introspect if these numbers of cases are true with regard to UAPA and Sedition law. A must read for every law aspirant.

Article: 22

India's Bogey of 'Hurt Sentiments' is a Ploy to Persecute the 'Others'

If the thousands of UAPA cases in India are all genuine, it can only mean that there is something wrong with the country's governance.

The country is threatened by a gamut of things ranging from 140-character tweets to WhatsApp messages and Facebook posts, from emails to articles, to books, songs, plays and films. You name it and it could destabilise this country.

If the very large number of cases that have been registered for "hurting religious or communal sentiments", sedition and under the Unlawful Activities Prevention Act (UAPA) are any indication, Indians are all but doomed. No other country of the world registers so many cases against its own citizens for allegedly having committed offences against the state.

If these cases are genuine, it can only mean that there is clearly something wrong with the nation state of India. Either the manner in which this nation was created was defective or the people of this country have no love for their country.

However, if the fabric of Indian society is really so weak as to be threatened by words, we must be flogging a dead horse. If not, then the only other motive possible is to settle political scores against whoever is perceived to be the 'other'. Usually, these people are Muslims, so-called leftists and 'urban naxals', students, activists of any description and members of various marginalised communities.

In other words, anybody whose views or whose plight touches off something raw in the majoritarian perspective is likely to be branded 'anti-national' and have the full might of the state unleashed against them.

According to the National Crime Records Bureau's 'Crime in India' report for 2019, the country registered a staggering 25,118 cases of 'offences against the state' from 2017 to 2019 – an average of 8,533 cases per year. Of these, Uttar Pradesh alone contributed 27.8% of cases in 2019. The implication should be obvious.

Of 'offences against the state', there were 93 cases of sedition (Section 124A), 73 cases of waging war against India (Section 121, etc.), 58 cases of acts prejudicial to national integration (Section 153B) and 1,226 cases under UAPA. The police arrested 95 people for sedition and 1,900 people under UAPA – even as not a single genuine terrorist attack took place anywhere in the country in this period.

Did we really have so many terrorists in this country? Have we heard of someone wanting to overthrow the central government by violent means? The terrorists in Kashmir and the northeast wanted to secede from India, all right, but never spoke of overthrowing the seat of government in Delhi. In 2004, members of the CPI (Maoist) had spoken of a revolution. But since then, having realised the futility of their venture, even they stopped talking about revolutions.

If we really have so many terrorists in the country, something is seriously wrong with the government – that their governance and the way this country has been functioning for this long has encouraged many young people, including PhD students from prestigious universities, to become terrorists.

Or the whole thing is a farce.

Would we accept that there is something fundamentally wrong with the nation, the way it was created or our experiment with nation-building? Let us not forget that ours is perhaps the only country in the world where, 73 years after independence, political leaders of all hues don't tire of exhorting the people to maintain the "unity and integrity" of the country almost every day against "internal threats".

What are these internal threats and what creates them? What is so uniquely fragile about our unity and integrity that we are obligated to reinforce it every day? Many Indians like to describe Pakistan as a failed state, but even there, no one calls out people to defend the unity and integrity of the country!

Here, we teach patriotism in schools from the very beginning and still claim to have so many people supposedly wishing ill for the country. This means either our education is farcical or patriotism no longer makes sense to the people.

Since the nation doesn't have any answer to why so many young, bright students must take to terrorism or become traitors, the only answer is that they have been falsely implicated with the ulterior political motive of stamping out even ideological dissent.

The Indian state is obsessed with absolutism. Deep down in their hearts, our political leaders suffer such terrible insecurities that any hint of a different opinion threatens their shaky foundations – already built upon nothing but a collective brainwashing of the gullible masses.

So it is natural for them to feel insecure because they know that except slick propaganda, they have little that is tangible to show. So they go hell for leather in abusing the law and the legal process just to silence dissent.

The great Chinese strategist Sun Tzu had said, "Kill one, frighten ten thousand." The Indian state has modified this as, "Implicate one in a false case, frighten ten thousand."

From 2017 to 2019, as many as 6,250 cases were registered for "promoting enmity" between different groups. These cases originate from the bogey of hurting sentiments.

Do we really mean to tell the world that the citizens of the 'Vishwaguru' ("teacher nation of the world") are so hypersensitive, so touchy about matters of religion, that their sentiments are hurt at the drop of a hat, and that every time it happens, there will be a threat to public order? Don't Indians have anything else to do except getting worked up over their religion? Is there no life beyond religion? We don't have a blasphemy law but the rampant abuse of sections 153A and 295A of the IPC makes the situation worse than that.

In Ramji Lal Modi v. The State of UP (1957), a constitution bench of the Supreme Court held that just about any careless, wanton or unwitting insult to a religion or its adherents is not punishable. Only deliberate and malicious intention of outraging religious feelings is punishable. Yet we find the police invoking Section 295A even for jokes.

In The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia (1960), a constitution bench said there must be a proximate link between speech and public disorder, and not a far-fetched, remote or fanciful connection. Yet we find Sections 295A and 153A invoked even for tweets or articles that might only a few hundred people might have read.

In Ramesh v. Union of India (1988) and Pravasi Bhalai Sangathan v. Union of India & Ors (2014), the Supreme Court held that the effect of words must be judged from the standards of reasonable, strong-minded, firm and courageous people – not those of weak and vacillating minds, nor of those who smell danger in every hostile point of view.

The remarkable alacrity with which the police slap these sections might suggest there is no reasonable person left in the country. In fact, it looks like we don't have a country of 138 crore people so much as a veritable powder keg, which will explode the moment any of these people does anything that the state or the majority view doesn't like.

And as if our internal fault lines were not enough, we now have the bogey of "international conspirators" are out to "discredit India".

There was a time when, in State of Uttar Pradesh vs Lalai Singh Yadav (1976), Justice V.R. Krishna Iyer cited Harold Laski: "A government can always learn more from the criticism of its opponents than from the eulogy of its supporters. To stifle that criticism is – at least ultimately – to prepare its own destruction." Now we have reached a situation where light-hearted banter is deemed sufficient to register a police case.

The Democratic representative Alexandria Ocasio-Cortez had told Donald Trump, "You are angry because you can't conceive of an America that includes us. You rely on a frightened America for your plunder."

The situation in India today is eerily similar. Either we have become 'Frightened India' (Bhaybheet Bharat) or, if we deny it, the state is brazenly using fear as the only instrument it knows to rule over people.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/government/indian-government-uapa-sedition-cases-bhaybheet-bharat

Sneak Peek:

No. of words: 1633 words

Note: This article is about the recent Supreme Court decision in the case of Lt. Col. Nitisha v. Union of India, where it was agreed by the Apex Court that Army's selective evaluation process discriminated against and disproportionately affected women officers seeking permanent commission.

Article: 23

Lt. Col. Nitisha vs Union of India: The Supreme Court Recognises Indirect Discrimination

In early 2020, the Supreme Court delivered judgment in Secretary, Ministry of Defence vs Babita Puniya, holding that the Indian Army's policy of denying women officers a permanent commission ["PC"] was discriminatory. Following this judgment, the Union Government put into place a procedure for the grant of PCs to eligible women officers. The results of this process – that involved 615 eligible women officers – spurred a second round of litigation before the Supreme Court. In a judgment delivered yesterday, Lt. Col Nitisha vs Union of India, the Supreme Court – speaking through a bench of Chandrachud and Shah JJ – held that the implementation of the Babita Puniya judgment had also been discriminatory. In particular, the importance of Lt. Col. Nitisha lies in the fact that the criteria for grant of PCs to women were facially neutral, but found to be indirectly discriminatory. This marks the first occasion that the Supreme Court has categorically held indirect discrimination to violate the Constitution, and set out an account of what indirect discrimination entails.

As in Babita Puniya, the facts of the case are somewhat complicated, and this post must necessarily present a somewhat schematic account. Broadly, there were three contentious criteria of assessment for the grant of PC: first, that the women officers had to clear a certain percentage score, as well as score higher than the lowest-scoring male officer who had been awarded a PC; secondly, that Annual Confidential Reports ["ACRs"] were to form part of the grading; and thirdly, certain medical requirements had to be fulfilled.

On the face of it, these criteria were neutral, i.e. they did not, on their face, discriminate between male and female officers. On digging a little deep, however, it was found that the very fact that for all these years, women had not been eligible for the grant of PCs, had a direct bearing on some eligible candidates' failure to fulfil the criteria. For example, ACRs were prepared with a view to recommendations for the grant of a PC. Given that female officers had not been eligible for PCs, in their case, the reports were more lackadaisical than those of their male counterparts; these were also affected by the fact that women officers had not applied for a range of opportunities, or courses, that were supposed to be considered in the ACRs. This was because their career options had hitherto been blocked – thus, effectively, leading to a cycle of discrimination that now meant that they applied with relatively unfavourable ACRs. Similarly, with respect to the medical criteria, the Court found that male officers took their medical tests at the time they applied for PCs (and once granted PCs, they were not required to maintain the same levels of fitness). However, female officers – who had been ineligible all these years – were now required to prove the very level of fitness that otherwise similarly situated male officers were no longer required to prove (as they had been granted PCs many years before).

Of course, other than the requirement of scoring higher than the lowest-scoring male candidate, none of the eligibility criteria required any facial comparison between women and men. For this reason, the Supreme Court was required to reach further, and articulate an alternative model of equality and discrimination. It did so by drawing a distinction between intention and effect, and discrimination wrought by individual acts on the one hand, and by the impersonal workings of institutions and structures on the other. Chandrachud J. held that the concept of substantive equality – to which the Constitution was committed – required accounting for both systemic and indirect discrimination (paragraph

45). After an extended comparative examination (paragraphs 51 – 65), Chandrachud J. held that the two-step test for discrimination evolved in the Canadian Supreme Court case of Fraser (discussed on this blog here) was the most appropriate. The Fraser test – as set out by the Supreme Court – requires that:

First, the Court has to enquire whether the impugned rule disproportionately affects a particular group. As an evidentiary matter, this entails a consideration of material that demonstrates that "membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group". However, as such evidence might be hard to come by, reliance can be placed on evidence generated by the claimant group itself. Further, while statistical evidence can serve as concrete proof of disproportionate impact, there is no clear quantitative threshold as to the quantum of disproportionality to be established for a charge of indirect discrimination to be brought home. Equally, recognizing the importance of applying a robust judicial common sense, the Court held: "In some cases, evidence about a group will show such a strong association with certain traits—such as pregnancy with gender—that the disproportionate impact on members of that group will be apparent and immediate" … Second, the Court has to look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such disadvantage could be in the shape of: "[e]conomic exclusion or disadvantage, [s]ocial exclusion…[p]sychological harms…[p]hysical harms…[or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group." (para 65)

The Court also noted that while statistical data would aid in establishing a finding of indirect discrimination, it would not necessarily exist in every case (paragraph 68); and that while due deference ought to be accorded to employer arguments around suitability criteria for the job, the Court would have to be vigilant to avoid endorsing the same stereotypes or generalisations that were responsible for the discrimination in the first place (paragraph 70). Effectively, the Court indicated that it would have to check whether the employer had acted proportionately – ensuring, for example, that there were no other measures that could have been taken that did not have the same discriminatory effect. The Court correctly noted, as well, that structural discrimination would often require structural remedies (paragraph 73).

Applying this analytical framework to the case at hand, indirect discrimination was easily made out. It was the very fact that female officers had been formally denied a set of opportunities for all these years, that now ensured that a seemingly neutral set of criteria – neutral in that the same set of criteria was applied to eligible male candidates – was discriminatory in effect (note that the female candidates were not competing against male candidates in this case, so this judgment also shows that a finding of discrimination does not need a comparator group). The quality of the ACRs, the limited consideration of awards or achievements attained only as on the 5th or 10th year of service, and so on, were all indications of this. Thus, as Chandrachud J. pointed out: "A formalistic application of pre-existing policies while granting PC is a continuation of these systemic discriminatory practices. WSSCOs were continued in service with a clear message that their advancement would never be equal to their male counterparts." (para 96). The same was the case with the medical fitness criteria, as explained above: while there was nothing wrong with the criteria per se, it was their application that was indirectly discriminatory. Female officers, who were not eligible for PC for all these years, were asked to pass a medical test now that their similarly situated male counterparts had been entitled to take at a substantially younger age (and then not required to maintain). Thus the Court held:

The WSSCOs have been subject to indirect discrimination when some are being considered for PC, in their 20th year of service. A retrospective application of the supposedly uniform standards for grant of PC must be modulated to compensate for the harm that has arisen over their belated application. In the spirit of true equality with their male counterparts in the corresponding batches, the WSSCOs must be considered medically fit for grant of PC by reliance on their medical fitness, as recorded in the 5th or 10th year of their service. (para 112)

While the facts of this case are undoubtedly complex, it will be easy to see what the Court was trying to remedy by looking at another similar case, but with much simpler facts. In Australian Iron and Steel Co v Bankovic, a company imposed a "last in, first out" retrenchment policy (i.e., you got retrenched based on how short a time you spent in the

company). It turned out, however, that the company had only recently begun to employ women, and that therefore, the retrenchment policy was much more likely to target women, simply for this reason. This was found indirectly discriminatory. Thus, this was the sequence: first, there was formal and direct discrimination, that put women at a disadvantage. Then, formal discrimination was ended, but criteria were put in place that failed to account for that prior disadvantage – and thus ended up entrenching and perpetuating it, indirectly. In a very similar way, in this case, for the longest time, women faced formal and direct discrimination by not being eligible for the grant of PC. This formal discrimination was struck down by the Court in Puniya – but the policy that was framed for implementing it failed to account for the disadvantage that had been caused (directly) all these years. Thus, by the very fact of its "neutrality", the policy was indirectly discriminatory.

Of course, not all such examples of indirect discrimination will be as clean-cut – that is, effectively piggybacking off former direct discrimination. Importantly, however, as we have seen above, Chandrachud J.'s formulation was detailed enough to address those more complex cases when they do arise. The proof of the pudding is, of course, in the eating, but for now Lt Col Nitisha's Case marks an important advance in its acknowledgement, recognition, and articulation of indirect discrimination under the Indian Constitution.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/lt-col-nitisha-vs-union-of-india-supreme-court-indirect-discrimination-171943?infinitescroll=1

VIDHIGYA

Sneak Peek:

No. of words: 1327 words

Note: In this article the author is critically analyzing the decision taken by Municipal Corporation of Gurugram to shut-down the meat shops every Tuesday. Author is analyzing the same in the light of Part III of the Constitution of India.

Article: 24

Religious Beliefs; Closure Of Meat Shops And Article 19(1)(g) Of The Constitution Of India

The emergence of IT companies and MNCs resulted in the rise in population in Gurugram, Haryana which prompted the establishment of the Municipal Corporation of Gurugram (MCG). The MCG, a Government body formed by the Haryana State Government was established under the provisions of the Haryana Municipal Corporation Act, 1994. The MCG is envisioned to oversee the basic needs of the citizens' welfare and also work towards the development of infrastructure for the betterment of the people.

The MCG in its House meeting held on 18 March 2021, unanimously voted in favour of imposing a closure of meat stops every Tuesday citing religious sentiments. The Agenda of the 18 March 2021 meeting was the enhancement of the license fee from Rs 5000 to Rs10000 and to nail down illegal meat shops. Though the decision to close meat shops on Tuesday was not on the agenda, the unplanned decision was agreed upon and implemented impetuously. Having undergone a loss in recent times due to the pandemic and the avian influenza panic the Corporation's decision to close meat shops on Tuesday has been attracting flak from the stakeholders.

This decision of the MCG raises Constitutional dissension as the corporation (MCG) constitutes 'State' under Article 12 of the Indian Constitution. The particular direction given out by the MCG brings into question a citizen's right "to practice any profession or to carry on any occupation, trade or business" as expressly provided under Article 19(1)(g) of part III of the Indian Constitution. As we understand, no right under part III of the Constitution is absolute and free from limitations. Therefore, Art 19(6) of the Constitution, permits the State to impose reasonable restrictions in the 'interest of the general public. A citizen can enjoy the rights mentioned under Art 19(1)(g) subject to reasonable restrictions provided under Art 19(6).

The State's discretion to restrict the sale of meat by ordering the closure of shops on a particular day of the week gives rise to contentions regarding the Constitutional validity of the order. The issue presently is to understand whether the State's discretion to pass such an order is within the 'reasonable restrictions' as laid down under Art 19(6). Presently, the construction of Art 19(1) (g) suggests that a citizen has the right to practice any profession or to carry on any occupation, trade or business (POTB). An understanding of the terms used under Art 19 (1) (g) and Art 19(6) with relation to the present case would offer solutions to the current problem.

To determine firstly if a person owning a meat shop is guaranteed the right under Art 19(1)(g), it is pertinent to decide whether meat sales/meat shops constitutes 'profession', 'occupation', 'trade' or 'business', because only if it constitutes any one of these will he/she enjoy protection under art 19(1)(g). As provided under section 329 of The Haryana Municipal Corporation Act, 1994, the sale of meat is termed as a 'trade' that requires a license from the Municipal Commissioner. The Supreme Court's (SC) decision in Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat is a precedent to be followed. A two-Judge Bench of the Supreme Court chaired by Justice Markandey Katju and Justice H. K.Sema held in this case that butchers have a right to practice their 'trade' of meat selling as provided under Art 19(1) (g) of the Indian Constitution and "selling meat was a trade guaranteed to a citizen under Art 19(1) (g)...". Therefore in the present case, it is implied that owners of meat shops have a right to carry on 'trade' under Article 19(1) (g) of the Indian Constitution.

Once established that meat shops function as a 'trade', the question of whether the MCG is justified to prohibit the sale of meat on a particular day of the week is the second question to be answered.Therefore whether the order passed by MCD falls under 'reasonable restriction', 'in the interests of the general public' under Art 19(6) is to be examined. As laid down in Anuradha Bhasin v Union of India, the Supreme Court has held that the restrictions laid down under article 19 have to be tested on the anvil of the test of proportionality and that the Articles 19 and 21 of the Constitution mandate that any 'State action' should satisfy five important criteria, which are : (a) State actions to be backing by a 'law', (b) legitimacy of purpose, (c) A rational connection of the act and object, (d) The necessity of the action, and finally (e) when the above four are established, then the test of proportionality.

The present order of the MCG, ordering the closure of meat shops citing 'religious sentiments associated with non-consumption of meat on Tuesdays does not pass the test of proportionality. The Supreme Court has observed in Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat that Article 19(1)(g) of the Constitution cannot be put to peril or jeopardized to assuage the feelings of any particular community or a particular section of society, or as a mark of religious sentiments of a particular community". According to mythology, meat is restricted on certain days of the week as the day is dedicated to a particular God. As there is no uniformity in restraining oneself from eating meat on a particular day of the week, the MCG's order to close meat shops does not satisfy the 'proportionality test', nor is the order 'in the interest of the public, as the order deprives people belonging to other communities the right to eat meat on Tuesdays.

Thirdly, The Supreme Court has held in Shaikh Zahid Mukhtar Petitioner v. The State Of Maharashtra And Ors. That the scope of Article 21 of the Constitution extends to include the right of a person to consume the 'food of his choice'. As laid down in this case, Art 21 protects a citizen and restricts State intrusion into a person's home and helps a person to lead a meaningful life which includes the right to eat food, preferably food of her/his choice. By doing so, the MCG's reach extends from the closure of meat shops to indirectly forcing people to quit eating meat on Tuesdays. The closure will also have an economic bearing on other allied industries like restaurants, leather industries etc. and also economically burden meat shop owners as the monthly rent payment will not be reduced and the closure of meat shops will also harm the food supply chain.

Fourthly, the Preamble to the Constitution reads India is a 'secular' State. While discussing in detail the concept of secularism, in S.R. Bommai vs Union Of India, the Supreme Court held that "the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever". The present order to close meat shops is also solely due to 'religious sentiments' and therefore deprives people of other communities of consuming meat on Tuesdays, which not only violates the principle of secularism but also is violative of Article 14 of the Indian Constitution which provides equality to all.

Fifthly, the present order deprives people of other communities of consuming meat on Tuesdays, which is violative of Article 14 of the Indian Constitution which provides equality to all. The contentious part of the order concerning infringement of Art 14 is also the increase of license fee for meat shops from the current Rs 5,000 to Rs 10,000. The intrusion of the 'State' in the private affairs of a person should be backed by a 'compelling state interest', which is lacking in this case. The order, therefore, raises several questions, like, whether the order was passed negligently ignoring the constitutional limits? And whether the State went overboard in mandating the closure of meat shops purely based on 'religious sentiments'?

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/municipal-corporation-of-gurugram-mcg-haryana-municipal-corporation-act-1994-article-191g-171865

Sneak Peek:

No. of words: 2872 words

Note: In this article the author is analyzing the concept of encryption in the digital world in the light of the Puttaswamy case. It is very informative text to understand the legal position about the subject.

Article: 25

Does The Traceability Requirement Meet The Puttaswamy Test?

1. Introduction

Encryption technology has popularly been used for varied purposes including secure communication. This allows for individuals to communicate amongst each other without anyone else being able to monitor the content of such conversations. This, thus, keeps such conversations even outside the purview of Law Enforcement Agencies ('LEAs'). This preserves the privacy of the users and allows them to safely communicate without any threats of surveillance. However, this aspect of encryption technologies has also led to States, including India, seeking the introduction of 'backdoors' to this technology, particularly citing concerns of misinformation, child pornography, and national security. In the year 2020 itself, encryption has faced multiple challenges across the globe. They include the proposal of an Act to mandate encryption backdoors in the United States, opposition to the proposal from Facebook to introduce encryption in its Messenger service, and blocking of ProtonMail in Russia owing to concerns of misinformation. In India specifically, an ad hoc Rajya Sabha committee recommended undermining of encryption to fight child pornography, and the Indian government jointly signed a statement with six other States arguing safety risks of end-to-end encryption.

In this debate, a particularly interesting feature that has influenced the discussions on encryption in India is the proposal to mandate traceability of messages sent on social media platforms. It is this proposal that we seek to analyze in this paper in the context of the right to privacy that has been recently accorded the status of a fundamental right in India. Accordingly, in the second section, we lay down the contours of the right to privacy and the test laid down by the Supreme Court in the Puttaswamy decision to determine its infringement. Then in the third section, we look at the encryption debate as it has developed in the Indian context. In the fourth section, we carry out the substantive analysis of the traceability proposal on the Puttaswamy test and argue that it does not satisfy the same. Finally, in conclusion, we briefly touch upon some of the alternatives to encryption backdoors that are currently in practice.

2. Privacy as a Fundamental Right: The Puttaswamy Test

The question of whether privacy is a fundamental right first arose in 2015 before a three-judge bench of the Supreme Court. The Court was assessing the constitutional validity of the Aadhar ecosystem. Therein the learned Attorney General had argued that Part III of the Indian Constitution does not accord the right to privacy the status of a fundamental right despite case law to that effect, as larger benches of the Apex Court in M P Sharma 1954 SCR 1077 (8 judge bench) and Kharak Singh 1964 SCR 332 (6 judge bench) have ruled otherwise. Thereafter, the three-judge bench referred the matter to a five-judge bench to ensure "institutional integrity and judicial discipline". Ultimately, the five-judge bench referred the constitutional question to an even larger bench of nine judges to pronounce authoritatively on the status of the right to privacy. This culminated in the decision in Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1.

The operative part of the judgment in Puttaswamy over-ruled the decisions in M P Sharma and Kharak Singh to the extent that they held the right to privacy was not protected by the Constitution. The nine-judge bench ruled that 'right

to privacy' is an intrinsic part of right to life. Accordingly, it further held that the body of case law that developed subsequent to Kharak Singh, recognizing the right to privacy, enunciated the correct position of law.

As the Puttaswamy decision rooted the right to privacy in Article 21 of the Constitution it can only be taken away through procedure established by law. The Supreme Court has already clarified in the Maneka Gandhi v. Union of India (1978) 1 SCC 248 decision that this procedure has to be just, fair and reasonable. How does 'due procedure' among other standards of 'judicial review' will operate in cases where the state restricts the fundamental right to privacy, has also been explained in the Puttaswamy case through a four-fold test created on the basis of the observations made by Justices Chandrachud and Kaul. The four elements of the test are as follows:

(i). Legitimate Aim stage: The court is required to check if there's a legitimate aim to infringe upon the right to privacy.

(ii). Suitability or rational nexus stage: This requires the court to examine if there is a rational connection between the infringement of the right and the purpose of the restriction. In other words, it has to be seen whether the measure is suitable for achieving the purpose of the restriction.

(iii). Necessity stage: This is to test if there is a less restrictive or equally effective alternative means of achieving the goal in terms of restrictions on the right.

(iv). Balancing stage: Herein, the benefit that the State gains by restricting the right has to be balanced with the impact of loss of the right.

If any restriction fails to satisfy the above four-pronged test, then it would amount to a violation of Article 21.

3. The Indian Encryption Debate

The Indian encryption debate has been moulded on the anvil of the Indian Telegraph Act. Section 5 of the Indian Telegraph Act empowers the government to lawfully intercept and monitor communication. Additionally, Section 84A of the Information Technology Act, 2000, ("IT Act, 2000") was introduced through an amendment in 2008. It allowed the government to prescribe modes and methods for encryption to ensure secure use of the electronic medium and promote e-governance and e-commerce. Following a more prescriptive mandate of regulation, Section 69 of the IT Act, 2000, allowed the Central and State governments to monitor and collect information through any computer resource for cybersecurity. This is supplemented with the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. Its Rule 9 provides that an order for decryption could relate to any information sent to or from a 'person or class of persons' or relate to 'any subject matter'.

With the growing challenge of the proliferation of Child Sexual Abuse Material ('CSAM') online, several countries including India have been growing apprehensive about the increase in encryption technology making it difficult to trace pornographic content and catch CSAM criminals. It was in this atmosphere that the National Encryption Policy was formulated in 2015. Critics opined that it was more of a 'decryption' policy because it only allowed platforms to function if they complied with the mandatory regulatory mechanism. The policy was said to simply secure government access to encrypted data, rather than securing user data. The Draft Intermediary Guidelines of 2018 further rekindled this debate by proposing to mandate intermediaries to introduce traceability on their platforms.

The new IT rules were finally notified by the Government on 25th February 2021 by notifying the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules, 2021") . In a bid to enforce traceability Rule 4(2) of the IT Rules 2021 lists out all the exceptions mentioned in Article 19 (2) of the Constitution. This is despite the extant criticism of the similar provision in the Draft IT Rules of 2018 from stakeholders across the ecosystem.

The proposal to mandate traceability seeks to ensure that platforms introduce technological updates to ensure that the original sender of a particular message could be traced. While some argue that this could be carried out without undermining the end-to-end encryption that WhatsApp provides, the common opinion is that it is not technologically possible to introduce traceability without undermining encryption. Admittedly, the Supreme Court in the Puttaswamy judgment explained that the Government's access to personal data for legitimate national security concerns is a reasonable restriction on right to privacy. However, the Apex Court also reiterated that such exceptions must be narrowly tailored and must meet the four-fold test prescribed in the decision, as discussed earlier. Accordingly, in the next section we shall analyze whether the traceability requirement satisfies this four-pronged test.

4. Examining Traceability on the Touchstone of Puttaswamy

Legitimate Aim of the State in a Democratic Society

With specific reference to backdoors on encryption, and legitimizing it based on the concerns of terrorism and prevention of crimes, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that governments have not demonstrated that criminal or terrorist use of encryption serves as an insuperable barrier to law enforcement objectives.

Moreover, it has been noted by the UN Special Rapporteur on Freedom of Expression, Frank LaRue that it is a matter of concern that vague and unspecified notions of national security, have been unduly used to justify interception and access to communications. The use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern enjoyment. It is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, activists, whistle blowers etc.

Accordingly, in Canada and the US, the tests of "pressing and substantial objective" and "compelling government interest" respectively have been disregarded as they are insufficiently rigorous.

In Klass and Ors v. Germany (1979) 2 EHRR 214, the European Court of Human Rights took note of the development of sophisticated forms of espionage and terrorism and ruled national security concerns are justified, only under exceptional circumstances. Given that undermining encryption is not possible on a case-to -case basis but is done en masse, the legitimacy of this action is in question.

Suitability of the measure or rational nexus between the infringement of the right and the purpose for the restriction

The purpose of introducing traceability as given by LEAs is that it would enable them to catch cyber criminals. However, the suitability of this measure to achieve the said objective is contestable given that studies suggest that creating backdoors does not stop criminals from using encryption. In fact, it makes it more difficult for the police to catch them. Encryption is a tool which is available online for anyone to download and use even if the government bans it. The knowledge required for building encrypted platforms is readily available in the public domain. Criminals already know how to write their own encryption codes. If a vulnerability or backdoor is created on popular encrypted platforms for the LEAs to use to track perpetrators then the savvy criminals will simply shift to another platform, possibly their own platform which is well encrypted.

Websites like GitHub are a storehouse of open source software for creating encrypted platforms which can be used by non-state actors to develop their own encrypted platforms, the moment they get concerned about backdoors being introduced in popular messaging platforms. The Signal protocol which has one of the most enhanced end-to-end encrypted protocols with no known backdoors is also available on GitHub. Moreover, a software known as Mujahideen Secrets was developed by al-Qaeda way back in 2007 to encrypt their online communications. Likewise, following the Snowden leaks in 2013 on NSA surveillance, three different terrorist organisations including GIMF, The Al-Fajr Technical Committee, and ISIL, created their own unique encryption tools.

Recently, The Global Encryption Coalition released a non-technical paper explaining why undermining encryption is in fact not at all a solution to terrorism or CSAM proliferation in the cyberspace, and how undermining encryption would create more problems than it seeks to resolve. It is equally noteworthy that if encryption is broken then users will have no guarantees of their data being safe due to the lack of a robust data protection regime in India. In order to emphasize the need for such a regime, the case study of the Minnesota Database queries is important. In Minnesota, more than 62% police officials were reported to use the surveillance capabilities of the State to surveil over their ex-wives and ex-girlfriends is an apt example of this threat.

Hence, undermining encryption will only mean that the police, at best, will be able to catch the gullible and less technically adept criminals, while the smarter ones who are more dangerous perpetrators of the online vices will easily get away. Further, without adequate safeguards for data, it will indeed be a concerning issue for the citizens to trust institutions that collect and store their data.

Necessity Stage:

In order to satisfy this test, the government will have to prove that there is no other less restrictive way for the government to get the data for tracking CSAM and catching its proliferators than to break end-to-end encryption. Some might argue that because there is no other way to get the information about who the originator of the content was, traceability may just meet the proportionality test. However, there are a plethora of studies which establish that in most cases access to 'content data' is not required and the availability of metadata is sufficient. Moreover, as the Europol's SIRIUS Digital Evidence Report explains, the tedious process of obtaining digital evidence via the Mutual Legal Assistance mechanism and the lack of standardization in company policies make it almost impossible to successfully process content data obtained from undermining encryption to achieve the desired result of tracking criminals. In any case, the justification and proof that the demand for traceability is indeed the least restrictive means available have to come from the State. This burden is something which the State has failed to meet till now.

On the other hand, UNICEF has recently released a report explaining how encryption is crucial to ensure online child safety. Even the TRAI after two years of extensive consultation with leading stakeholders in the ecosystem, analysis of international jurisprudence and the discussions at the International Telecommunications Union opined that the encryption technology should not be tinkered with. It was observed in its report that if the encryption technology is broken then the platforms will not be able to provide the same level of security to the users who will be rendered vulnerable to cyberattacks and surveillance.

Balancing Stage

To meet this requirement, it needs to be proven that the balance between the right to privacy of the citizens and the government's argument of national security to introduce traceability lies in the latter's favour, allowing for the infringement of privacy. It is difficult to satisfy this test as privacy of the citizens is the foundational block of national security. The exercise to create this balance is rendered even more difficult in light of the fact that the argument of national security on the basis of which the LEAs try to justify the demand of backdoors is itself compromised due to weakened encryption. The Greek Watergate Scandal, popularly known as the "Athens Affair", where the political and military elites of Athens were spied using a vulnerability introduced for lawful interception, is a perfect evidence of this fact. Accordingly, the introduction of traceability will make the platforms vulnerable to foreign surveillance and attacks by savvy criminals which will in turn threaten user safety and the privacy, eventually leading to a national security crisis in itself rather than solving the existing one.

Compromising with encryption has ramifications for not just privacy of the citizens but also for the digital economy and critical information infrastructure of the nation. Online banking and e-commerce services can be rendered vulnerable due to weakened encryption leading to loss of consumer trust and harm to the competitiveness of the companies in the global market. High-end encryption technology protects not just users and businesses, but also Critical Information Infrastructures of the government like those of Aadhar and Aarogya Setu among others. In

addition to these, undermining encryption will also have adverse effects for cross border data flow. Hence, the government's demand for traceability to combat online challenges can certainly not be balanced against the ramifications of backdoors on a country's socio-economic health in addition to its impact on the security and the fundamental right to privacy of the citizens.

Summing Up

In light of the above arguments, it is difficult to justify the demand to introduce traceability on encrypted platforms on the threshold of the four-fold test proposed in the Puttaswamy judgment. The Puttaswamy case also requires a case-by-case analysis to determine whether the intrusion is valid. However, undermining encryption would render the whole population susceptible to cyber-vulnerabilities. Thus, a blanket creation of a backdoor, i.e., an exploit within a secure platform, that compromises the privacy of all would be worrisome, and is certain to fail the test of Puttaswamy.

This implies that there is a need to look at possible alternatives to remedy the problems that traceability seeks to resolve. A primary measure to this end should be strengthening LEA capabilities in metadata analysis which, as mentioned earlier, would enable them to carry out effective investigations. For misinformation in specific, a recent alternative that has been used is that of content moderation and the addition of filters regarding the veracity of the information by social media platforms such as Twitter. This solution, however, has also left a lot to be desired in implementing it on scale or tackling the existing COVID-19 pandemic that has impacted the already limited availability of content moderators.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/the-puttaswamy-test-right-to-privacy-article-21-171181?infinitescroll=1

Sneak Peek:

No. of words: 1812 words

Note: This article gain prominence as author critically examines the grant of extension under various provisions of law due to the pandemic. It will help you enhance your legal acumen.

Article: 26

Extension of Limitation Prescribed Under General/Special Law Due To COVID 19 Pandemic – An Analysis

Various Statutes prescribe a time limit for filing of statutory appeal to the concerned appellate authority. Take for instance statute like Central Excise, Service Tax (Chapter V of Finance Act 1994), FTDR Act 1992, Electricity Act, Consumer Protection Act and so on. These statute while prescribing the time limit for filing appeal also provides for another period within which delay in filing appeal can be condoned. In the statues abovementioned the delay in filing is condonable only for a prescribed period, which mostly relate to First appeals. Let us refer such extension of time prescribed under statute as "condonable period". Like for instance Sec. 107 of CGST Act, provides for condonable delay of one month, Sec.15 of FTDR Act 1992 also provides for condonable period of thirty days. On the other hand fiscal statutes above as well as other Statutes also provide a period for filing appeal before 2nd appellate authority along with a provision that the delay in filing appeal may be condoned by the appellate forum without any prescribed time limit on 'sufficient cause' being shown. In other words in such category of appeals the delay in presentation is condonable without any cap on delay, while in the First category the appellate authorities have no power to condone the same beyond the prescribed period. The first category of appeals which restricts the delay in presentation of appeal within a prescribed period is the subject matter of this Article viewed from the recent COVID 19 pandemic and the resultant hardships caused to litigants, lawyers, including appellate authorities and judicial fora.

2.1 Taking suo moto cognizance of the difficulties faced across the country due to lock down , social distancing, movement of general public, Hon'ble Supreme Court in Suo Motu Writ Petition Civil No. 3 of 2020 in RE: Cognizance for Extension of Limitation (SMW (C) No. 3/2020) passed the following interim order dated 23.03.2020 "To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings. The Apex Court in the above order observed that it is a binding order within the meaning of Art. 141 on all courts/Tribunal and authorities

2.2 Subsequently the Hon'ble Supreme Court in its order dated 06.05.2020 (SMW (C) No.3/2020) following the earlier order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No.3/2020, ordered that all periods of limitation prescribed under Arbitration and Conciliation Act, 1996 and under Sec. 138 of Negotiable Instrument Act, 1881 (NI Act 1881) shall be extended with effect from 15.3.2020 till further orders passed in the current petitions. In the above order tt was further clarified that if the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises, shall be extended for a period of 15 days after lifting the lockdown.

2.3 Later on the Hon'ble Supreme Court in the case of S.S Group Pvt Ltd Vs Aaditiya Garg & another in C.A 4085/2020 dated 17.12.2020 observed as follows " The National Commission thus declined to take the written statement on record in view of the Constitution Bench decision of this Court in New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd.,(2020) 5 SCC 757, wherein it has been held that the Consumer Court has no power to extend the time for filing the response to the complaint beyond 45 days……It is true that the decision of the

Constitution Bench of this Court in New India Assurance Co. Ltd. (supra) clearly provides that no written statement is to be allowed to be filed beyond the period of 45 days as per Section 38 of the Consumer Protection Act, 2019. However, in this context, it is noteworthy to refer to the order dated 23.03.2020 passed by this Court in SMW(C) No.3 of 2020, titled as "In Re: Cognizance for Extension of Limitation…....In the present matter, it is an admitted fact that the period of limitation of 30 days to file the written statement had expired on 12.08.2020 and the extended period of 15 days expired on 27.08.2020. This period expired when the order dated 23.03.2020 passed by this Court in SMW(C) No.3 of 2020 was continuing. In view of the aforesaid, in our opinion, the limitation for filing the written statement in the present proceedings before the National Commission would be deemed to have been extended as it is clear from the order dated 23.03.2020 that the extended period of limitation was applicable to all petitions/ applications/suits/appeals and all other proceedings. As such, the delay of four days in filing the written statements in the pending proceedings before the National Commission deserves to be allowed, and is accordingly allowed." It is pertinent to note that the Hon'ble Apex Court in judgment dated 17.12.2020 observed as follows "..The above order is still operative and by subsequent orders, the scope has been enlarged so that the said order applies in other proceedings also …"

3.1 Earlier in a catena of judgments the Hon'ble Supreme Court emphasized the point that when a statute prescribed a particular time limit, the same cannot be condoned by Courts under any circumstances. For instance in the case of Singh Enterprises Vs CCE (2008 (221) E.L.T. 163 (S.C.) Apex Court held as follows "In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. " Following the above judgment in the case of Amchong Tea Estate Vs UOI 2010 (257) E.L.T. 3 (S.C.) held that "In this connection we may rely on a decision in Singh Enterprises v. Commissioner of Central Excise, Jamshedpur & Ors., reported in [(2008) 3 SCC 70], wherein this Court has held that the proviso to sub-section (1) of Section 35 makes the position crystal clear that the Appellate Authority has no power to condone the delay beyond the period of 30 days and that the language used makes the position clear that the Legislature intended to entertain the appeal by condoning the delay only upto the 30 days and not 60 days. "

3.2 Further Hon'ble Supreme Court in the case of M/s. Suryachakra Power Corporation Limited v. Electricity Department (2016 (16) SCC 152) held as follows "Since, the Supreme Court cannot condone the delay beyond 60 days under Section 125 of the Electricity Act, 2003, and in the facts of the present case, since the principles of Section 14 of the Limitation Act, 1963 are not attracted, Interlocutory Application No.1 of 2015 for condonation of delay is dismissed. Consequently, the appeal is also dismissed on the ground of delay. " In yet another case reported in CC Vs Hongo India Pvt Ltd (2009 (236) E.L.T. 417 (S.C.) Apex Court held as follows " It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act. In the light of

the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation."

4. Due to COVID 19 pandemic many of the litigants could not file the statutory appeal within the condonable period due to lockdown of business, staff working from home, inability to travel-interstate, meeting & engaging a Counsel etc. Such litigants were guided by Hon'ble Apex Court interim order dated 23.03.2020 any delay in presenting such appeals is condonable without any limit till today as no final orders have been pronounced. This extension of time limit until further orders, is strengthened in the light of the observations in subsequent order dated 17.12.2020. First Appeals are being filed with condonation of delay petition (delay beyond statutory prescribed limit) in the light of Apex Courts orders above, and if delay ins not condoned for some reason or other , litigants would be put to undue hardship. This is due to the wordings used in order dated 06.05.2020 which says that the period is extended for 15 days after the lockdown is lifted, which may lead to different interpretation. If the appeals are filed say during this year 2021, there is also likelihood of lower authorities taking a view that 'lock down' having been lifted (restoration of

normal life) they cannot take shelter under COVID 19 pandemic, though the Apex Court vide its order dated 17.12.2020 emphasized that extension of time continues, which means even today if an appeal is filed, and is beyond the condonable period the same has to be admitted by the authority concerned.

5. Recently the Apex Court heard the SMW (C) No.3/2020 on 3rd March 2021. when the matter was heard the Attorney General informed the Apex Court that the order on limitation be recalled in view of lifting of lockdown. The Apex Court informed the Attorney General that it proposes to lift the ban on running of limitation by proposing to give a grace period of 'ninety days' from lifting of the extension of limitation.

6. The matter in SMW (C) No.3/2020 was again heard on 4th March 2021 and after hearing the arguments the Apex Court reserved orders. The Apex Court by its order dated 08.03.2021 while disposing of the Suo Moto W.P held as follows (a) for computing the period of limitation for any suit, application, appeal or proceedings, the period from 15.03.2020 to 14.03.2021 shall stand excluded. (However the balance period remaining as on 15.03.2020 shall become available w.e.f 15.03.2021) (b) in cases where limitation expired during 15.03.2020 to 14.03.2021 (notwithstanding balance of limitation period) all persons shall have limitation of 90 days from 15.03.2021 (c) period from 15.03.2020 to 14.03.2021 shall stand excluded for computing the period of limitation under Arbitration & Conciliation Act, 1996, Commercial Courts Act, 2015, Negotiable Instruments Act, 1881 and other laws which prescribe period of limitation for instituting proceedings. Hope the Government on its part issue instructions, and the trade bodies inform all concerned including affected parties, by giving wide publicity, to take note of the final orders issued and adhere by the same.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/covid-19-limitation-prescribed-under-generalspecial-law-171177?infinitescroll=1

Sneak Peek:

No. of words: 2929 words

Note: In this article the author is critically analyzing the recent US Supreme Court decision where the court ordered to produce the financial records of the Former President Donald Trump. A must read for every law aspirant. Do follow this new development of law. Enjoy this article!!

Article: 27

U.S. Supreme Court on Absolute Immunity of The American President (The Case Of Trump V. Vance)

One of the most baffling legal questions confronting the judiciary in most constitutional democracies, the world over, is how to balance the increasing demands of the political Executive for Absolute Immunity from all prosecutions and the protection and preservation of basic individual rights guaranteed under the Constitution and the laws. Can any modern democracy countenance a situation whereunder the legal maxim 'rex non potest peccare', i.e. "the King can do no wrong", an English common law doctrine which is a hangover from the 'ancien regime' i.e. the feudal era of Europe, be pressed into service to grant Absolute Immunity to present day Executives ?. The Supreme Court of the United States of America in the recent case of Trump v. Vance 591 U.S. ___ (2020) has addressed this question.

The facts first. Upon receiving a subpoena (a court process which is like a summons from a criminal court in India) from the District Attorney Office of New York County based on a request from a Grand Jury for production of documents on allegations of possible tax evasion and insurance and bank fraud, relating to personal businesses of president Trump a petition in the Federal District Court was filed by the president challenging the legality of the subpoena and the competence of the District Attorney to issue the same to a sitting president.

A grand jury in USA is essentially a legal body, usually composed of 16 to 23 citizens, which is empowered to conduct official proceedings and investigate potential criminal conduct of an accused and determine whether criminal charges should be brought against the alleged wrongdoer. The system of grand jury has continued to exist in USA, having received constitutional recognition, by way of the 5th Amendment to the American Constitution which reads as follows "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury……". Noticeably, the system of grand jury has been abandoned in most other jurisdictions of the world including India. A grand jury in ordinary legal parlance thus is basically a mechanism for collection of evidence and also for weighing and shifting the same to arrive at a conclusion to proceed or not to proceed against the alleged wrongdoer. While doing so a grand jury is competent to compel the production of documents and record statements on oath by issuing subpoenas (similar to summons issued by Indian Courts). The function of a grand jury is a unique amalgam of both accusatory and investigatory exercises. It is composed of ordinary lay citizens who examine a set of evidence put forth by a prosecutor in a criminal investigation. In USA, unlike a 'trial jury' which is also referred to as a 'petite jury' which participates in a criminal trial in a court of law and returns a finding of 'guilt' or ' innocence' a grand jury is not competent to do so. Matters referred to a grand jury are always handled behind closed doors and are highly secretive in nature. On the basis of the documents and evidence collected the grand jury, in exercise of its accusatory function, determines whether there is 'probable cause' to believe that one or more persons have committed a certain offence.

Coming now to the facts of the present case of president Trump since, the subpoena directed M/s Mazars (the tax accounting firm of president Donald Trump) to produce financial records relating to the president and business organizations affiliated with him, the president, acting in his personal capacity invoked the jurisdiction of the Federal District Court challenging the subpoena. It was the contention of president Trump that under Article II of the U.S. Constitution and the Supremacy Clause, a sitting president enjoys absolute immunity from state criminal process.

Trump further prayed for a stay of the operation and effect of the subpoena, as well as, all future steps for enforcing the same. His tax firm M/s Mazars took no position on the legal issues raised by the president in his petition on the specious plea that the dispute was only between the president and the office of the District Attorney of New York County. After hearing arguments the District Court refused to exercise jurisdiction in the matter and dismissed the case on the basis of the earlier Supreme Court judgment titled Younger Vs. Harris, 401 U.S. 37 (1971) wherein it was held that United States federal courts were required to abstain from hearing any civil rights tort claims brought by a person who is currently being prosecuted for a matter arising from that claim. Mr. Justice Black, delivering the opinion of the court had held "a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgements"

Being aggrieved, president Trump approached the United States Court of Appeals for the Second Circuit. The Appeal Court in its judgment did not agree with the District Court's rejection of the appeal on the basis of a mechanical reliance upon the judgment of Younger Vs. Harris. However, it agreed with the District Court in holding that president Trump was not entitled to any preliminary injunction, in as much as, "presidential immunity does not bar the enforcement of a State grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertained to the president". It also rejected the argument of the Solicitor General of U.S.A. that a state grand jury subpoena must satisfy a heightened showing of need and that the judgments relied upon by the Solicitor General, who appeared as amicus curiae in the matter, pertained to privileged Executive Branch Communications and hence, were not relevant to the facts of the present case whereunder the subpoena had only sought information relating solely to the president in his private capacity and was in no manner connected with the discharge of his constitutional obligations. The Court of Appeals, nevertheless, directed that the case be remanded to the District Court and the President was at liberty to raise further arguments as deemed appropriate.

President Trump carried the challenge further to the U.S. Supreme Court by filing a petition for grant of CERTIORARI. By a 7-2 majority the Supreme Court of the United States rejected the challenge. Chief justice John Roberts delivered the opinion/judgment of the court in which Associate Justices Ginsburg, Breyer, Sotomayor, and Kagan, joined. Justice Kavanaugh, and Justice Gorsuch filed a separate common opinion/judgment concurring with the majority view. However, Justice Thomas and Justice Alito field separate opinions dissenting with the majority opinion.

In its majority opinion/judgment the court drew heavily from past precedents i.e. from the celebrated case of United States Vs. Burr, 25 F. Cas. 30, 33-34 delivered by CHIEF JUSTICE JOHN MARSHALL who had also delivered the historic judgment on Judicial Review in the case of Marbury v. Madison. In the case of United States v. Burr, the accused Burr (who became the Vice-President of U.S.A.) had got a subpoena issued from the court directing president Thomas Jefferson to produce a letter received by the president from General Wilkinson and accompanying documents which the president had referred in his massage to the congress. The president had opposed the request arguing that a sitting president could not be subjected to such a subpoena and that the letter might contain state secrets. Chief Justice Marshall rejected the objection and held that the president does not "stand exempt from the general provisions of the constitution" and in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. Further, giving a purposive construction to the Sixth Amendment Justice Marshall held that the expression 'evidence' should also extend to documents and other materials which are relevant for the defense. In his judgement he held thus: "A subpoena duces tecum, may issue to any person to whom an ordinary subpoena may issue. No fair construction of the Constitution supported the conclusion that the right to compel the attendance of witnesses does not extend to requiring those witnesses to bring with them such papers as may be material in the defense. And as a matter of basic fairness, permitting such information to be withheld would tarnish the reputation of the court. As for the propriety of introducing any paper, that would depend on the character of the paper, not on the character of the person who holds it." Rejecting the argument that the King being the vicar of god on earth can do no wrong i.e. the Divine Right theory, Chief Justice Marshall had held "At common law the "single

reservation" to the duty to testify in response to a subpoena was "the case of the king, whose "dignity" was seen as "in compatible" with appearing "under the process of the court". But Marshall explained that a king is born to power and can do no wrong. The president by contrast is of the people and subject to the law". Unimpressed by the submissions that making the president submit to a court process would impair his duties as Chief Magistrate which demands his whole time for national objects, Marshall held that those demands were 'not unremitting' and should the president's duties preclude his attendance at a particular time and place, a court would work that out upon returned of the subpoena. All these reasoning of Chief Justice Marshall in the case of United States Vs. Burr were profitably quoted by Chief Justice John Roberts in the majority opinion.

The majority view also rejected the president's contention that complying with state criminal subpoenas would necessarily distract the chief executive from his duties and further rejected the reliance of the president on the judgment of the Supreme Court in the case of Nixon v. Fitzgerald 457 U.S. 731 (1982) which had recognized a presidents absolute immunity from damages liability arising out of his official acts. In doing so the court relied upon the earlier case of Clinton v Jones 520 U.S. 681 (1997). The majority opinion also rejected Trump's claim that the stigma of being summoned will undermine his leadership at home and abroad by holding that there is nothing inherently stigmatizing about a president performing the citizens normal duty of furnishing relevant information to a criminal investigation. The majority judgment also rejected the argument that submitting presidents to state criminal process will make them easily identifiable targets for harassment.

The court also took into consideration the fact that the judgment of Chief Justice Marshall in United States v. Burr had stood the test of time and was good law which has been reinforced by subsequent events. Successive president's had accepted Chief Justice Marshall's ruling that the chief executive is subject to subpoena. In 1818 president Monroe offered to sit for a deposition and ultimately submitted answers to written interrogatories. In 1875 President Grant had submitted a three hour deposition in the criminal prosecution of a political appointee. Similarly, President Ford had also submitted to a court process and had deposed in the trial of his attempted assassin. President Carter had also testified in a case through videotape deposition. In the historic Watergate case President Nixon's challenge to the subpoena for production of oval office recordings failed and he had to submit to the criminal process.

President Trump as well as the Solicitor General for USA had also sought to distinguish all the earlier judgments by arguing that there was no earlier precedent adjudicating the effect of a subpoena issued by a state attorney on behalf of a grand jury of the state on the powers of the President as detailed in Article II and the Supremacy Clause and that the earlier tests and standards applied by the Supreme Court were only to a federal subpoena which could not apply ipso facto to a subpoena issued by the office of the state attorney of New York. They contended that a 'heightened need' standard ought to be adopted in such a different situation in keeping with the federal structure of the constitution and the supremacy clause. The court also rejected this argument and reasoned that applying any 'heightened standard' would extend protection designed for official documents to the president's private papers. In doing so the majority once again relied upon the case of United States v. Burr which in the clearest of terms had held that "If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual". The court further held that "a double standard has no basis in law and therefore, nothing in Article II or the Supremacy clause supports holding state subpoenas to a higher standard than their federal counterparts".

Having dismissed the writ of certiorari the court held as follows; "the arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened need. The Court of Appeals, however, has directed that the case be returned to the District Court, where the President may raise further arguments as appropriate. We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion." After remand of the case, a second innings commenced. The challenge was once again carried by president Trump upto the Supreme Court which finally put the issue at rest by dismissing the case. Consequently, President Trump had to submit the documents to the District Attorney Office as directed in the subpoena.

The case of Donald Trump v. Cyrus R. Vance is a shot in the arm for Indian Criminal Courts and can be profitably applied in India to the political executive. Chapter VII of the Code of Criminal Procedure, 1973 deals with process to compel the production of things. Sections 91 and 92 of the said chapter expressly allows the court or officer in-charge of a police station to issue summons for production of any document or other thing and failure to do so would invite penal consequences.

EXPLANATORY NOTES:

Article II of U.S. Constitution

SECTION. 1.

The executive Power shall be vested in a President of the United States of America…….

SECTION. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Amendment VI of U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article VI, Clause 2: The Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding. The Supremacy Clause, establishes that the federal constitution and the federal laws take precedence over state laws and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers and from assuming any functions that are exclusively entrusted to the federal government.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/us-supreme-court-donald-trump-american-constitution-170888?infinitescroll=1

VIDHIGYA

Sneak Peek:

No. of words: 1203 words

Note: In this article the author is tracing the Constitutional history of the Nepal and analyzing the recent political vacuum in the Nepal. As a CLAT aspirant it is a suggested to have a fair idea about it.

Article: 28

Nepal and Constitutional Reforms

In all modern constitutions, human rights and freedoms and their security occupy a prominent role. Many of them include references to human rights in international law, Constitutional reform is a compelling shift from one form of governance to another, from autocracy to democracy, from one-party rule to multi-party rule, for example, it is a precursor to elections for any new form of government (by local constituents as well as the international community). Constitution-making is no longer regarded as a technical legal exercise but is used as a profoundly political, transformative process in conflict-affected countries (Teitel, 1997).

The openness to international law is one of the features of all new constitutions. Manifestations of this transparency are diverse but differ from constitution to constitution. It is only natural thatand others affirm their primacy over national laws. Many new constitutions contain foreign affairs and international relations provisions. Both these provisions, one way or another, include general requirements to conform with the laws of international law when performing international relations (for instance, Art. 6 of the Turkmen Constitution, Art. 18 of the Belarus Constitution, Art. 8 of the Kazakh Constitution).

The monarchy of Nepal ended in 2008. It's parliament was dissolved three times during the time it was in force, and finally the Constituent Assembly-cum-Parliament was established in 2008. The Communist Party of Nepal (Maoist) emerged as the dominant party by taking 220 out of 575 seats in the elections to the Nepalese Constituent Assembly (CA) in 2008. Despite having received four extensions from the Supreme Court of Nepal, the first CA was unable to deliver the constitution by the deadline that came to an end in 2012. The Supreme Court of Nepal did not grant any further extension. The second CA was elected in 2013. Unofficially, the one-year deadline for the second CA was set by the Assembly to deliver the constitution. It took seven years and two Constituent Assemblies, the second of which passed with a 90% majority. Article 1 of the new Constitution reads as "1. Constitution as the fundamental law: ((1). This constitution is the fundamental law of Nepal. All laws inconsistent with this constitution shall, to the extent of such inconsistency, be void."

Since the nation's first political crisis in the previous year, constitutional experts have anticipated a new one. Following the strife within the ruling NCP (Nepal Communist Party) leadership, Prime Minister K.P. Sharma Oli dissolved the lower house of the country's parliament (275-member House of Representatives) recently. Following the criticism of his opponents in the party, he resorted to choosing the necessary evil to save the fall of his government. It is a crucial moment for constitutional experts to 'look east' and watch out for the 'constitutional fractures' in the neighborhood. With an interesting turn of events, the Standing Committee of the Nepal PM's party condemned this move as unconstitutional and undemocratic.

A writ petition against the move was filed with the Supreme Court. This incident would be an epoch in the history of the Constitution of Nepal. It would analyze the courts and legislatures in reasoning processes, deliberation and decision-making structures, and institutional capacity. If the court finds that Oli's decision has violated constitutional provisions, he will have to resign as prime minister. If not, the interim government will continue until the next elections, this year.

In their reaction, both the Opposition and the Speaker boycotted the constitutional council meetings called by the Prime Minister, which were considered unconstitutional by the Oli group. Numerous rounds of talks and discussions between the two have proven unsuccessful in addressing the crisis, with both leaders sticking to their respective positions. P.M. Oli was hesitant to step down from one role as a PM or party chair, as his rival group had requested. All efforts by the second-ranking leadership to coax the two leaders to reach a compromise have also failed. The split in a two-thirds majority party raised concerns that it could lead to a systemic collapse.

The constitution of 2015, has 305 articles and eight parts. This constitution is started with a preamble by incorporating the principle of "socialism based on democratic values." The constitution has democratic provisions as possessed by the best constitutions of the world. It contains the major principles such as democracy, republicanism, federalism, secularism, and inclusiveness. Under the provision of proportional representation, efforts to make it inclusive covering vulnerable sections of society. According to Article 85 (1) and Article 76 (7) of the Constitution of Nepal, the lower house has a term of five years unless dissolved earlier. There is no provision in the Constitution, however, that allows the Prime Minister, who leads the two-thirds majority government, to unilaterally dissolve it. Which is why Section 76 of the Constitution states clearly that the President can dissolve Parliament only in a condition where the prospect of establishing a coalition ceases entirely, on the advice of the Prime Minister. So this exercise should have taken place within the parliament. These procedural requirements were not followed as Oli abolished the parliament.

As a repercussion, several opposition parties have taken to the streets to protest the decision of PM Oli, the first dissolution in the country's democratic history. With the political and constitutional crisis in Nepal escalating by the day and the ruling Nepal Communist Party (NCP) experiencing a vertical split. Elkins, Ginsberg, and Melton have used their extensive empirical data to suggest that on average, constitutions last only 19 years (Elkins et al, 2009) while 406 out of 964 of those lasted more than 10 years (Huq et al, 2014). The government is right that it is impossible to satisfy all the people in a democracy all the time, but erroneous when it, therefore, ignores the real concerns of a large sector of the population. Years of prejudice and discrimination have pre-disposed populations of plain origin, to a degree that other social groups perceive government acts of prejudice and arrogance.

Nepal will find its way back from the edge, but the international community also has a role to play, especially in encouraging the government and the parties to revisit the obligations of the CPA and the statutory bodies to uphold the rule of law. Such constitutional commitments do not, from the perspective of international law, add much to the already existing obligations of all States to comply with the customary and treaty rules of that law. Rather, willingness is a kind of 'confidence-building measure' to be a loyal and law-abiding member of the international community.

The Diplomat in a recent piece argued that Nepal's foreign policy has become strongly pro-China under the NCP government. The issue of the Kalapani boundary conflict has eroded common conceptions of India in Nepal. Trying to take advantage, Nepal's current leadership has taken a unilateral decision to draw up new maps showing that Kalapani, Lipulekh, and Limpiyadhura belong to Nepal. Evidently, by accusing New Delhi of seizing Nepali land, by issuing maps that showed disputed territory as part of Nepal, and by including these changes in the Constitution, Oli began to take hostile positions against India, even provoking New Delhi. It is essential that a stable democratic government is in place in Nepal in the interest of India and International community.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/nepal-constitutional-reforms-170604

Sneak Peek:

No. of words: 1191 words

Note: This article gains prominence as the author alleges curtailment of rights and liberties of OCIs in India and criticizes the new notification of the Ministry of Home Affairs with regard to OCI. It is suggested to go for that Vidhigya 360 analysis of the same.

Article: 29

With new OCI notification, India has ended its experiment with dual citizenship

In a stunning development for Overseas Citizens of India, the Ministry of Home Affairs issued a notification on March 4 dramatically altering the compact between OCIs and the Indian state. This notification, which is issued under Section 7B of the Citizenship Act, 1955, supersedes three earlier notifications issued on April 11, 2005, January 5, 2007, and January 5, 2009, which laid down the rights of the OCIs.

Apart from humiliating and illegally classifying OCIs as "foreign nationals", the new notification introduces a series of new restrictions that dramatically curtails the rights and liberties of OCIs in India. These restrictions include a requirement for OCIs to secure a special permit to undertake "any research", to undertake any "missionary" or "Tablighi" or "journalistic activities" or to visit any area in India notified as "protected", "restricted" or "prohibited".

In addition, the notification now equates OCIs to "foreign nationals" in respect of "all other economic, financial and educational fields" for the purposes of the Foreign Exchange Management Act, 2003 although past circulars by the Reserve Bank of India under FEMA will hold ground. This reverses the position that has held for the last 16 years wherein OCIs were equated to Non-Resident Indians rather than "foreign nationals" for the purposes of their economic, financial and educational rights.

OCIs can however continue to purchase land (other than agricultural land), pursue the profession of medicine, law, architecture and accountancy and seek parity with Indian citizens with regard to airfares and entry fee to monuments and parks. OCIs can also continue to seek enrolment in Indian educational institutions on par with NRIs but not for seats reserved exclusively for Indian citizens.

Judicial defeats

Most of these new restrictions have likely been inspired by the defeats suffered by the government in various cases filed by OCIs before the judiciary. Take for example, the new requirement for OCIs to apply for a special permit to undertake any missionary activities. This restriction has been introduced to undercut a judgment by Justice Vibhu Bakru of the Delhi High Court wherein he came down heavily on the Ministry of Home Affairs for cancelling the OCI card of an American-Indian doctor on the grounds that he was engaged in "evangelical and subversive activities" while offering free medical services to the needy and the poor in Bihar.

In that judgment, Justice Bakru made it clear that there was no restriction preventing OCIs from engaging in religious activities.

Similarly, the restrictions on OCIs competing for seats reserved for Indian citizens is meant to undercut a judgment of the Karnataka High Court by Justices BV Nagarathna and NS Sanjay Gowda declaring that OCI students will be treated as Indian citizens for the purposes of admission to professional courses.

Lastly, the Ministry of Home Affair's assertion that OCIs are foreign nationals and not Indian citizens is most likely inspired by ongoing litigation before the Delhi High Court wherein an OCI has sought a declaration from the court that OCIs enjoy fundamental rights just like Indian citizens.

The requirement for OCIs to take a special permit to engage in journalistic activities has likely been motivated by right-wing ideologues like Subramaniam Swamy who has been targeting journalists like The Wire's Siddharth Vardarajan because of their foreign citizenship. There are several other next generation OCIs who work as journalists in India and whose future will now be under a cloud if the Ministry of Home Affairs decides to deny them the required permit to continue working as journalists in India.

Long-term visa programme

This notification by the Ministry of Home Affairs is not surprising. For some time now, the Ministry of Home Affairs has dedicated its efforts to reduce the concept of OCIs to a glorified long-term visa programme rather than implement it as a dual citizenship programme, as was the intent of Parliament when then Home Minister LK Advani piloted the Citizenship (Amendment) Act, 2003, through Parliament.

The "Statement of Objects & Reasons" accompanying this Bill, which lays down the intent of the government at the time of introducing a bill in Parliament and which can legitimately be used by the judiciary to discern the legislative intent, stated the following:

"Subsequently, the High Level Committee on Indian Diaspora constituted by the Central Government, inter alia, recommended the amendment of this Act to provide for the grant of dual citizenship to persons of Indian origin belonging to certain specified countries. The Central Government has accordingly decided to make provisions for the grant of dual citizenship."

Advani in his introductory speech had clarified once again that the entire purpose of the Bill was to introduce dual citizenship for the Indian diaspora. It is therefore disingenuous for the Ministry of Home Affairs to now claim through a recent notification the claim that OCIs are foreign nationals. This argument is all the more absurd when viewed in light of the fact that the phrase OCI literally has the phrase "Indian citizen" in its title.

Lastly, it bears noting that the entire concept of OCIs was brought through the Citizenship Act, 1955, which is a legislation specifically meant to regulate the concept of Indian citizenship. There are separate laws like the Foreigners Act, 1946 and the Foreign Exchange Management Act, 2003, which deal exclusively with foreigners and their rights in India.

The fact that Parliament sought to locate OCIs in the Citizenship Act and not the Foreigners Act or FEMA is sufficient proof that Parliament wanted OCIs to be Indian citizens.

Correct conceptualisation

Rather than declaring OCIs as foreign nationals, the Ministry of Home Affairs should recognise OCIs as a new class of Indian citizens who enjoy a different set of rights from Indian citizens holding Indian passports. The rights to which OCIs are not entitled are mentioned in the Citizenship Act. This list includes the right to hold public office or voting – the idea being that OCIs are excluded entirely from the political sphere of citizenship.

Unfortunately, Parliament delegated to the government of India via Section 7 B of the Citizenship Act, the power to decide the remaining rights of OCIs through notifications. While the legality of such delegation is suspect, there is also no doubt that no government can deprive any class of citizens of their fundamental rights.

To argue against such a basic proposition by declaring an entire class of citizens as foreign nationals, as has been done by the Ministry of Home in this present case, is quite simple wrong in law. Parliament can lay down the criteria for citizenship but once it decides to bestow citizenship on any category of persons, not even Parliament can proceed to deprive that class of citizens of their fundamental rights.

The very idea of fundamental rights in India is that every person is born with these rights and the Constitution merely recognises such rights.

If the Home Ministry fails to withdraw its most recent notification, it may just be the end of India's short-lived experiment with dual-citizenship. It will be difficult if not impossible for the Narendra Modi government to reclaim the trust of OCIs after this latest notification unless it acts swiftly.

Courtesy: 'Scroll' as extracted from:

https://scroll.in/global/988721/with-new-oci-notification-india-has-ended-its-experiment-with-dual-citizenship

VIDHIGYA

Sneak Peek:

No. of words: 1384 words

Note: In this article the author highlights the importance of disclosure of report which gave clean chit to Supreme Court Judge, Justice N V Ramana. Author is criticizing for non-disclosure of the report of such serious allegation against sitting Supreme Court Judge by Andhra Pradesh CM.

Article: 30

Why the Supreme Court should make public its report giving Justice Ramana a clean chit

This is especially important when judges themselves inquire allegations against other judges.

On October 6, Andhra Pradesh Chief Minister YS Jagan Mohan Reddy sent a letter to Chief Justice of India SA Bobde in which he made sensational allegations about Justice NV Ramana, the second senior-most judge of the Supreme Court.

For over five months, the Supreme Court did not say anything about the action it was taking with regard to the letter.

On Wednesday, a single-page statement from the court said the letter had been dealt under its in-house procedure and was dismissed after "due consideration". The contents of the proceedings, the court said, were "strictly confidential" and so were not liable to be made public.

The statement came on a day Justice Bobde recommended Justice Ramana to be the next chief justice of India as per the seniority principle. Justice Ramana will take over on April 24.

This brings to an unceremonious end one of the most dramatic chapters in the court's history, in which a sitting chief minister of a large state took the unprecedented step of putting on record serious allegations against a sitting judge of the Supreme Court.

The manner in which the court has dealt with the allegations is problematic in several ways, the first of which is the disregard shown to the principle of transparency.

This disregard, however, is becoming a consistent feature of the court, as is evidence from several other instances from the recent past.

Serious allegations

The core of Reddy's allegation was that Justice Ramana had been influencing the proceedings of the Andhra Pradesh High Court in favour of former chief minister and Telugu Desam Party chief N Chandrababu Naidu. The letter alleged interference with the roster of judges in the High Court and claimed that cases relating to Naidu and his party members ended up with select judges. This invariably resulted in orders against the interests of the government, it said.

The October 6 letter had sought the intervention of Chief Justice Bobde to ensure neutrality in the High Court proceedings.

The letter had also mentioned a criminal case the Andhra government had registered over a land deal in Amaravati in September, in which two daughters of Justice Ramana, former advocate general of the state D Srinivas and several others were accused. It was alleged that there was insider trading in the land purchases in 2014, with the accused

allegedly accessing information about the development plans for a proposed new capital at Amaravati before its notification.

Within hours of the FIR being registered, the High Court stayed the investigation and gagged the media from reporting its contents. The gag order was lifted by the Supreme Court in November.

This was the first time a sitting chief minister had taken the extraordinary step of putting in writing allegations against a sitting Supreme Court judge.

Several media reports pointed out at that time that Jagan Reddy had several corruption cases pending against him and the decision of a bench led by Justice Ramana in September to order expediting long-pending criminal trials against elected representatives across the country may have triggered the backlash from the chief minister.

Court's response

For over five months, there was no official communication from the Supreme Court indicating what action had been initiated with regard to Reddy's letter.

On Wednesday, as news broke of Chief Justice Bobde recommending Justice Ramana's name as his successor to India's top judicial post, the Supreme Court website carried a one-page statement that said the letter had been dealt with through in-house proceedings and was dismissed.

The in-house procedure was adopted by the court in 1999 as a form of remedial action to deal with complaints about sitting judges of the Supreme Court and the high courts. Under the procedure relating to Supreme Court judges, the Chief Justice seeks the response of the judge about the complaint if he finds that it is of a serious nature involving misconduct or impropriety. Upon receiving the response, if the Chief Justice is of the opinion that a deeper investigaton is necessary, a committee of three judges is formed.

A report in the Times of India said the letter had been looked into by Bobde and two senior judges, who found it "baseless, frivolous, false, motivated and an attempt to browbeat the judiciary."

However, the Supreme Court said in its statement that the contents of the in-house proceedings will not be made public.

This leaves several questions unanswered.

First, how was the in-house investigation conducted? Did the committee use the services of an investigation agency to verify the allegations made about Justice Ramana? If so, which agency?

If the judges had directly inquired into the allegations and found them to be "baseless", was Jagan Reddy given an opportunity to respond to the findings? The in-house procedure states that to conduct the inquiry, the committee should devise its own procedure "consistent with the principle of natural justice".

Going by the Times of India report, if the in-house committee of judges found the letter to be an attempt to "browbeat the judiciary", this would be a serious charge against Reddy that required contempt of court proceedings to be initiated, given the damage the letter has caused the reputation of the next Chief Justice of India. But will the court actually do so?

Court and transparency

There are at least two other instances in the recent past when the Supreme Court had decided to keep away from the public crucial reports that had serious consequences to its image.

In 2019, the court had put beyond public reach the findings of the in-house committee of judges that investigated the sexual harassment complaint against former Chief Justice Ranjan Gogoi. The proceedings had found no substance in the complaint.

Next, when the sexual harassment complaint was made in April 2019, Utsav Bains, a Supreme Court lawyer, had alleged that there was a conspiracy to fix Gogoi in the case. The court formed a one-man committee headed by former judge AK Patnaik to look into allegations of a larger conspiracy against the judiciary.

The report of the committee was submitted in October, 2019. In February, the court took up the case for hearing and swiftly closed it by stating that no useful purpose would be served in continuing the proceedings. When RTI applications were filed asking for a copy of the report, the court refused to disclose it.

Revisit procedures

As lawyer Aarti Raghavan noted in The Hindu, the episode "serves as a reminder of the inadequate, self-fashioned rules that govern inquiries into judicial misconduct". This includes, Raghavan says, the absence of any requirement to disclose the results of the inquiry.

This absence largely flows from a judgment the court delivered in 2003. While dealing with a petition that sought the release of the report of an in-house inquiry into a sexual harassment complaint against three judges of the Karnataka High Court, the Supreme Court held that in-house procedure reports are prepared for the satisfaction of the chief justice. It added that releasing the report to the public could do more harm to the institution as judges would rather prefer to face inquiry leading to impeachment.

As the court itself often notes in its judgements, not only should justice be done, it must also be seen to be done. This is important to ensure that the public trust in the integrity of the institution remains strong.

What shakes this trust is opaqueness. If the in-house committee's finding is that Reddy made false allegations against a sitting judge of the Supreme Court, publication of the report that establishes this would only add to the credibility of the in-house proceedings. This is especially important when judges themselves inquire into allegations against fellow judges.

In the absence of the report in the public domain, any action against Reddy, whether it be in the form of contempt of court or otherwise, may find little traction with the public given that they would have nothing on which to base their judgement, except for a single-page statement from the court bereft of any insights into how it came to dismiss the allegations made by an important constitutional authority elected to office by the people of Andhra Pradesh.

Courtesy: 'Scroll' as extracted from:

https://scroll.in/article/990557/why-the-supreme-court-should-make-public-its-report-giving-justice-ramana-a-clean-chit

Sneak Peek:

No. of words: 1401 words

Note: In this article the author is tracing the historical aspect of the Delhi and the working of the Delhi Administration. It is very informative text. It will help you to enhance your legal acumen.

Article: 31

Delhi's administration as the tail wagging the dog

The Government of NCT of Delhi (Amendment) Bill, 2021 will reduce the elected government to a mere vestigial organ

A courtier once said about Charles II, "We have a pretty witty king, Whose word no man relies on. He never said a foolish thing, And never did a wise one." Charles supposedly replied, "The wise words are my own, the deeds are my ministers." Thus was seeded the system of the cabinet form of government, which eventually flowered in England and left its imprimatur over constitutional structures throughout the world. India has no monarchs but a President and Governors, in whose name, the government is run. They can do almost nothing by themselves, without the aid and advice of their cabinet of Ministers. However, the Lieutenant Governor (LG) of Delhi, will likely be an exception soon.

Parliamentary democracy, with a cabinet form of government, is part of the basic structure of the Indian Constitution. Its first article reads, "India that is Bharat, shall be a Union of States." When the Constitution came into force, there were four kinds of States, called Parts A,B, C and D States, with the last two being administered by centrally appointed Chief Commissioners and Lieutenant Governors, with no locally elected Assemblies to aid and advise them.

Governing Delhi

Delhi as the National Capital, belonged to the nation as a whole. It was felt that if Delhi became a part of any constituent State of the Union, that State would sooner or later acquire a predominant position in relation to other States. Second, the need for keeping the National Capital under the control of the Union Government was deemed to be vital in the national interest. It was felt that if Delhi became a full State, the administration of the National Capital would be divided into rigid compartments of the State field and Union field. Conflicts would likely arise in vital matters, particularly if the two governments were run by different political parties.

Hence, Delhi was initially made a Part C State. Its population then was around 14 lakh people. In 1951, a Legislative Assembly was created with an elected Chief Minister. Chaudhary Brahm Prakash became the first Chief Minister in 1952. However, a prolonged stand-off with the Chief Commissioner, and later the Union Home Minister, Govind Ballabh Pant, over issues of jurisdictions and functional autonomy, eventually led to his resignation, in 1955. In 1956, when the Constitution of India was amended to implement the provisions of the States Reorganisation Act, only two categories, namely, States and Union Territories remained in the Indian Union. Delhi then became a Union Territory to be administered by an Administrator appointed by the President. The Legislative Assembly of Delhi and the Council stood abolished, despite loud protests in Parliament. Ten years later, the Delhi Administration Act, 1966 provided for a limited representative Government in Delhi through a Metropolitan Council comprising 56 elected Members and five nominated Members. This structure continued for many years, with repeated political demands for full statehood to be granted to Delhi.

In 1987, the Balakrishnan Committee was set up to submit its recommendations with regard to the status to be conferred on Delhi. In 1989, the Committee recommended that Delhi should continue to be a Union Territory but that

there must be a Legislative Assembly and Council of Ministers responsible to the said Assembly with appropriate powers; and to ensure stability, appropriate constitutional measures should be taken to confer the National Capital a special status. Based on this report, the Constitution (69th) Amendment Act and the Government of National Capital Territory of Delhi (GNCT) Act, 1991 were passed. They roughly restored the kind of governance system that was offered to Delhi in 1952: a Union Territory with a Legislative Assembly, a Council of Ministers and an elected Chief Minister. This limited reincarnation has continued to hold the field to date, despite several efforts to progress to full or near-statehood.

Politics and questions

Between 1991 to date, there have been various instances when the Delhi Assembly has been won by a party other than the ruling party at the Centre. In an era of mixed but slim mandates, the Delhi government and the Union Government have differed, but more often than not found a modus vivendi . But the Lok Sabha elections of 2014 and 2019 and the Delhi Assembly elections of 2015 and 2020, have resulted in huge mandates to personality-led governments, from different parties that are seemingly locked in mortal combat with each other.

The ensuing fights lead to constitutional questions on Delhi's peculiar government structure being litigated up to the Supreme Court. A Bench in 2018 ruled that "...Parliament envisaged a representative form of Government for the NCT of Delhi. The said provision intends to provide for the Capital a directly elected Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision". The Court further ruled that "... The Constitution has mandated a federal balance wherein independence of a certain required degree is assured to the State Governments. As opposed to centralism, a balanced federal structure mandates that the Union does not usurp all powers and the States enjoy freedom without any unsolicited interference from the Central Government with respect to matters which exclusively fall within their domain."

The remaining issues of governance, especially in the matter of control over Delhi government servants, was remitted to two judges of the Court for further adjudication. In 2019, there was a difference of opinion recorded in separate judgments by the two judges and the matter awaits hearing before a larger Bench.

The consequences

It is against this convoluted historical and legal background that we must assess the Central government's justification that "In order to give effect to the interpretation made by Hon'ble Supreme Court in the aforesaid judgments, a Bill, namely, the Government of National Capital Territory of Delhi (Amendment) Bill, 2021 seeks, inter alia, to clarify the expression 'Government', ….consistent with the status of Delhi as a Union territory to address the ambiguities in the interpretation of the legislative provisions."

The Bill effectively reduces the elected government to a mere vestigial organ and elevates the centrally appointed LG, to the position of a Viceroy with plenipotentiary powers. Simply put, the elected government in Delhi can do nothing, if the LG does not permit them to so do. It provides that, "The expression 'Government' referred to in any law to be made by the Legislative Assembly shall mean the Lieutenant Governor." It further provides that "...before taking any executive action in pursuance of the decision of the Council of Ministers or a Minister, to exercise powers of Government, ...under any law in force in the Capital, the opinion of Lieutenant Governor ...shall be obtained on all such matters as may be specified, by a general or special order, by Lieutenant Governor."

If the Bill is passed by both Houses of Parliament, as it seems so, it will be a case of the unelected tail wagging the elected dog. The population of Delhi which counts among the highest in the world, will have an unrepresentative administration. It will be ruled by an appointed LG, who can only be changed if the rest of the country, decides to change the Central government. There can be no recourse to the ballot box to hold to account an unelected, centrally

appointed government functionary. It is quite likely that the amendment act will end up being challenged in the constitutional courts. The Supreme Court has already cautioned — "Interpretation cannot ignore the conscience of the Constitution. That apart, when we take a broader view, we are also alive to the consequence of such an interpretation. If the expressions in case of difference and on any matter are construed to mean that the Lieutenant Governor can differ on any proposal, the expectation of the people which has its legitimacy in a democratic set-up, although different from States as understood under the Constitution, will lose its purpose in simple semantics."

Will Parliamentarians heed the Court's caution, or like Charles II, will they never say "a foolish thing and never do a wise one"?

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/delhis-administration-as-the-tail-wagging-the-dog/article34135140.ece

VIDHIGYA

Sneak Peek:

No. of words: 1107 words

Note: This article is about the recent NCT of Delhi (Amendment) Bill, 2021, which amends certain powers and responsibilities of the Legislative Assembly and the Lieutenant Governor. It is suggested to follow it. A must read for every law aspirant. Enjoy this article!!

Article: 32

Delhi Bill will sow the seeds of absolutism

If passed in its current form, the NCT of Delhi (Amendment) Bill, 2021 will strip the elected government of almost all its powers. It must be referred to a select committee and not passed in haste.

Making the law retrospective, the Bill provides that if such rules have been framed they will become void.

The political theorist Jean Louis De Lolme had once famously observed that "British Parliament can do everything but make a man a woman, a woman a man". The English statesman Lord Burleigh had remarked in a similar vein that England could "never be ruined but by a Parliament". In India, the Constitution, and not Parliament, is supreme; yet, at times, parliamentary enactments give the indication that the latter can do anything. At a time when the Freedom House report has downgraded India as a "partly free" country and V-Dem's report has rubbed salt on our wounds by terming India an "electoral autocracy", the NCT Bill, 2021, introduced in the Lok Sabha last week, will further dent our international reputation.

This author has several disagreements with both the reports, yet who can deny that we are not doing enough to preserve our democratic capital and unnecessarily enacting laws or coming up with policies that have possibilities of tilting our democracy towards authoritarianism. The overriding powers given to the Governor-General in the Government of India Act, 1935 was opposed by the leaders of our freedom movement, and this opposition prevented the legislation from being enforced at the Centre. The Delhi Bill takes us back to British era.

Such Bills could strengthen the international perception of India becoming an electoral autocracy. This ill-timed move not only negates cooperative federalism but also upturns the fundamental principles laid down by the five-judge bench judgment of the Supreme Court in 2018. While the court was hopeful of a "constitutional renaissance" in the country, the Bill if passed in the current form would sow the seeds of absolutism. Justice D Y Chandrachud had, in fact, noted in his concurring judgment that democracy is in danger due to authoritarian tendencies in several countries.

The then CJI Dipak Misra had devoted 120 pages in elaborating 12 fundamental principles of our liberal constitutional democracy with constitutionalism or the concept of limited powers as its central idea. To sustain what he called constitutional glory, we must attach the highest importance to people who are the real sovereigns and who speak through their elected representatives.

The Bill takes away almost all the powers of elected representatives.

CJI Misra had also observed that courts need to take recourse to pragmatic interpretation to further the spirit of Constitution, rule of law and participatory democracy. The clear message of the judgment was that Delhi's LG is just an "administrator" and an administrative head bound by the "aid and advice" rendered by Delhi's Council of Ministers. The LG, according to this verdict, has no independent powers and has to go by the advice of the council of ministers or comply with the orders of the President on matters referred to him. His concurrence is not needed in every matter and he can refer matters to the President only in exceptional situations and not in a "routine or mechanical

manner". The apex court had reversed the judgment of Delhi High Court which had held the LG to be a master of his own, not bound by the "aid and advice" of his ministers. The new Bill seeks to reinstate these powers.

Similarly, the then CJI also talked of "constitutional objectivity" as the key to checks and balances between the legislature and executive — one that ensures that the two operate within their allotted spheres since "legitimate constitutional trust" is based on distribution and separation of powers with denial of absolute power to any one functionary being the ultimate goal. The Court, therefore, held that "any matter" in Article 239AA(4) does not mean "every matter". In other words, the LG cannot refer any matter to the President; he has to employ "constitutional objectivity" and exercise this power in the rarest of rare situations for sound and valid reasons. The LG does not have the power to change every decision or differ with every decision of the Council of Ministers.

In an equally authoritative concurring opinion, Justice Ashok Bhushan had favoured vesting real powers in the representative government rather than in the nominated LG. That the LG must reign and not rule is the core principle of the cabinet system of governance. A two-judge bench of the apex court in 2019 did concede that as far as the anti-corruption bureau is concerned, the LG will have exclusive powers but on the issue of services, the two judges differed and the matter was referred to a larger bench.

Having supported the near abrogation of Article 370, Delhi CM Arvind Kejriwal should have no face to oppose the dilution of the elected government's powers in Delhi — after all, Delhi is a Union Territory rather than a full-fledged state like erstwhile Jammu & Kashmir.

In a master stroke, the Centre invoked Article 370 itself to amend the Constitution by a Presidential Order (C.O. 272 of 2019) and changed the definitions of certain terms in Article 367. As a result, the Constituent Assembly of Jammu and Kashmir, dissolved way back on January 26,1957, was made the legislative assembly of the state. Article 370 was also invoked to make another historical change: The legislative assembly of the erstwhile state was henceforth to be construed as the Governor of Jammu and Kashmir. The J&K government was deemed to be the Governor acting on the advice of his council of ministers. In a similar manner, the Delhi Bill stipulates that the government of Delhi will mean the LG. It goes one step ahead and does not require the LG to act on the advice of the council of ministers.

The legislative assembly or its committees can no longer make rules to enable itself or its committees to consider the matters of day to day administration or conduct inquiries in relation to administrative decisions. Making the law retrospective, the Bill provides that if such rules have been framed they will become void. The Bill also makes it incumbent on the Delhi government to take the LG's opinion before taking any executive action, virtually taking away almost all powers of the elected government.

The Bill should be referred to a select committee and not passed in haste like the Farm Bills. Evolving consensus in such matters would be consistent both with federalism as well as the high principles laid down by the Supreme Court.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/nct-bill-electoral-autocracy-constitutional-democracy-7238825/

Sneak Peek:

No. of words: 2146 words

Note: This article is in furtherance of last preceding article. Author is Constitutionally analyzing The Government of National Capital Territory of Delhi (Amendment) Bill, 2021. It is suggested to go for that Vidhigya 360 Degree analysis of the Bill and make your own short notes too. A must read article.

Article: 33

Centre's Delhi Amendment Bill is at Odds With Supreme Court's Ruling and the Constitution

The Government of National Capital Territory of Delhi (Amendment) Bill, 2021, introduced in the Lok Sabha on March 15, has evoked strong comments from the media as well as experts. This Bill contains amendments that will enhance the powers of the lieutenant governor (LG) of Delhi and further hobble the elected government (led by the Aam Aadmi Party) and emasculate the assembly.

It is very surprising that after a constitution bench of the Supreme Court in 2018 settled the constitutional issues relating to the relationship between the Delhi government and the Union government in matters of governance, parliament has been called upon to amend the Act to unsettle this relationship.

Delhi was given a fully elected legislative assembly and a responsible government through an amendment in the constitution in 1991. Though technically a Union Territory, Delhi was treated as a special case, being the capital of the country, and given a special constitutional status by parliament in exercise of its constituent power as against its normal legislative power. Article 239AA was added to Part VIII of the constitution which contains general provisions relating to the administration of Union territories.

This article provided for an assembly, fully elected, and a council of ministers responsible to the assembly. It conferred on the assembly the power to legislate on all matters in the state list as well as the concurrent list except land, police and public order. The purpose behind granting a special status to Delhi has been explained by the Supreme Court in GNCTD Vs. Union of India in the following words:

"The real purpose behind the Constitution (69th Amendment) Act, 1991, as we believe, is to establish a democratic set up and representative from of government wherein the majority has a right to embody their opinions in laws and policies pertaining to the NCT of Delhi subject to the limitations imposed by the constitution."

A democratically elected legislature with all the powers of a state legislature except the excluded subjects and a representative government responsible to the legislature with all the executive powers to the exclusion of the executive powers of the Union are the special features of the administrative set up created under Article 239 AA of the constitution.

However, there was one sticking point in the otherwise excellent constitutional scheme contained in this Article. It brought in a provision from the Government of Union Territories Act, 1963, namely, that in case of a difference between the LG and the council of ministers on any matter, the matter shall be referred to the president by the LG for his decision and pending such decision the LG can take any action on the matter as he thinks fit.

Such a provision might have been reasonable or even necessary for a UT under the administrative control of the president. But to bring in such a provision in the constitutional enactment conferring a special status on Delhi was quite unnecessary. It has become the single source of trouble and conflicts between the LG and the elected

government of Delhi as the former could disagree with all major administrative and legislative initiatives of the elected government if he so desires.

Although the constitution bench of the Supreme Court has held that the government does not have to seek the concurrence of the LG on its decisions and that any differences between them should be resolved keeping in view the constitutional primacy of representative government and co-operative federalism, the state government is under constant threat from the LG's power to differ with the government on important issues. The Supreme Court, of course, made it extremely difficult for the LG to refer such matters to the president. It said that he cannot refer a matter mechanically or mindlessly an has to make all attempts to resolve the differences within the framework of the law and the Transaction of Business Rules.

This is the background against which the proposed new amendments – which curtail the powers of the government and the assembly – need to be considered.

One of the amendments says that the rules of the assembly shall not be inconsistent with the rules of Lok Sabha. This is an astounding proposition. It is the privilege inherent in every legislature to conduct its own proceedings as per the rules made by it. The constitution and the statutes have merely recognised this inherent right of the legislatures and made special provisions for it. Framing the rules to conduct its proceedings is thus a part of the privilege each house of a legislature enjoys. Further, each legislative house is independent of the other. So, the Delhi assembly is an independent legislative house and the Lok Sabha has no control over it. Parliament has no power to legislate and take away the inherent right of a legislature to frame rules for conducting its proceedings. Parliament, for example, cannot make a law saying that the Rajya Sabha's rules will not be inconsistent with the Lok Sabha rules.

Another amendment, if passed, has very serious consequences. It says that the Delhi assembly shall not make rules to enable itself or its committees to consider matters of day-to-day administration. It further says that no rule shall be made by the assembly to conduct inquiries in relation to administrative decisions and if such a rule exists now, it will become void after this amendment comes into force.

Every democratic legislature has the inherent right to scrutinise the decisions taken by the executive, which flows from the executive being responsible to the legislature. Executive accountability is the essence of the parliamentary system of government, which is a part of the basic structure of the constitution. The Delhi assembly has the inherent and inalienable right to scrutinise the decisions of the government, administrative or otherwise. No authority can take it away. Inquiry into or investigation of the decisions of the executive is an integral part of the legislative oversight of the executive. Parliament has no competence to take away this right through some legislation. These amendments, it can thus be seen, violate the basic structure of the constitution, apart from violating Article 239 AA (6).

Another crucial amendment requires the state government to obtain the opinion of the LG on their decisions before executive action is taken on those decisions. Thus, the elected government cannot take any action unless it obtains the LG's opinion. A government is often called upon to take urgent decisions and actions on issues concerning people's lives. But after this amendment comes into force, it will have to wait till the LG deigns to give their opinion on the decisions of the government. The effect of this amendment will be that the government will not be able to act quickly on matters which it considers important. There can be no more effective way than this to hobble an elected government and make it totally ineffective, for this amendment does not requires the LG to give their opinion within a timeframe. So, she or he can take their own time.

But is this amendment legally maintainable? In my view, it is not. This amendment nullifies the decision of the Supreme Court which has clearly held that the elected government of Delhi can take all decisions within its jurisdiction and execute them without obtaining the concurrence of the LG. In case of a difference of opinion on a matter between the LG and the government, the former should make all efforts to resolve it and only in extreme cases should she or refer the matter to the president for a decision.

The above amendment nullifies this decision of the Supreme Court from the position of taking decisions and executing them without obtaining the concurrence of the LG; being unable to act on its decisions, the state government will now be waiting endlessly for the opinion of the LG thereon. Thus this amendment clearly nullifies the decision of the Supreme Court. The apex court had, in the case of People's Union for Civil Liberties (2002) held that the legislature has no power to set at naught the decision of the court. It can only change the basis on which the decision has been taken by the court and make a general law.

Setting aside a decision of the court by the legislature amounts to exercising the judicial power of the state which is not the function of the legislature. The Supreme Court had adopted the principles of democracy and balanced federalism as the basis for its decision to give unfettered freedom to the elected government to carry out its decisions. The above amendment Bill while nullifying the decision of the Supreme Court does not attempt to change its basis. On the contrary, as the statement of objects and reasons indicates, the Bill tries to define the responsibilities of the elected government and the LG in line with the constitutional scheme of governance of the NCT of Delhi. So, the Bill does not change the basis of the decision of the Supreme Court but in effect nullifies the decision. Parliament has no power to nullify the Supreme Court's decision without changing the basis of it as it is the judicial function of the state. So, this amendment is clearly invalid.

The above amendment is invalid for another reason too. The Government of National Capital Territory of Delhi Act, 1991 was enacted by parliament as a legislative measure to give effect to the provisions contained in Article 239AA. It is a supplemental law and is intended to deal with incidental matters. As a supplemental legislation, it cannot travel beyond the provisions contained in Article 239AA. Clause (4) of this Article says that the LG will act on the aid and advice of the council of ministers which means he can act only on the aid and advice of the council of ministers except in respect of the excluded items. The Supreme Court has settled the law in this matter by declaring that the state government can take decisions and execute them without taking the concurrence of the LG.

The proposed amendments, which require the government to obtain the opinion of the LG before action is taken, do not give effect to clause (4) and are neither incidental nor consequential. A legislative proposal cannot be incidental or consequential if the effect of it is against the parent law or constitution. The above amendment thus violates Article 239AA (7) and is therefore invalid.

Another proposed amendment that needs to be examined is the one that defines 'government' as 'lieutenant governor'. It says that in all the laws to be made by the assembly, the "government" shall mean the "lieutenant governor". One is at a loss to understand why such an amendment has been proposed. Legislative proposals are brought before the assembly by the elected government. When it is passed by the assembly, it is the duty of the government to enforce it because it is responsible to the legislature.

The LG is not a part of the assembly and is not responsible to the assembly. If the LG is the government and not the elected government, he is not bound to act in accordance with the decisions of the assembly. It will be a negation of the content of clause (4) of Article 239AA.

Further, Article 239AB provides for president's rule in Delhi when the administration of the territory cannot be carried on in accordance with the provisions of Article 239AA. President's rule is imposed on a report from the LG. If the LG is the government, will she or he have to make a report against themselves? It is obvious that Article 239AA recognises the well-established constitutional position that the elected government is the real government and the governor or LG is only a constitutional head. So this amendment is against Article 239AA and is thus invalid.

Now, the consequences of the new amendments can be summarised as follows:

The committees of the Delhi assembly including the Public Accounts Committee, the Public Undertaking Committee etc. will cease to exist as the rules under which they are set up will become void because these committees scrutinise, inquire into or investigate the decisions of the government.

The LG, who will be the government, is under no obligation to implement any law passed by the assembly or carry out the directions of the house as he is not responsible to the assembly.

The elected government of Delhi will wait endlessly for the LG's opinion without being able to execute their decision. So, the decisions of the cabinet or of the ministers will mostly remain on paper only. Thus, the government will become non-functional.

In sum, the proposed amendments violate the basic structure of the constitution, violate specific articles of the constitution and violate the privileges of the Delhi assembly. It cannot stand judicial scrutiny.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/delhi-amendment-bill-centre-lieutenant-governor-supreme-court

VIDHIGYA

Sneak Peek:

No. of words: 1633 words

Note: In this article, the author is analyzing the rights of Rohingya and their situation in Myanmar. As a CLAT aspirant, you do not need to mug up the facts of the case but just to have a fair idea about it.

Article: 34

Article 21 in a Time of Genocide: The Rohingya Case before the Supreme Court

On Friday the Supreme Court reserved orders in a plea seeking interim directions to restrain the central government from deporting Rohingya refugees detained in Jammu and Kashmir. The application further urged the court to order the release of the detained refugees and to direct the government of J&K and the Union Home Ministry to grant these persons identification cards through the Foreigners Regional Registration Office. This petition for interim relief was filed on the back of a slew of news reports that showed that the J&K administration had set up a sub-jail in Kathua as a "holding centre" under the Foreigners Act, and had rounded up and placed in these cells more than 150 Rohingya refugees, including many women and children. The prayers for temporary respite are nestled within a larger challenge to the Union government's direction to the states to identify Rohingya in India as "illegal immigrants" and to have them deported to Myanmar in a "continuous manner."

By most accounts the Rohingya, who are a mostly Muslim ethnic group, constitute the world's most persecuted minority. They represent the largest single group of "stateless" people and live without citizenship and access to basic legal rights. In August 2017, thousands of Rohingya fled Myanmar's borders, either by foot or sea, after the launch of a lethal assault on them by the country's army. The United Nations' high commissioner for human rights described the attack as a "textbook example of ethnic cleansing." (This report provides a timeline of the successive cycles of violence and persecution against the Rohingya in Myanmar).

The consequences of the violence that commenced in 2017 were felt across the globe. The Indian government's immediate reaction to the arrival of Rohingya, who had fled persecution, was to direct the States to conduct surveys under the Foreigners Act and to arrange for the deportation of the immigrants. In response to queries pointing to the issuance of identity cards to Rohingya refugees by the United Nations High Commissioner for Refugees, the Union Minister of State for Home Affairs Kiren Rijiju said, "they are doing it, we can't stop them from registering. But we are not signatory to the accord on refugees. As far as we are concerned, they are all illegal immigrants. They have no basis to live here. Anybody who is illegal migrant will be deported." It was this endeavour by the State that came under challenge in the original petition filed under Article 32 by a pair of refugees, in Mohammad Salimullah v. Union of India. The primary plea remains pending till date. In it, the petitioners claim that India's commitments under international law, in particular the principle of non-refoulement, would stand breached should they and other refugees be deported to Myanmar. What is more, they also argue that their rights under the Constitution of India are under threat, specifically the right to equality guaranteed by Article 14 and the right to life and personal liberty promised under Article 21.

The principle of non-refoulement is enshrined in Article 33(1) of the 1951 United Nations Convention Relating to the Status of Refugees. It stipulates that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Article 33(2) contains a limited exception. It states that "The benefit of the present provision [i.e. Article 33(1) referred to above] may not however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or

who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

In the present case, there can be little argument against the threat faced by the Rohingya in Myanmar. The International Court of Justice granted provisional measures in January 2020 in a case brought by Gambia, and recognised that there was prima facie evidence of breaches made by Myanmar of the 1948 Genocide Convention and that the remaining Rohingya population were "extremely vulnerable" to attacks by the military. The Court took note of the resolution passed in December 2019, by the United Nations General Assembly, which recorded "its grave concern that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process."

It's therefore clear that should the Rohingya refugees in India now be deported to Myanmar, the actions will doubtless be in breach of Article 33 of the Refugee Convention. But the government's argument in the Supreme Court is that India is not a party to the convention and is therefore not bound by the requirements of Article 33. This argument is fine as far as it goes. But treaty law isn't the only source of international law. Article 38(1)(b) of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law" as one of the sources of law which binds all nation-states. For a rule to amount to international custom, two factors need fulfilling: consistent state practice and opinio juris, that is a sense on behalf of a state that it is bound to the law in question. The principle of non-refoulement, as a 2007 advisory opinion by the UNHCR makes clear, is widely regarded as fulfilling both these factors and as therefore constituting a rule of international custom. Although contested, there is also a substantial body of opinion that points to the rule against refoulement constituting what is regarded in international law as a jus cogens norm, as a peremptory principle against which no derogation whatsoever is permissible. Even domestic laws inconsistent with such a norm would have no validity under international law. Therefore, the government's argument that it is not bound by the principle of non-refoulement merely because India isn't a party to the Refugee Convention ought to be rejected.

In any event, as an intervention application filed in the Supreme Court by the United Nations' Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance demonstrates, there are other treaties to which India is a party that will stand breached should the Rohingya be deported to Myanmar. Specifically, the application points out that the following treaties, among others, will stand violated: (1) International Convention on the Elimination of All Forms of Racial Discrimination; (2) Articles 2(1), 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR); (3) Articles 2(2) & 3 of the International Covenant on Economic and Social Rights (ICESCR); (4) Article 2 of Convention on the Elimination of All Forms of Discrimination Against Women. The special rapporteur argues that barring a few exceptions, these treaties require states to guarantee non-nationals equal enjoyment of civil, political, social and economic rights and that the obligations under these treaties require India not to discriminate on the basis of national origin by satisfying principles of racial equality.

Regrettably, though, the Supreme Court has thus far refused to hear the counsel appearing on behalf of the special rapporteur. But still the question remains: to what extent can the court compel India to act in consonance with international law? Past judgments of the Supreme Court are divided on the question. Courts have been hesitant to apply international norms when domestic law is manifestly contradictory to those rules. But, in this case, a reading of the Foreigners Act, 1946, shows us that the powers vested under it on the government is discretionary. There is no domestic law that mandates the government to act contrary to the principle of non-refoulement. This being the case, the Supreme Court must accord the greatest respect possible to India's obligations both under treaty and customary international law. If nothing else, these obligations ought to guide the court in providing a proper interpretation of the fundamental rights that serve as the basis of the petitioners' challenge.

Indeed, two high courts have already read Article 21 as including within its ambit a right against refoulement. In their judgments in Ktaer Abbas Habib Al Qutaifi v. Union of India (1998) and Dongh Lian Kham v. Union of India (2015)

the Gujarat and Delhi High Courts have both held that the principle of non-refoulement is inherent in Article 21's guarantee of the right to life and personal liberty. In the former case, the Gujarat High Court noted that "the principle of 'non-refoulment' is encompassed in Article 21 of the Constitution of India and the projection is available, so long as the presence of the refugee is not prejudicial to the national security," and that "where no construction of the domestic law is possible, courts can give effect to international conventions and treaties by a harmonious construction." As the high courts recognised, the right under Article 21 is available to both citizens and non-citizens alike.

Images coming out of Myanmar's streets tell their own story. Already following the military coup of February 1, the country's armed forces have killed hundreds of protestors, including those who have expressed sympathy with the Rohingya. On Saturday alone the army killed over 100 people, including a five-year-old child. The Rohingya have long faced similar assaults from the country's junta. To deport them at a time like this is to condemn them to sure death. There is a reason why Article 21 of the Constitution is made applicable to all persons, irrespective of citizenship. And nowhere is that reason more evident than in the plight of the Rohingya refugees.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/article-21-genocide-rohingya-case-supreme-court-171896?infinitescroll=1

VIDHIGYA

Sneak Peek:

No. of words: 642 words

Note: This article is in furtherance of last preceding article and in this article the author is analyzing India's stand on Myanmar refugees in the light of the International Law. It is a must read article. Do follow it.

Article: 35

An unconscionable act: on India's position on Myanmar

India would be in breach of international law in turning its back on the people of Myanmar

The world has been watching Myanmar descend into a brutal military dictatorship again. The scenes from the past few weeks have been terrible — peaceful protestors being killed, detained, and communities terrorised. In all this, the people of Myanmar have been pleading with the international community to support them in their hour of need. It is incumbent upon Myanmar's neighbours to stand up for rule of law, democracy and human rights.

Engaging in doublespeak

While many in India are supportive of those in Myanmar calling for democracy, the Indian government has been engaging in doublespeak. On the one hand, India has made relatively strong, laudable statements as part of the UN Security Council and at the UN Human Rights Council in Geneva in support of the people of Myanmar. On the other, the government is simultaneously detaining and preparing to deport Rohingya refugees to Myanmar.

The Ministry of Home Affairs has also recently issued a diktat to border States to check "illegal influx" from Myanmar to India. The Ministry wrongly labels those fleeing into India as "infiltrators", arguing that they are not to be considered refugees as India has not signed the UN Refugee Convention.

This is an erroneous position in international law. These individuals would fall within the legal definition of refugees i.e., those who have a well-founded fear of persecution, and the customary international law norm of non-refoulement is legally binding. This means that no State can send individuals back to a situation of danger, which is clearly the case in Myanmar. Non-refoulement applies to those countries which have signed the conventions as well as those that have not.

This is of particular relevance to those police and security personnel refusing illegal orders to attack protesters, instead seeking refuge in India, as multiple credible reports indicate. There are growing calls from the UN and states for the atrocities committed by Myanmar security forces in the course of these protests to be investigated as possible crimes against humanity, given their scale, coordination and their widespread and systematic nature. Furthermore, this week, the Independent Investigative Mechanism for Myanmar (IIMM), a UN established body that is mandated to investigate and build case files for international crimes committed in Myanmar since 2011, issued a public call to security personnel to reach out and provide information regarding illegal orders and policies, which are a necessary component of building cases against those higher up in the chain of command. India must shelter these individuals and allow the IIMM access, should they indicate willingness to cooperate in these international investigations.

Crimes against the Rohingya

Coinciding with the mass crackdown against protesters in Myanmar this month, reports emerged of Rohingya refugees being rounded up and detained in India, in preparation for deportation to Myanmar. The office of the UN High Commissioner for Refugees in India was denied access to individuals detained in Delhi. The Rohingya are refugees who have fled years of atrocities and a genocidal campaign, and must not be sent back to Myanmar where their lives

are in certain danger. There are also international legal proceedings ongoing in relation to the Rohingya. A case before the International Court of Justice relates to violations of the Genocide Convention by Myanmar, and has been brought against it by The Gambia, with Canada, the Netherlands and Maldives joining the case recently. Simultaneously, the Prosecutor of the International Criminal Court is investigating international crimes against the Rohingya. These international legal proceedings are indications of the seriousness and gravity of the crimes against the Rohingya, which India would do well to heed.

To turn its back on the people of Myanmar would be unconscionable now, and India would be in breach of international law in doing so.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/an-unconscionable-act/article34134759.ece

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Aman.

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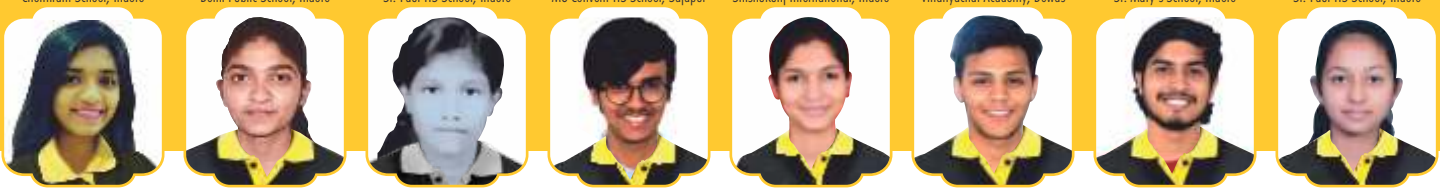

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Holy Trinity School, Allahabad

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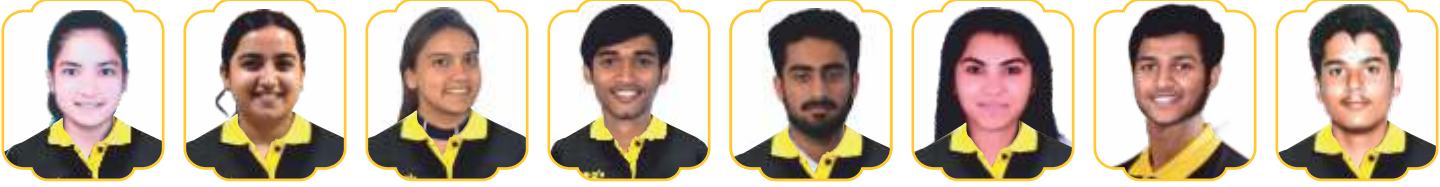

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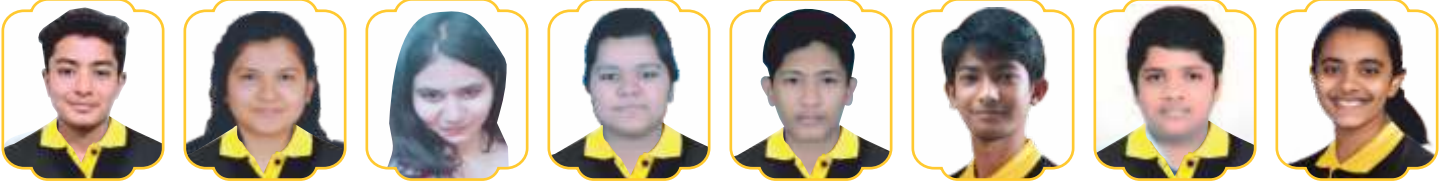

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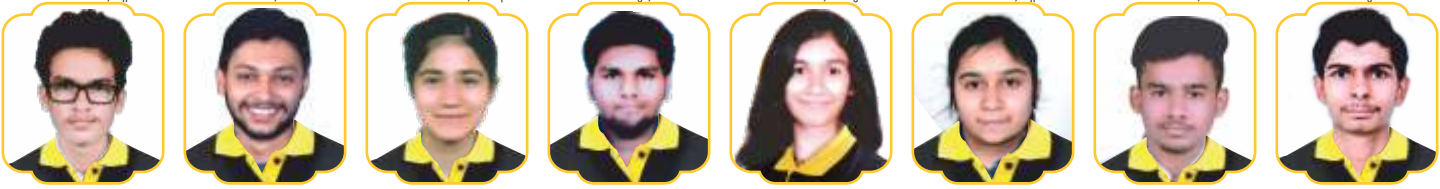

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