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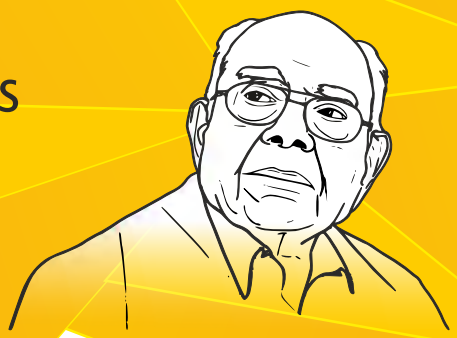

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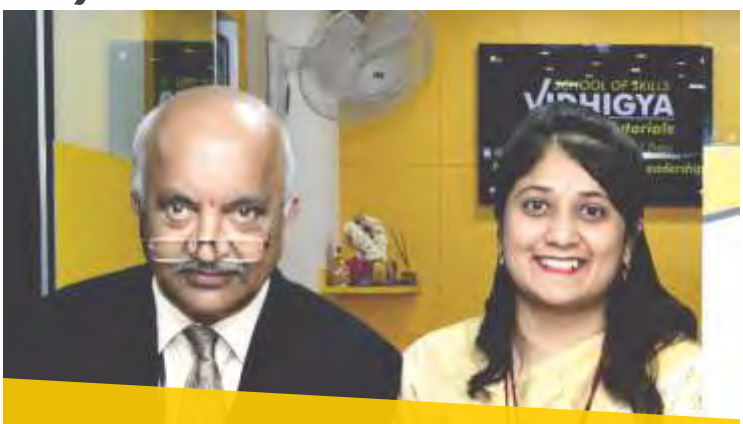

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Sneak Peek:

No. of words: 1450 words

Note: In this article, the author is criticizing The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020 and the legal intricacies of the same. It will help you to enhance your legal acumen. It is suggested to do follow it.

Article: 1

Constitutional Validity of The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020

The Governor of Uttar Pradesh has promulgated the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 with the aim of prohibiting 'unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage'.

The haste with which the legislation has been passed and enforced directs to the approach of the government towards minorities, which is stated by the Chief Minister in many statements. The Ordinance is against the provisions of the Constitution primarily on two aspects- the procedure which was adopted to enact the legislation and secondly, the manner in which it infringes the Right to Privacy mandated under Article 21 of the Constitution.

Procedural irregularities

The legislation has been enacted as an Ordinance by the Governor of the State under the provisions of Article 213 of the Constitution which extends the legislative powers to the Executive. The power of Governor under Article 213 is defined as such-

If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

A bare reading of the Article provides that the Governor can exercise the power only when "circumstances exist which render it necessary to take immediate action". Thus, as a sine qua non the Governor has to be satisfied of the exigent situation, which is the sole ground for the exercise of this legislative function. In the absence of such an urgency, the exercise of legislative power by the Governor is unconstitutional. Such hasty passing of Ordinances without any reason requiring immediate action has been held to be illegal as it seems to be undertaken 'primarily to by-pass debate and discussion in the legislature' (RC Cooper v. Union of India), which is anti-democratic.

The compelling reason which was purported to be cited in the instant case was the rise in the cases of 'love jihad' or forced conversion for marriage. Moreover, the Chief Minister had cited the two decisions of single judges of High Court of Allahabad (Priyanshi @ Km. Shamren v. State of U.P.

and Noor Jahan Begum @ Anjali Mishra vs. State of U.P.) which had held marriages after religious conversion to be void. No statistics, facts or figures have been cited by the government as an evidence of the compelling circumstances.

On the other hand, there is abundance of data against the proposition. The Special Investigation team appointed by the UP Police to gather data and information regarding the cases of 'love jihad' found no concrete proof as most of the cases of Hindu-Muslim marriages turned out to be consensual. The women in all such cases had married persons of different religion out of their own free will. Further, the Division Bench of the High Court of Allahabad decried the two aforementioned cases and held them to be "not good laws" under the Constitution (SalamatAnsari v State of UP).

In the light of these factors, no circumstances existed before the government which required the immediate action of promulgating an Ordinance by-passing the regular prescribed procedure of law making through the Parliament. This subject definitely calls for a thorough debate and analysis by expert committees before being passed as the law of the land. The process of enacting this legislation containing such stringent penal provisions is an anathema and is purely an act making mockery of the Constitution.

Complete negation of Privacy Rights

Apart from the procedural irregularities, the legislation completely undermines the Constitutional principles and rights ensured thereunder. Private life of an individual and the freedom to take decisions for the private life have been held to be inviolable fundamental right of every individual. Through numerous decisions, the Courts have recognised and upheld the sanctity of personal space which includes the decisions with respect to marriage and family life. Right to choose a partner irrespective of caste, creed or religion, is inhered under right to life and personal liberty, an integral part of the Fundamental Right under Article 21 of the Constitution of India (Salamat Ansari v State of UP).

In the case of Lata Singh v State of U.P, the Supreme Court has very clearly laid down the law regarding inter-faith and inter-religious marriages, and has held thus- "This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage."

While declaring the decisions on 'love jihad' by the single benches of High Court of Allahabad to be not good law, the Division Bench had held that "We do not see Priyanka Kharwar and Salamat as Hindu and Muslim, rather as two grown up individuals who out of their own free will and choice are living together peacefully and happily over a year. The Courts and the Constitutional Courts in particular are enjoined to uphold the life and liberty of an individual guaranteed under Article 21 of the Constitution of India. Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty. Interference in a personal relationship, would constitute a serious encroachment into the right to freedom of choice of the two individuals".

In the case of K.S. Puttaswamyv Union of India (famously known as the Right to Privacy judgment) Hon'ble Supreme Court held that-

"The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised."

Unlawful infringement with this right has been held to be unconstitutional under the Right to Privacy judgment. The judgment has asserted that no law could interfere with the privacy rights of the people and enter into their private lives without any reasonable and justifiable reasons and no law would be held to be a good law if it attempts to do so without providing a procedure which is proportionate and which ensures a rational nexus between the objects and the means adopted to achieve them.

In order to determine this, the judgment developed a test and called it the 'Triple Test' comprising three elements of legality, need and proportionality to determine the correctness of the legislation on the touchstone of privacy rights. It has been held by the Court that – The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.

The present legislation fails miserably on all the three elements as it is neither legal, nor the government has been able to justify any legitimate state aim and the provisions of the Ordinance are not proportionate to the object and needs sought to be fulfilled by the law. It unjustly interferes with the personal rights of the individual and makes the acts declared by the Courts to be private (right to marry of one's own choice and right to conversion of religion) criminal by including provisions of imprisonment. The 'victims' under the Ordinance are rendered remedy less with no procedural safeguards against any form of abuse. Hence, the Ordinance negates the privacy rights prescribed under Article 21 of the Constitution.

Thus, the Ordinance is in absolute contradiction to privacy rights; is illegal, unjustified and against the principles of constitutionalism and it ought to be declared unconstitutional.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/love-jihad-constitutional-validity-unlawful-conversion-up-government-167296

Sneak Peek:

No. of words: 1114 words

Note: In this Article, the author is critically analyzing The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020 and the legal intricacies of the same. A bit technical, but yes you should have a good legal insight about this topic.

Article: 2

UP's 'love jihad' ordinance has chilling effect on freedom of conscience

The freedom of conscience means nothing if every act of religious conversion is going to be presumed illegal unless proven otherwise. The UP ordinance's failure to prohibit forcible reconversion is also deeply disturbing.

The ordinance makes it a criminal offence for a person to convert another by coercion, misrepresentation, fraud etc, which is unobjectionable.

The governor of Uttar Pradesh has recently promulgated an ordinance to prohibit "unlawful conversion" from one religion to another. The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, as it is called, seeks to prevent "love jihad" in the state by criminalising, among other things, marriages carried out solely for the purpose of religious conversion. However, the ordinance, as it is presently drafted, dangerously imperils the freedom of conscience and the right to profess, practise and propagate religion under Article 25 of the Constitution.

The ordinance makes it a criminal offence for a person to convert another by coercion, misrepresentation, fraud etc, which is unobjectionable. A marriage solemnised for the "sole purpose" of unlawfully converting the bride or the groom is required to be declared void by the competent court. A person who wishes to convert to another religion (including to Hinduism) now has to follow a somewhat cumbersome process — issuing a declaration to the district magistrate, both before and after the conversion, and subjecting oneself to an enquiry by the district magistrate.

However, there are several provisions in the ordinance which could plausibly be identified as unconstitutional. For instance, the ordinance makes it a criminal offence to convert a person by offering her an "allurement". The term "allurement" is defined very broadly, to include even providing a gift to the person who is sought to be converted. This means that if a person offers a copy of the Bhagavad Gita to a non-Hindu, and the non-Hindu decides to convert to Hinduism after reading it, the conversion could be said to have taken place by "allurement" since it occurred after a gift was given to the convert. Under the ordinance, "allurement" can also mean telling the person sought to be converted that she will have a "better lifestyle" if she converts, or that she will incur "divine displeasure or otherwise" if she does not.

The use of the words "or otherwise" in the definition of allurement is puzzling. Is it sought to be thereby conveyed that if a preacher simply encourages her listeners to convert to another religion by arguing that her religion has more persuasive tenets than theirs — this amounts to illegal

"allurement" under the ordinance? The essential prerequisite of a criminal law is that it has to be precise. A person cannot be put behind bars for doing something that a penal law does not clearly and unequivocally prohibit. On this touchstone, the definition of "allurement" leaves much to be desired.

There can be no quarrel with the ordinance's premise that converting somebody by fraud or misrepresentation is wrong. After all, no person should be forced to convert to another religion against her will. In fact, though the members of the Constituent Assembly included the right to "propagate" one's religion in the chapter on fundamental rights, they considered it a "rather obvious doctrine" that this would not include forcible conversions. "Forcible conversion is no conversion", Sardar Vallabhbhai Patel had said in one of the sub-committees of the assembly, adding, "we won't recognise it." However, the UP ordinance goes beyond this principle and does something quite strange.

It says that "reconversion" to a person's previous religion is not illegal, even if it is vitiated by fraud, force, allurement, misrepresentation and so on. In other words, if a person converts from Religion A to Religion B of her own volition, and is then forced to reconvert back to Religion A against her will, this will not constitute "conversion" under the ordinance at all, and falls completely outside the ambit of the law. Through this peculiar provision, the law seems to send an unmistakable signal to its target audience: Prohibit illegal conversion to other religions, but look the other way if a convert is forced to reconvert back to ours.

Illegal conversion under the ordinance attracts a punishment of 1-5 years in prison. However, if the victim of the illegal conversion is a minor, a member of the Scheduled Castes or Scheduled Tribes or, strangely, a woman, the punishment is doubled — at 2-10 years behind bars. In other words, it does not matter who the woman is. She may be a highly educated CEO of a multinational company. Yet, if somebody converts her against her will, the punishment can go up to 10 years in prison, as against somebody who illegally converts her male subordinates, who will get five years in prison at the most. The ordinance unfairly paints all women with the same brush — assuming that all women, and not merely women from historically marginalised or economically weak groups, are gullible, vulnerable and especially susceptible to illegal conversion.

Perhaps the most striking provision of the ordinance is the one which deals with the burden of proof. Ordinarily, when someone makes an allegation that something has happened, it is up to her to prove it. The burden of proof in criminal cases is on the prosecution, and the presumption is that a person accused of committing an offence is innocent until proven guilty. The Uttar Pradesh ordinance turns this rule on its head. Every religious conversion is presumed to be illegal. The burden is on the person carrying out the conversion to prove that it is not illegal. The offence of illegal conversion is also "cognisable" and "non-bailable", meaning that a police officer can arrest an accused without a warrant, and the accused may or may not be released on bail, at the discretion of the court. All this puts an incredible chilling effect on the freedom of conscience.

In Rev Stainislaus v State of Madhya Pradesh (1977), a bench of five judges of the Supreme Court held that the fundamental right to "propagate" religion does not include the right to convert a person to another religion. In that case, the court had upheld anti-conversion statutes enacted by the states of

Orissa and Madhya Pradesh, which imposed somewhat similar (even if slightly less extreme) restraints on the freedom of conscience and the right to propagate religion.

In view of the recent ordinance, perhaps it is now time to revisit that judgment. The freedom of conscience means nothing if every act of religious conversion is going to be presumed illegal unless proven otherwise. The UP ordinance's failure to prohibit forcible reconversion is also deeply disturbing.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/up-love-jihad-law-religious-conversion-anti-conversion-law-7078370/

Sneak Peek:

No. of words: 1067 words

Note: In this article, the author is critically analyzing the Model Mandi Act and the assurances given by the M.P. government. It is suggested to have a fair idea about it.

Article: 3

By amending Model Mandi Act, MP has pushed its agricultural sector into throes of uncertainty

The state has posted high growth rates in the agricultural sector in recent years, but the growth has been skewed in favour of the state's irrigated parts and a small number of crops.

A reduction in mandi cess on the traders from 1.7 per cent to 0.5 per cent in October this year has weakened the revenue-generating capacity of the mandis.

Madhya Pradesh is primarily an agricultural state. One third of its gross state domestic product comes from this sector, half of the state's area is used for cultivation, and 70 per cent of the total workers and 85 per cent of the rural workers are dependent on agriculture for livelihood ("Madhya Pradesh Agriculture Economic Survey" 2016). The state has posted high growth rates in the agricultural sector in recent years, but the growth has been skewed in favour of the state's irrigated parts and a small number of crops. High agricultural growth has, thus, been accompanied by an increase in the number of farmer suicides and regular incidents of dumping of unsold produce on the highways by farmers due to sharp declines in prices. Farmer agitations, taking place at frequent intervals in the state, have, however, failed to attract national attention, barring the 2017 Mandsaur incident in which five protesting farmers died.

The Shivraj Singh Chouhan led BJP government in the state has put all its weight behind the new agricultural laws, giving verbal assurances to the farmers that the reforms will give them more freedom, help in augmenting their incomes and act as a cushion against adverse price fluctuations. These claims merit a close scrutiny.

The first claim is that the reforms will not affect the functioning of the mandis. Now, the Krishi Upaj Mandi Act, 1972, which governed the state's 259 mandis, was recently amended, and the Model Mandi Act passed in May 2020 allowed traders to make purchases outside the mandis without any levy. Even though the state government has repeatedly tried to assure farmers that mandis will not be affected by the new farm laws, in the first six months of the amendments, there has been a significant decline in their business. Moreover, a reduction in mandi cess on the traders from 1.7 per cent to 0.5 per cent in October this year has weakened the revenue-generating capacity of the mandis. This has already translated into a shortage in funds, required for the maintenance of these mandis and the payment of salaries of around 6,500 employees, excluding the registered labourers. Employees of the mandi board have organised protests in the state capital, complaining of non-payment of salaries, but no solution has been implemented regarding the revenue shortfall of the mandis. Instead of paying

heed to the demand for overhauling the functioning of mandis and making them more democratic, dynamic and transparent, the reforms seem to have broken the back of the existing set-up.

The second claim is that reforms will augment incomes. Now, tremendous increase in wheat production is one of the prominent factors which has contributed to MP's high agricultural growth. State policy has incentivised wheat production through increased procurement, bonus over MSP and improvements in irrigation facilities in certain parts of the state. The Madhya Pradesh Civil Supplies Corporation has expanded its capacity manifold over the years and large investments have been made by the state machinery in developing its agricultural marketing apparatus. There has been a massive increase in wheat procurement by the state over the last decade. Even with the lockdown restrictions in place in 2020, Madhya Pradesh procured record levels of wheat, amounting to one-third of total wheat procurement in the country. It is instructive to remember that the APMC/MSP regime came to the rescue of wheat farmers in the midst of the pandemic, when private buying dried up. However, in the recent speeches and writings of the state's Chief Minister, this achievement of the state government has been conspicuous by its absence. The new reforms, in fact, mark a sharp U-turn in the state government's policy stance and will lead to the collapse of the investments, made in strengthening agricultural markets.

The third claim is that private trade will help in better price discovery. Wheat was procured by the Madhya Pradesh state government during April-July 2020 at the minimum support price of Rs 1925 per quintal. Fieldwork done (as part of a larger research project) in villages of Hoshangabad, the largest wheat producing district, show that most of the produce was sold to the state government at MSP. The rates of wheat in the open market in Hoshangabad during the time of the harvest, as well as now, are hovering around Rs 1,450 per quintal. The price which was supposed to act a floor, actually turned out to be the best a farmer could get for his produce. Similarly, maize and moong crops, for which there was no procurement by the state, are being sold in Hoshangabad at Rs 1,000 and Rs 6,000-6,500 per quintal respectively, whereas the MSP announced for these crops is Rs 1,850 and Rs 7,196 per quintal. Incidents of farmers destroying standing crops of vegetables like cauliflower and tomatoes in the face of high cost of cultivation and extremely low prices have become common in the state and elsewhere.

The fourth claim is that of the freedom to sell anywhere. This assurance by the central as well as state governments should be seen in the light of a recent address by the Chief Minister of Madhya Pradesh (delivered at Nasrullaganj, Sehore District on December 3, 2020) in which he claimed that trucks from neighbouring states will be confiscated and only the state's produce would be purchased. Identical observations have already been made by several other states, such as Haryana. Diverging political calculations at the state level and at the Centre often result in such contradictory statements. Similar tropes of "One Nation, One Market" and freedom to the farmers to sell anywhere were utilised in promotion of eNAM Scheme, which has largely remained a non-starter in the four years of its existence in the state.

Instead of capitalising on the investments already made, and strengthening the agricultural marketing structure, the state government, through its amendments to the Model Mandi Act and its unconditional support to the farm laws, has pushed its agricultural sector into the throes of uncertainty.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/madhya-pradesh-farmers-mandi-act-7113824/

Sneak Peek:

No. of words: 481 words

Note: This article talks about 'Cattle Bill 2020' and the author is critically analyzing the said bill. As a CLAT Aspirant, it is a must read article.

Article: 4

Bad and worse

Karnataka's cow protection bill, like similar laws in other states, threatens to rupture critical chains in the rural economy.

To be fair to the MCG most government entities like to create a citizenry in their own image — bureaucratic, officious, eager to prosecute.

On Wednesday, Karnataka's BJP government resurrected a cattle protection bill that had been passed by the state assembly 10 years ago but could not enter the statute book because the governor refused assent. The contentious piece of legislation has got a new lease of life with the state's Vidhan Sabha passing it without a debate — the Opposition Congress and Janata Dal (S) members walked out, saying that the Speaker did not give them adequate time to air their views. If Governor Vajubhai Vala approves it, the Karnataka Prevention of Slaughter and Preservation of Cattle Bill 2020 could create problems for the state's farmers, much like what's being experienced by their counterparts in other states — especially Uttar Pradesh — which have similarly stringent laws. Like in these states, in Karnataka the critical relationship between the farmer and the butcher is threatened — the proposed law stipulates a prison term of three to five years and fines ranging from Rs 50,000 to Rs 5 lakh for purchasing or disposing of cattle for slaughter and gives the police sweeping powers to search premises and vehicles.

In July, Karnataka's minister for animal husbandry and fisheries, Prabhu Chavan, reportedly talked of studying UP's Prevention of Cow Slaughter Act. The law dates back to 1955, but Chavan would have done well to have taken stock of the situation since 2017 when, by all accounts, the Act began to be implemented with great strictness by the Yogi Adityanath government in UP, which banned the state's cattle slaughterhouses. Of salience would have been the Allahabad High Court's observation on October 26 this year: "The Act is being used against innocent persons… In rural areas, cattle owners, who are unable to feed their livestock, abandon them. They cannot be transported outside the state for fear of locals and police. There are no pastures now. Thus, these animals wander here and there destroying crops. Earlier, farmers were afraid of the neelgai… now they have to save their crops from stray cows".

A cow lives for about 15 years. But the animal becomes virtually uneconomical for the farmer after eight years when its milk output falls. Such animals — as well as male cattle not required for draught and breeding purposes — would earlier be destined for a local livestock market, and from there to a slaughterhouse. But with several states trying to outdo each other in cow protection in the past five

years, the link between farms and slaughterhouses has been ruptured. The Karnataka bill is of a piece with laws that have made cattle traders insecure and emboldened vigilantes. The Karnataka governor must refuse assent to the proposed law.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/editorials/cow-slaughter-karnataka-anti-cow-slaughter-bill-7100104/

Sneak Peek:

No. of words: 1433 words

Note: In this article, the author has discussed the role of parliamentary committees in the process of enacting a piece of legislation. It is a very informative text to understand the subject.

Article: 5

Pointing the finger at parliamentary scrutiny

The demand for repeal of laws passed by Parliament only shows a serious lapse in the management of legislative work.

The new Farm Bills passed by Parliament in the last monsoon session have evoked a scale of protest unforeseen by the government. Negotiations between the government and the farmers seem to have produced no result, and the farmers are determined to scale up their agitation in the coming days. The country seems to be heading toward a serious confrontation between the government and the agitating farmers.

A noteworthy aspect of the negotiations is that many of the proposals put forward now by the government for the consideration of the farmers are issues which were more or less rejected by the government when those Bills were debated in Parliament. The government is reportedly willing to amend these Acts now in order to meet the demands of the farmers. It is another matter that the farmers have rejected these proposals. They have made it clear that they want these laws to be repealed and if necessary, fresh laws to be enacted after discussions with the farmers and other stakeholders.

A process of refinement

The demand for the repeal of the laws passed by Parliament only recently essentially points to a serious lapse in the management of the legislative work in Parliament. Parliament is the supreme law-making body which has put in place a large machinery of committees to scrutinise the Bills which are brought before it by the government as a part of its legislative programme. Rules of the Houses leave it to the Speaker or the Chairman to refer the Bills to the Standing Committees for a detailed scrutiny thereof. After such scrutiny is completed, the committees send their reports containing their recommendations on improvements to be made in the Bills to the Houses. While undertaking such scrutiny, the committees invite various stakeholders to place their views before them. Only after elaborate consultation do the committees formulate their views and recommendations. Under any circumstances, the Bills which come back to the Houses after the scrutiny by the committees will be in a much better shape in terms of their content.

This is the common experience. That is the reason why the Rules of the Houses provide for reference of the Bills to the committees. Although, technically, the reference to the committees is within the discretion of the Speaker or the Chairman, the intendment of the Rules is that all important Bills should go before the committees for a detailed examination.

However, every Bill which comes before the Houses need not be sent to the committees. For example, some minor Amendment Bills or Bills which do not have any serious ramifications need not be sent to the committees. That is precisely why the Presiding officers have been given the discretion in the matter of reference of Bills to committees. But it does not mean that they can exercise their discretion not to refer to the committee an important Bill which has serious implications for society. Such an action only defeats the purpose of the Rules.

Draughtsman's creations

Data show that very few Bills are referred to the Parliamentary Committees now. Ministers are generally reluctant to send their Bills to the committees because they are in a hurry to pass them. They often request the Presiding Officers not to refer their Bills to the committees. But the Presiding Officers are required to exercise their independent judgment in the matter and decide the issue. They need to keep in mind the fact that the Bills which the government brings before the Houses often have serious shortcomings. They are in fact draughtsman's creations. Members of Parliament who know the ground realities better apply their mind and put them in a better shape.

Across history

Improving the pieces of legislation through detailed scrutiny by Parliament through its committees is historically an ancient practice. In fact, the British Parliament has been doing it since the 16th century. The Indian experience of legislative scrutiny of Bills goes back to the post-Montagu–Chelmsford Reforms. It is interesting to note that the Central Legislative Assembly which was the Parliament of British India, had set up three committees: Committee on Petitions relating to Bills, Select Committee of Amendments of standing orders and Select Committee on Bills. Thus, even the colonial Parliament recognised the need and usefulness of parliamentary scrutiny of Bills brought to the House by the government.

Free India's Parliament established a vast network of committees to undertake scrutiny of various aspects of governance including the Bills. Prior to the formation of Standing Committees, the Indian Parliament used to appoint select committees, joint select committees, etc. for detailed scrutiny of important legislative proposals of the government. With the formation of standing committees, the occasions for appointing select or joint select committees are few.

A cursory look at the Bills sent to the committees in the past would reveal the seriousness shown by both the government and the Opposition in having the Bills scrutinised by the committees. So far as the select committees or joint select committees are concerned, generally, a proposal from the Opposition to set up such a committee is agreed to by the government.

Usually, some informal consultations take place between the government and the Opposition before a consensus is arrived at on the formation of such committees. Old-timers in Parliament are quite familiar with this healthy tradition of consensus making in Parliament.

These Bills were made better

Now for a few examples of Bills scrutinised by Parliamentary Committees in the past may be cited to show that important legislative proposals were usually sent to the committees for detailed

examination; this resulted in the improvement of their content. The Protection of Plant Varieties and Farmers' Rights Bill was introduced in 1999 in the Lok Sabha and was immediately referred to a joint committee of both Houses. This Bill was meant to develop new varieties of plants and protect the rights of farmers and breeders. The committee completed its work in eight months and made many improvements by way of bringing greater clarity into various terms and concepts.

Similarly, the Seeds Bill, 2004 was referred to the Standing Committee on Agriculture which obtained the views of agricultural research institutions, agricultural universities, national and State seed corporations, private seed companies, scientists, farmers' organisations, non-governmental organisations and individuals. Through the process of consultation with a wide range of experts and research organisations and farmers, the committee made significant improvements in the Bill; as a result, there was a better law on seeds.

It was the same case with the Companies (Amendment) Bill, the Information Technology Bill, and the Goods and Services Tax Bill, to name a few. The Lokpal and Lokayuktas Bill which was introduced in the Lok Sabha in 2011, which was referred to the Committee, was again referred to a Select Committee of the Rajya Sabha when it was transmitted to that House after being passed by the Lok Sabha. Thus, this Bill underwent double security by two committees of Parliament. When this Bill went back to the Lok Sabha after being passed by Rajya Sabha — with amendments as suggested by its Select Committee — Sushma Swaraj, then Leader of the Opposition, Lok Sabha, was lavish in her praise of the Chairman, Rajya Sabha for subjecting the Bill to further scrutiny by the Rajya Sabha's Select Committee and greatly improving the Bill's content.

This is only a sample of Bills referred to Parliamentary Committees for detailed study. It is in fact difficult to understand why the Farm Bills — they seek to alter the well-established system of grain trade in major grain growing States and which have left farmers completely shaken — were not sent to the Parliamentary Committee on Agriculture for a detailed study. The Committee is sure to have consulted the farmers apart from other stakeholders and suggested improvements which, perhaps, could have averted the current agitation.

Functioning by consensus

Our Parliamentary Committees have a tradition of working in a non-party manner. The reports of these Committees are based on consensus. It may be a bit difficult for people to believe that the instrumentalities of Parliament could rise above parties. But that is how they function. The systems of Parliament are inclusive. They have the capacity to harmonise contradictions. Despite the adversarial politics playing out in full force in the Houses, the calm atmosphere prevailing in the committee rooms and the purposiveness shown by the members in dealing with issues are a tremendously reassuring factor. To make these systems gradually non-functional and irrelevant is to invite disaster.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/pointing-the-finger-at-parliamentary-scrutiny/article33309735.ece

Sneak Peek:

No. of words: 1283 words

Note: In this article, the author is critically analyzing the functioning of the parliament and criticizing for not following the procedure and the healthy conventions. Author poses concern in the light of the way parliament is functioning now-a-days. As a CLAT aspirant, it is a must read article.

Article: 6

The Spirit of Parliament Is in Its Healthy Functioning, Not in Brick and Mortar

We are today governed by rulers who have little use or patience with the conventions, practices and procedures of our parliamentary system developed over the decades.

The Spirit of Parliament Is in Its Healthy Functioning, Not in Brick and Mortar

The prime minister laid the foundation stone of a new parliament building on December 10, 2020, with live national coverage of the event on all TV channels, like always with his events.

If the spirit of parliament resides in brick and mortar this was indeed a great occasion. But if it resides in the healthy functioning of parliament, in the true spirit of parliamentary democracy, then it was a cruel joke. The Indian parliament building was completed in 1927. The British parliament building, the Palace of Westminster was completed in 1860 and, with the exception of repair to the damage caused by bombing during the Second World War, has existed in its old style ever since.

There have been alterations and other adjustments inside but the building has largely remained the same. There is no proposal, to the best of my knowledge, to shift the ‘mother of all parliaments’ to a new building. But the British are not great builders like our present prime minister who will soon take his place as the greatest builder in our history after Shah Jahan; just wait for the Central Vista project to be completed.

But returning to the theme of the spirit of parliament, it is difficult to believe that this spirit resides in brick and mortar. There is no doubt that the soul of parliament rests in its healthy functioning; not in brick and mortar. And what has been the fate of our parliament over the last six years?

The winter session of parliament this year has been postponed in view of the COVID-19 pandemic. Nothing else has been held up on these grounds, including the laying of the foundation of a new parliament building. So, COVID-19 is being used selectively to postpone events to suit the government. The session would have offered an opportunity to the opposition to hold the government accountable on a number of issues of vital national importance including the farmers’ agitation.

But even if the session had been held, I am not sure if the opposition would have been able to corner the government. Has the opposition been able to hold the government to account effectively over the last six years on any issue? And I am not merely referring to the business conducted by the two houses of parliament during their sessions; I am referring to the functioning of parliament in its totality in which the parliamentary committees play an important role – both in examining legislation and discussing other important issues.

I was shocked to learn from news reports that during the first five years of this government only 25% of the bills introduced in the two houses were referred to the standing committees compared to 71% during the UPA years. In the last 18 months, this number is zero; and the list includes the three highly controversial farm laws. We have not forgotten the unruly scenes in Rajya Sabha where the just demand of the opposition to refer the bill to a select committee was overruled by a government determined to ride roughshod over the demand with the help of a pliant presiding officer.

It is not difficult to conclude that the denigration of the parliamentary standing committees is a denigration of parliament itself and seriously reduces the effectiveness of its functioning. There is little doubt that if the three farm bills had been referred to the concerned standing committee, it would have invited the farmers' representatives, heard them, included their suggestions in its recommendations and better bills would have been passed avoiding all the complications which have now arisen. I have no doubt in my mind that the bypassing of parliamentary procedures is directly responsible for the current mess. And the government must bear the blame for it.

Over the years the state assemblies have been seriously circumvented in their functioning. Their sessions have become shorter and shorter. Bills are passed in a hurry and without detailed examination including money bills and even the budgets. Members are happy serving in committees and collecting their allowances, legal from the assembly and illegal from the officials. So, the government is happy, the members are happy and the public has ceased to care. So, those who largely have the experience of the working of state assemblies but are at the helm today at the centre, want the parliament also to function like the state assemblies. All this must change if parliamentary democracy has to survive in this country. And it can be done with just a little political will and changes in the Rules of Procedure of the two houses of parliament and similarly of the state assemblies.

First of all, the rules must lay down that parliament will meet for at least 120 days in a year, sixty days during the budget session with a break and for thirty days for the monsoon and winter sessions. The date or day of the month on which the session will be called should also be laid down. Second, the number of working days should also be prescribed keeping in mind the various holidays. Third, the rules should also lay down that all bills will be sent to the standing committees except those on which there is an all-party consensus to the contrary.

Fourth, the power to summon the sessions should vest in the chief executive officers of the two houses. After all, it will be a very routine procedure after the rules are changed. Fifth, there should also be a rule which prescribes how many calling attention motions and short duration discussions will be taken up in a session which will be decided on the basis of consensus amongst the political parties in the business advisory committees of the two houses. Recent experience would show that a

partisan presiding officer can play havoc with the rules and effectively destroy what little space exists for the opposition. Therefore, we cannot leave things to the goodwill of the rulers anymore. They must be bound, hand and foot, by rules and procedures which must be followed strictly.

When I was finance minister, the government decided to repeal the draconian and outdated Foreign Exchange Regulation Act and replace it with two new legislations—the Foreign Exchange Management Act and the Prevention of Money Laundering Act. When I went took the Bills to Rajya Sabha, where the government did not have a majority, senior leaders of the house like Pranab Mukherji and Mulayam Singh Yadav told me during the debate on the Bill that I should not imagine that the provisions of the Act would be implemented in the same spirit in which we had framed them.

They warned me that in future we might have governments which would use it as a tool of political vendetta. How correct were they? Therefore, they insisted that the Bill be referred to a select committee of the house. I readily agreed. It is another matter that despite all the built-in safeguards the Act is today being thoroughly misused to fix political opponents.

We are today governed by rulers who have little use or patience with the conventions, practices and procedures of our parliamentary system developed over the decades. It could get worse in the future. We must respond to this reality before it is too late. Hence these suggestions. The government may not have any use for them, but will the opposition take note?

Courtesy: 'The Wire' as extracted from:

https://thewire.in/politics/parliament-foundation-stone-winter-session

Sneak Peek:

No. of words: 830 words

Note: In this article, the author is analyzing the verdict delivered by the Hon'ble Supreme Court of India in the case of Samir Agrawal v. Competition Commission of India & Ors. The Supreme Court examined the provisions of the Competition act while setting aside the NCLAT observations on the issue of locus-standi — the right to be heard. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 7

Restoring Competition Commission's mandate

By overturning the NCLAT order, the Supreme Court has strengthened the legislative intent towards antitrust enforcement.

December 15, 2020 saw the settling of one of the most significant chapters of competition jurisprudence in India wherein the Supreme Court restored the jurisdictional ambit of the Competition Commission of India (CCI) otherwise constricted by locus standi flowing from a ruling of the National Company Law Appellate Tribunal (NCLAT).

Generally understood, locus standi is the right or capacity of a person to bring an action or to appear in a court/tribunal. Six months ago, the NCLAT ruled in a case related to cab aggregators that anyone bringing a case/information before the CCI should have suffered legal injury as a consumer or must have lost the benefits of healthy competitive practices. This ruling in effect mandated the applicability of locus standi before the CCI. Many experts started to doubt the very existence of competition regulation as the CCI might not be able to entertain information in which the informants do not have any personal interest or had suffered any personal injury from the impugned anti-competitive conduct. Several articles in newspapers highlighted the cataclysmic effect of the NCLAT decision on the very essence of antitrust practice in India and on the Commission, which would become toothless to maintain healthy competition in markets.

The narrowing effect of the NCLAT order on the CCI's jurisdiction attempted to redefine the reach and output of the competition authority in the country. The limiting effect it had on the ability of the CCI to take cognisance of alleged violations brought to its notice, froze the dynamic perpetration of competitiveness in the economy. In order to have more competitive markets, the catchment of CCI's jurisdiction has to be unhindered and wider. It is known from more than 130 competition authorities in the world that more competitive markets stimulate innovation and generally lead to lower prices for consumers, increase product variety and quality, lead to greater entry and enhanced investment. The growing number of competition jurisdictions over the years, from a handful in 1970 to more than 125 in 2020, is testimony to the fact that the reach of competition authorities is globally recognised and their efficacy, jurisdictionally felt. Since the objective of a competition authority is to promote and ensure competition, it benefits all — market players, markets, consumers and the economy. This outcome of competition regulation makes the position of the competition authority

very unique in the system of governance. Thus, wider the reach of competition authority, greater the benefits for the economy.

On December 15, the Supreme Court reversed NCLAT observation on locus standi and held that any person can be an informant before the CCI and one does not have to be a "consumer" or "complainant". The reasoning and rationale has been drawn from amendments to Section 19 and Section 35 of the Competition Act, 2002. It has also been emphasised that the Commission investigates cases involving competition issues in rem which affects public interest, rather than acting as a mere arbiter to ascertain facts and determine rights in personam arising out of rival claims between parties. The duty of CCI is towards the market and the economy at large and not towards any particular informant or complainant who approaches the CCI.

In CCI v. SAIL, the apex court has dealt with the inquisitorial nature of the proceedings before the CCI and projected the latter as an expert body, distinguished from a judicial or a quasi-judicial body. In the present case, the Supreme Court has emphasised that when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching it and the appellate authority, that is, the NCLAT, must be kept wide open in public interest so as to sub-serve the high public purpose of the Act.

No doubt, in an inquisitorial set up it is not required to confine the scope of the inquiry to the parties whose names are mentioned in the information. Thus the scope of competition scrutiny under the Act is wider. Under Section 45 of the Act, the Commission may impose penalty for false information, wilful suppression, wilful alternation, wilful destruction or omission to state material facts and this may be considered a balancing feature for the wide jurisdictional coverage the CCI has. The inquisitorial function of the Commission ensures that it investigates the information received from any person or takes action suo moto in the larger interest of the public.

The statutory scheme sanctioned by Parliament endows the CCI with inquisitorial, regulatory, administrative, and adjudicatory powers which are to be exercised to fulfil the broad mandate of the Competition Act, 2002. The Supreme Court judgment in the case has settled a crucial principle of competition jurisprudence in India, without which the bite and might of competition regulation would have been constricted. In essence, the judgment has not only settled a very poignant issue, but has also strengthened the legislative intent towards the antitrust enforcement in the country.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/restoring-competition-commissions-mandate-7123688/

Sneak Peek:

No. of words: 799 words

Note: In this article, the author is critically analyzing the situation of prisons in India. As a CLAT aspirant, you did not need to mug up the facts but just to have a fair idea about it.

Article: 8

Systemic neglect ensures that prisons act as warehouses for the marginalized

Prolongation of these so-called criminal cases is unconscionable, as is forcing vulnerable people into remaining in hotspots of increased infection and fatal risk.

The policy rhetoric wants prisons to be places of reform and rehabilitation.

Two recent incidents of Stan Swamy and Gautam Navlakha show up the state of our prisons today. Both are undertrial prisoners in the Bhima-Koregaon case. Both had to move the courts for the simplest of necessities. One, to get a sipper cup and a straw because he is an 80-year-old man with Parkinson's and the other to wrest a pair of glasses to replace a broken pair. It led to the Bombay High Court into making an observation that workshops should be conducted for the prison staff to sensitise them.

Why did these matters have to go to the courts? It is, perhaps, an indication of the fact that there is little space for ground-level staff to make operational decisions. Officials do not want to get into trouble, especially in cases of political prisoners arrested under national security laws.

The law on provision of basic facilities to prisoners is clear — it lies squarely with custodial authorities. The Nelson Mandela Rules 2015 issued by the UN and the Model Prison Manual 2016 by the Bureau of Police Research and Development, Ministry of Home Affairs, have elaborate provisions regarding the care, treatment and rehabilitation of prisoners. A plethora of Supreme Court and high court judgments reiterate that prisoners are human beings with basic rights. In essence, the law emphasises that as far as under trial prisoners are concerned, they enjoy all other rights, save those restricted by virtue of their being incarcerated.

-Yet, violations are an everyday routine. They get highlighted when there is a mishap with a high-profile person, like a Rajan Pillai whose death in Tihar Prison due to lack of medical care led to the high court awarding compensation; or if a public-spirited individual like Sheela Barse files a PIL; or because of a judge who, as in the recent case of "Re Inhuman Conditions in 1382 Prisons", sees the need for systemic change. Notorious criminals, too, like Charles Sobhraj and Sunil Batra, who had the gumption to take matters to the Supreme Court, have played their part in prison reforms over the years.

But standard setting doesn't mean compliance. Our prisons are full of people in compromised states. Around 70 per cent are undertrials and more than 75 per cent come from marginalised sections. They know little about the law. Even if they are aware, they have little recourse to any complaints

mechanism and must fall back on an uneven legal aid system. If at all a prisoner can reach the judge, they are either too busy in their routine work or too enmeshed in the local culture to act. Financial, infrastructural, and human resource shortfalls that range from 20 to 40 per cent also play their part in adding to staff stress and inmate misery.

The Supreme Court issued orders to state governments to take steps to prevent the spread of the coronavirus in prisons through a suo moto PIL filed in March 2020, leading to more than 68,000 prisoners being released on bail or parole so far. But a pre-pandemic comparison between 2017 and 2019 shows that overcrowding increased from 116 to 119 per cent. Overcrowding in individual prisons stands much higher; some prisons are more than three times crowded than their official capacity.

Despite efforts at clearing cases, an acute shortage of judges and court infrastructure ensures an accelerating accumulation of cases in courts. Between 2019 and 2020, the numbers crept up from 3.5 crore toward 4 crore, an over 10 per cent rise. According to the India Justice report 2019, it takes an average of three years for the case to traverse the high court and six years in the subordinate courts.

It doesn't have to be this way. There are pathways to accountability and to reform. But since both supervisor and policy maker know the on-ground constraints and the biases within the culture, much is excused or pushed under the carpet. Reform attempts like the constitution of Undertrial Review Committees mandated by the Supreme Court work patchily. In most prisons, the Board of Visitors meant to function as an oversight mechanism are not even constituted.

The policy rhetoric wants prisons to be places of reform and rehabilitation. Their neglect by the executive and oversight bodies ensures they act as warehouses for the poor and the marginalised. But the constitutional ordering of this country requires that pandemic or no pandemic, justice must not wait. Prolongation of these so-called criminal cases is unconscionable, as is forcing vulnerable people into remaining in hotspots of increased infection and fatal risk.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/bhima-koregaon-case-national-security-laws-political-prisoners-nsa-7122512/

Sneak Peek:

No. of words: 2241 words

Note: This article talks about recent Hon'ble Supreme Court decision in Saurav Yadav v State of Uttar Pradesh pertaining to reservation. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 9

How the Supreme Court Blocked Attempts to Dilute Merit Under the Open Category

In Saurav Yadav v State of Uttar Pradesh, the apex court's three-judge bench explained how merit is served by permitting candidates belonging to reserved categories compete with 'general' candidates.

How the Supreme Court Blocked Attempts to Dilute Merit Under the Open Category

Last Friday's judgment by a three-judge bench of the Supreme Court in Saurav Yadav v State of Uttar Pradesh is a significant addition to the discourse on reservations.

Those who oppose reservations of any kind are inclined to find merit in the argument that reservations per se are opposed to merit, and therefore, likely to compromise efficiency in public service. Therefore, the critics of reservation are likely to endorse the view that the open category, which is free of reservation of any kind, must be available only to candidates who are not the beneficiaries of any reservations, so that merit is accommodated to the extent possible.

Underlying this reasoning is the assumption that reservation and merit are incompatible in principle. In Saurav Yadav, the Supreme Court explains how erroneous this assumption is, in a nuanced way. It does so while setting aside two high court judgments, which supported the view that vacancies under open category (OC) must be filled up only by candidates belonging to the open category. In other words, it rejected the unstated assumption that the open category is 'reserved' for those who are not entitled to reservations for SCs, STs and OBCs.

In Saurav Yadav, the court reiterates its previously held view that candidates belonging to reserved categories like SCs, STs, and OBCs can be appointed under open or general category, if they qualified on their own merit, so that they are not counted under the reserved category. However, it found that there was disagreement among the high courts on applying this principle while filling the quota under horizontal reservations meant for women, physically-handicapped persons, dependants of freedom fighters and ex-servicemen. The bench comprising Justices Uday Umesh Lalit, S. Ravindra Bhat and Hrishikesh Roy resolves this disagreement in two concurring judgments, one authored by Justice Lalit and the other by Justice Bhat.

Horizontal & vertical reservations

Horizontal reservations cut across the vertical reservations – the Supreme Court called it as "interlocking reservations" in Indra Sawhney and Others v Union of India (1992). To be more

precise, suppose three per cent of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. Social reservations in favour of SCs, STs and OBCs under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women (under Article 15(3)) etc., are "horizontal reservations".

Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective backward class. The Supreme Court had ruled in Indra Sawhney that the entire reservation quota will be intact and available in addition to those selected under open competition category.

The persons selected against the horizontal quota will be placed in the appropriate category; if he belongs to SC category, he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. The Supreme Court had made it clear in Indra Sawhney that even after providing for these horizontal reservations, the percentage of reservations in favour backward class of citizens remains – and should remain – the same.

In a subsequent case, the Supreme Court further clarified the issue thus: For example, if there are 200 vacancies and 15% is the vertical reservation for SCs and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SCs should be: "For SC: 30 posts, of which nine posts (30 per cent of 30) are for women".

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC woman candidates, then there is no need to disturb the list by including any further SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidates on the ground that the SC women have been selected in excess of the prescribed internal quota of four.

How the high courts disagreed

Rajasthan, Bombay, Uttarakhand and Gujarat high courts had adopted this principle while dealing with horizontal reservation. That is, these high courts held that candidates belonging to reserved categories can be considered to fill horizontal quota under open category on their own merit. The high courts of Allahabad and Madhya Pradesh, on the contrary, held that candidates from reserved categories can be adjusted only against their own categories under the concerned vertical reservation and not against the 'open or general category'.

The Lalit-Bhat-Roy bench observed that there can be special dispensation when it comes to candidates being considered against seats or quota meant for reserved candidates and in theory, it is possible that a more meritorious candidate coming from Open/General category may not get selected.

But the converse can never be true, and will be opposed to the very basic principles which have all the while been accepted by the apex court, the bench held. Thus all women, irrespective of whether they belong, or do not belong, to the reserved category are entitled to compete for posts earmarked in favour of women under the open category, it reiterated.

There is no reservation for posts in the open/general category, and horizontal reservation in favour of women in the general category is available to be filled up from amongst all women irrespective of their caste status, the bench held.

"Holding otherwise, would result in surreptitious introduction of reservation in favour of those who do not belong to the socially and educationally backward classes, and a disguised attempt at communal reservation which was frowned upon by the Supreme Court in 1951 in the State of Madras v Smt.Champakam Dorairajan", the bench cited a recent Gujarat high court ruling approvingly.

The Uttar Pradesh case

In the instant case, two candidates, one belonging to the OBC-Female and another belonging to the SC-Female participated in the selection process in 2013 for filling up posts of constables in Uttar Pradesh police. Their grievance was that candidates with marks lower than what they secured had been selected in General Female category disregarding their claim.

The state has horizontal reservations for women candidates, and the state had submitted that it would not be possible to carry forward the vacancies under horizontal reservation to the next selection, in case the appropriate number of candidates for horizontal reservation were not available. The Allahabad high court had accepted this plea.

The cut-off marks for eligible female (general category) was 274.8928. While all male candidates belonging to OBC, SC, ST category securing more than the cut-off marks (313.616) for the male candidates in the general/open/unreserved category were selected, the same standard was not applied to the OBC or SC or ST women category candidates, although they had obtained more than the cut-off marks for the female candidates in the general or open or unreserved category.

The bench rejected the views of Allahabad and Madhya Pradesh high courts, and described the view adopted by the high courts of Rajasthan, Bombay, Uttarakhand and Gujarat as correct and rational. The bench held that if the appellant and the similarly situated candidates had secured more marks than the last candidates selected in open or general category, the logical consequence must be to annul the selection, and directed the authorities to do the selection de novo in the light of its conclusion.

The bench directed that all candidates belonging to the OBC female category who had secured more marks than 274.8928, that is, the marks secured by the last candidate appointed in 'General

Category-Female' must be offered employment as constables in Uttar Pradesh police. Since none of the candidates belonging to SC female category had secured more marks than 274.8298, the bench rejected their claims.

In his separate judgment, Justice Bhat agreed with Justice Lalit's main judgment which the latter authored on behalf of the bench, and added a few reasons of his own, which are not opposed to that of Justice Lalit.

In 1999, the Uttar Pradesh government issued a government order providing 20% reservation for women on the process of direct recruitment to state public services and posts subject to certain conditions. One such condition is that if a woman is selected on the basis of merit in any state public service and post, her selection will be against the vacancy reserved for women in that category.

Another condition is that if a suitable women candidate is not available for the post reserved for women, then such a post shall be filled up from amongst a suitable male candidate and such a post shall not be carried forward for future.

Justice Bhat noted that the only stipulation with respect to the treatment of horizontal reservation for women, is that in case a woman candidate is selected, she would be adjusted against the appropriate social category she belongs to (SC/ST/OBC/OC). However, there is no rule, or direction which prohibits the adjustment of socially reserved categories of women in the general category or "open category", he held.

The features of vertical reservations, according to Justice Bhat, are:

(i) They cannot be filled by the open category, or categories of candidates other than those specified and have to be filled by candidates of the concerned social category only (SC/ST/OBC);

(ii) Mobility ('migration') from the reserved (specified category) to the unreserved (open category) slot is possible, based on meritorious performance;

(iii) In case of migration from reserved to open category, the vacancy in the reserved category should be filled by another person from the same specified category, lower in rank;

(iv) If the vacancies cannot be filled by the specified categories due to shortfall of candidates, the vacancies are to be 'carried forward' or dealt with appropriately by rules.

Horizontal reservations on the other hand, by their nature, Justice Bhat clarified, are not inviolate pools or carved in stone. They are premised on their overlaps and are 'interlocking' reservations. They cannot be carried forward.

The first rule that applies to filling horizontal reservation quotas is one of adjustment, i.e. examining whether on merit any of the horizontal categories are adjusted in the merit list in the open category, and then, in the quota for such horizontal category within the particular specified/social reservation.

The open category is not a 'quota', but rather available to all women and men alike. Criticising the Allahabad and Madhya Pradesh high court judgments, Justice Bhat explains that if they are upheld,

the result would be confining the number of women candidates, irrespective of their performance, in their social reservation categories and therefore, destructive of logic and merit.

The two high courts' view, therefore – perhaps unconsciously supports- but definitely results in confining the number of women in the select list to the overall numerical quota assured by the rule, Justice Bhat observed. In his view, when more than the stipulated percentage 20 per cent (say, 40 or 50 per cent) of women candidates figure in the most meritorious category, the conclusion of these two high courts would result in injustice, as it would penalise merit.

In view of apex court's clear decisions, Justice Bhat held that it is too late in the day for the Uttar Pradesh government to contend that women candidates who are entitled to benefit of social category reservations, cannot fill open category vacancies. "The said view is starkly exposed as misconceived, because it would result in such women candidates with less merit (in the open category) being selected, and those with more merit than such selected candidates, (in the social/vertical reservation category) being left out of selection," Justice Bhat held.

Justice Bhat concluded that reservations, both vertical and horizontal, are methods of ensuring representation in public services. "These are not to be seen as rigid "slots", where a candidate's merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state's argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him," he held.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/supreme-court-reservation-merit

Sneak Peek:

No. of words: 706 words

Note: In this article, the author has discussed a landmark judgment of Delhi High Court (Karan v. State N.C.T. of Delhi) and its impact on victim jurisprudence. If fine-tuned, it may help reduce crime. As a CLAT aspirant, it is a must read article. Do follow this new development of law.

Article: 10

Delhi HC's judgment on victims' right to restitution is a landmark in jurisprudence

In a landmark verdict in Karan v. State N.C.T. of Delhi, the Delhi High Court has secured the right to restitution for victims of crime. The progressive impact of the judgment on victim jurisprudence will certainly be unparalleled.

Even though Section 357 of the CrPC empowered courts to order the accused to pay "compensation" to the victim, this was rarely followed. This led the apex court to observe on multiple occasions that Section 357 must be used liberally. Ultimately, in Ankush Shivaji Gaikwad v. State of Maharashtra (2013), the SC held that lower courts must apply judicial mind and record reasons for passing, or not passing, orders pertaining to the use of Section 357 — effectively making its application mandatory.

However, the lower courts found practical constraints while applying Section 357. First, these courts were limited by the language of Section 357, which allowed them to issue orders for only such compensation as may otherwise be recoverable in a civil court. Second, the courts were restricted by the absence of a uniform head under which compensation could be granted. Third, the absence of a uniform mechanism to calculate the paying capacity of the accused as well as ascertaining the impact of the crime on the victim prevented courts from granting compensation under the section without risking arbitrariness. Fourth, the absence of sentencing guidelines impeded the application of the section. Neither Section 357 nor the SC judgment in Ankush Shivaji Gaikwad came to the aid of the courts with respect to these limitations.

The significance of the Karan verdict lies in the Delhi High Court's use of the Victim Impact Report (VIR) to determine the quantum of compensation. The Court's version of VIR is loosely based on the concept of Victim Impact Statements (VIS), but with some significant differences. VIS is an instrument of victim participation, which effectively allows victims to inform the court in their own words as to how the crime impacted them. Barring minor variations, the VIS's format comprises the description of physical injury, emotional harm, or the damage or loss to property as a result of the offence.

VIS provides victims with the opportunity to directly address the court and, therefore, works towards providing them assurance about their concerns being heard and addressed by the court. It allows the victim to come to terms with the offence and makes the offender perceive and realise the impact of the crime on the victim. It also works to aid the court in determining the quantum of the sentence and fine.

It is in this sense that the Delhi HCs conception of VIR differs from a traditional VIS. The primary purpose of the VIR in the Court's conception is to act as an aid to determine the quantum of compensation to the victim in conjunction with the paying capacity of the accused. The VIR will not be directly made by the victim before the court but will be filed by the Delhi State Legal Services Authority (DLSA), which shall conduct a summary inquiry to ascertain the impact of the crime upon the victim.

The DLSA shall submit a report that reckons the paying capacity of the accused as well as the impact on the victim, after a conviction. The courts will have to pass an order of compensation based on this report, and in the manner laid down by the judgment. The scheme is binding on all lower courts in Delhi that deal with criminal cases.

While the verdict generates hope for victims, there are certain concerns. For instance, the language of Section 357 does not differentiate between restitution and compensation. Restitution includes reparation made by the offender while compensation is paid by the state. Unless this difference is statutorily recognised, ambiguity is bound to persist. Moreover, VIR/VIS should not remain merely limited to calculating restitution; it must be effectively used in the sentencing process — especially because the victim is not a party when the court hears the offender on the question of the sentence. The need of the hour is that the courts come forward to adopt VIR/VIS as one of the best practices in the interest of justice to victims of crime.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/delhi-hcs-judgment-on-victims-right-to-restitution-is-a-landmark-in-jurisprudence-7117356/

Sneak Peek:

No. of words: 460 words

Note: This article talks about The Electricity (Rights of Consumers) Rules, 2020 which was notified by the Central Government. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 11

Consumer is king

New electricity rules aim to make discoms accountable to users. Competition, not just regulation, is necessary to achieve this.

BJP West BengalThe sanctity of due process lies in not just hearing the accused in court but in also being fair and appearing to be fair in the justice process.

On Monday, the central government notified The Electricity (Rights of Consumers) Rules, 2020 that are aimed at making power distribution companies more accountable to the end consumer. The underlying rationale for the new set of rules is straightforward. Power distribution companies, whether public or private entities, are essentially geographical monopolies. This leaves the end consumer with no alternative to shift even if they are unhappy with the services being offered to them — unlike the telecom sector where consumers can easily migrate to other service providers. Thus, in the absence of real competition, consumers have little or no power to hold discoms accountable for the quality of electricity supplied or the service provided. The new rules attempt to address this issue by putting in place a structure to make discoms more accountable to the end consumer, placing him at the centre of the regulations.

The rules cover 11 key areas, encompassing the obligation of the distribution licencees, metering arrangements, release of new connections, and a grievance redressal and compensation mechanism, among others. Discoms will now have to compensate consumers for long power cuts, delays in granting electricity connections, and other such lapses in service. For instance, as per the new rules, new connections should be provided by discoms within seven days of receiving the request in metros, 15 days in other municipal areas, and 30 days in rural areas — failure to comply with these timelines will result in penalties. Currently, some state electricity regulatory commissions (SERCs) do have provisions for compensation if the stated performance benchmarks are not met. However, not all states adhere to them, or have user friendly procedures for receiving the compensation. The new rules attempt to fix this by paving the way for an automatic compensation mechanism. However, there is some concern that these rules violate the domain of the SERCs. Some experts have also argued that they may be inconsistent with the performance benchmarks that have already been specified by SERCs. But, the real challenge will lie in their effective implementation.

While these are welcome steps, the larger issue of ushering in competition in the power distribution segment — the weakest link in the power chain — remains. The government had earlier hoped to

introduce the model of separation of carriage and content. Doing so would have allowed consumers the freedom to choose their electricity supplier. This would have ushered in competition, forcing discoms to improve their performance standards, and adopt a more consumer centric approach.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/editorials/consumer-is-king-7115786/

Sneak Peek:

No. of words: 1249 words

Note: In this article, the author has discussed the need to timely resolve the dispute related to admission of students in higher studies. As a CLAT aspirant, it is a must read article.

Article: 12

In admission related matter, justice delayed is most times justice denied

Colleges should not be permitted to subsequently arbitrarily change the implications of non-submission of documents in the required format, particularly if they have not reserved the discretion to do so.

Recently, the case of a student being denied admission by Indian Institute of Technology Bombay (IIT-B) despite having a high rank, allegedly due to an erroneous click by the candidate, came to the spotlight. The matter is subjudice.

The incident drew national attention. It reminds us of the errors or acts of injustice that university officials might commit while dealing with the admission-related process. For instance, in the field of law, the National Law University, Sonipat (DBRANLU) and the Himachal Pradesh National Law University Shimla, were amongst the prestigious law colleges that issued a revised list of selected candidates after arbitrarily changing the mandatory admission requirements, as their first list had errors. A writ petition has been filed and is pending before the Punjab and Haryana High Court against DBRANLU.

Against this backdrop, we highlight that how, in numerous cases, where the university officials may commit errors or take arbitrary/unjust decisions, even if aggrieved students choose to knock on the doors of the court to seek justice, there is a risk that by the time verdict comes, the petitioner is left without an efficacious or adequate remedy. This is particularly so when admission-related disputes continue to be pending without any adequate interim relief. Any subsequent remedy in such cases becomes practically inadequate with loss of studies as the semester advances substantially. No other remedy, besides restitutionary remedy, can be as effective. However, restitutionary remedy is not as easily available.

In cases such as Chandigarh Administration v. Jasmine Kaur, compensatory relief (and not restitutionary relief in the form of granting of admission seat) was granted for the previous unjustified loss of the admission opportunity. This was done solely because the time limit for filling in the vacant seat got expired and by the time the verdict came, another student who was previously selected, though erroneously, had already continued with his studies at the concerned institution. Therefore, it seemed unjust to ask the latter student to discontinue his studies in the middle of the year.

In the subsequent case of S. Krishna Sradha v. State of Andhra Pradesh and Others, this erroneous approach of granting compensation as a relief in admission-related matters was rectified to some

extent. Endorsing the approach taken in Asha v. Pt BD Sharma University of Health Sciences and Others, in Krishna Sradha, the court said that the restitutionary remedy of allowing admission to an applicant who was previously denied admission arbitrarily could be granted. This can be so even if the semester has started and the last date for filling in the vacant seats have expired by the time the verdict is pronounced. However, a discretionary qualifier of the rarest of rare cases was added, that's is, if the court finds that one, no fault is attributable to the candidate; two, the candidate has pursued his/her rights and legal remedies expeditiously; and three, there is fault on the part of the authorities and breach of rules and regulations.

The rarest of rare qualifier has multiple problems.

The first is on account of ambiguity in what counts as "no fault attributable to the candidate". Would there be different standards for children from economically weaker sections (EWS) or backward classes? Similarly, the condition of "pursuing rights and legal remedies expeditiously" presumes that everyone is in a position to obtain quality legal counsel and assistance, a premise distant from the ground realities.

Furthermore, it is unclear from the Krishna Sradha case if there exists a fourth qualifier that such relief would be granted only if the compensatory relief is inadequate, inadequacy being a subjective term again. In the Krishna Sradha case the court observed that the chances of the compensatory relief being inadequate are more in professional courses. This is a flawed presumption. In every course, every student, in his/her own circumstances, has reasons to value his/her admission to the course.

Further, a careful reading of the relief granted in Krishna Sradha shows that another filter against the granting of restitutionary remedy is that such a remedy may be granted only within a reasonable period of time, that is, within one month of passing of the last date provided by the university for seeking admission. If the court's decision does not come within such time and/or if an additional seat cannot be created to accommodate the aggrieved student, admission can be granted only in the next academic session. This leaves the student with the loss of one year on account of delay in judicial decision making.

In light of the limited nature of the reliefs that can be granted to a student, should he choose to challenge an admission decision before the judiciary, it is the responsibility of the universities that when they seek documentation at the pre-admission stage they ask for only the most "basic" and "important" documents given the function the document performs. Further, the notification should clarify which documents are mandatory. Colleges should not be permitted to subsequently arbitrarily change the implications of non-submission of documents in the required format, particularly if they have not reserved the discretion to do so. This alone would be in the interest of certainty, objectivity and fairness.

In addition, at present, many universities tend to give the responsibility of answering helpline numbers provided to university officials as an additional responsibility. Instead, there should be a personnel appointed on a full-time basis specifically to answer such queries timely.

Besides, the judiciary itself should be sensitive to the delicate and time-bound nature of these proceedings. Therefore, in fixing the date for hearing or while deciding upon the fate of a

preponement application or an application seeking interim relief in such cases, courts across the country should demonstrate a more empathetic approach. This is unlike the approach recently adopted by the Punjab and Haryana High Court in the pending writ petition, Shrey Kumar Garg v. State of Haryana and Others, where the next date for hearing has been fixed for February 2021 despite a request for preponement by the petitioner. By the time the matter is decided on merits the first semester would have come to an end. The courts must realise that in such matters both kinds of students are victims: Ones who are unjustly denied admission, due to procedural or substantive lapses by the university, and the ones who are awarded admission by the university as a result of its erroneous/arbitrary decision.

Additionally, strengthening the role and infrastructure of state and national education tribunals can be a way forward to ensure speedy disposal of admission-related cases. At present, awareness about the existence and role of these tribunals is not as wide. There is lack of clarity on their role across all the states. Since in admission-related matters, time is of essence, a specified timeframe must be provided in the rules for educational tribunal. Further, there should be special guidelines for grant of interim relief because such relief is crucial in admission-related matters.

While concluding, we would like to point out that in Saurabh Chaudhary v. Union of India, it has been said, what was intuitive even otherwise: Unjust denial of admission is violation not only of a fundamental right but also that of a human right.

It is important that courts as well as admission officials take greater note of this.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/in-admission-related-matter-justice-delayed-is-most-times-justice-denied-7113836/

Sneak Peek:

No. of words: 860 words

Note: In this article, the author is analyzing the recent judgment delivered by Hon'ble Supreme Court in the case of Paramvir Singh Saini v. Baljit Singh & Ors. The Author has appreciated the steps taken by the judiciary in preventing custodial torture and highlights that more reforms are needed in this direction in order to end the same. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 13

Comprehensive reforms, not just CCTVs, can end custodial torture

The realities of torture and its prosecution in India would temper our expectations from this one development. The Supreme Court needs to ensure robust implementation of its order and simultaneously plug the gaps so that incidents of torture are curtailed.

In a bid to curb torture, a three-judge bench of the Supreme Court recently mandated that CCTV cameras be installed in police stations and offices of other investigative agencies. Though a significant step to curtail custodial torture at these sites, it can have a meaningful impact only if coupled with long-pending reforms to end impunity for torture and a change in the culture of police violence.

While the judgment has been assigned a "landmark" status, it is not the first time that courts have called for the deployment of CCTVs. Previous decisions with similar recommendations have been poorly implemented, evidenced by reports of installation of defunct cameras and exaggerated claims of authorities about the number of cameras installed.

It is, however, important to note that the present decision shows a marked difference than the earlier ones in its approach. It shows more care by listing out areas of police stations where cameras must be installed to ensure that there are no blind spots. It asks for oversight committees to be set up to monitor the functioning of the cameras. It also specifies that the cameras must be equipped with night vision and be able to record audio and visual footage. The recordings will have to be preserved for at least 12 months.

Though the decision acknowledges the right of the victims to secure the footage, there is little clarity on how this translates into practice. Even if the decision is followed in letter and spirit, there are a host of other issues that come in the way of fixing criminal responsibility on perpetrators of custodial violence.

Since torture is not recognised as an offence per se under Indian law, the judgment's reference to the use of force resulting in "serious injuries and/or custodial deaths" unwittingly creates a high threshold for what amounts to torture. It fails to acknowledge the existence of forms of physical and psychological torture that leave behind no marks on the body.

Availability of CCTV footage and the setting up of human rights courts do not address concerns about the fairness of investigations. The absence of statutory guidelines mandating independent investigation results in police officers from the same police station investigating the crime, providing ample opportunities to them for suppressing evidence.

Alteration of a video to conceal an object, an event or change the meaning conveyed by the video is a well-documented reality in the United States. Indian courts have also expressed their apprehension of police tampering with CCTV footage. The judgment does not assuage these concerns. In fact, it vests the responsibility for the working and maintenance of the cameras with the station house officers under whose command torture often takes place.

Requiring prior sanction from the government operates as the foremost hurdle in initiating criminal complaints. It is not unknown for the courts to grant protection while holding that the atrocities were "done under the colour of official duty". This absolves many perpetrators of any responsibility.

Between 2005-2018, with respect to 1,200 deaths in police custody, 593 cases were registered, 186 police personnel were charge-sheeted, and only seven were convicted (National Crime Records Bureau). Evidentiary concerns frequently arise since often the only witnesses are the victims themselves. The Supreme Court (1995) has noted that police officials remain silent to protect their colleagues as they are "bound by brotherhood" and held that courts should not insist on direct or ocular evidence in these cases. This position is rarely applied and many cases result in acquittal for want of evidence. Installation of cameras may help in collecting incriminating evidence in the rare instances where police are brazen enough to torture under surveillance.

In the absence of a definition, it is common for courts to charge responsible personnel with less serious offences. Those held responsible for custodial deaths are often not convicted for murder, but for offences that are comparatively less grave such as grievous hurt.

Besides, CCTVs will monitor only one of many sites where torture happens. Multiple works on torture in India suggest that torture is often not inflicted in police stations, but isolated areas or police vehicles. Victims are illegally detained and tortured in undisclosed locations before officially arrested and brought to the police station. Cameras in police stations will not foreclose the possibility of torture in other locations. They may just shift torture to other sites, away from the scrutiny of the cameras. Further, this does not address other forms of equally pervasive violence such as extra-judicial killings and summary executions in India's conflict zones.

Monitoring the police through CCTVs is an important step towards combating torture but its effectiveness is contingent on broader reforms. The realities of torture and its prosecution in India would temper our expectations from this one development. The Supreme Court needs to ensure robust implementation of its order and simultaneously plug the gaps so that incidents of torture are curtailed.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/police-custodial-torture-cases-cctvs-7100133/

Sneak Peek:

No. of words: 2839 words

Note: In this article, the author is analyzing the decision of Hon'ble Apex Court to install CCTVs in places where police interrogates in the light of the Human Rights. It is furtherance of the last article and it will help you to develop your legal acumen.

Article: 14

Human Rights- Judiciary Strikes Against 'Third Degree' Through Transparency

On this day of International Human Rights Day, can we hope that the third-degree treatment by police will become a thing of past? Whether the recent Supreme Court order put an end Rakshak Bhakshak syndrome in India. Perhaps. Hopes are raised by the apex court's order of 2nd December and Madras High Court's order of 3rd December 2020.

'Who will police the police' is a big question for which world could not give any answer till today. But SC gave answer - Cameras can police the police. Possibility of a watch either by citizen through RTI or judiciary through footage of camera recording will prevent the phenomenon of hurting the person to confess or admit a crime. Transparency is the system that helps police not to resort to third degree methods to extract crime related information.

Supreme Court asked government to fix camaras in every possible place where the Police interrogates the persons. To avoid efforts or difficulties of investigation, the police mostly use easy technic of torture to extract the information and then collect evidence. The technology available could be effectively used for prevention of violation of Human Rights by police. The Madras High Court directed the state to make police transparent towards the family of victim of custodial violence and also gave specific guidelines to the judicial magistrates and sessions judges.

Police under the watch of camera

The Supreme Court on 2nd December was examining a case of custodial torture in Punjab and considering issue of CCTV installation in police stations and examination of witnesses by police. The Bench directed the Governments at the Centre, all the states and union territories to install CCTVs with night vision cameras in each police station, including central probe agencies such as CBI, ED, NIA etc across India. Justice RF Rohinton Nariman, heading a Bench with two other judges K.M. Joseph, Aniruddha Bose, said: "The state and union territory governments should ensure that CCTV cameras are installed in each and every police station functioning in the respective state and/or union territory. In addition, the Union of India is also directed to install CCTV cameras and recording equipment in the offices of: CBI, NIA, ED, NCB, DRI, SFIO and any other agency which carries out interrogations and has the power of arrest".....The CCTV systems "must be equipped with night vision and must necessarily consist of audio as well as video footage…The SHO of the police station concerned shall be responsible for the working, maintenance and recording of CCTVs". the SC also ordered constitution of Oversight Committees at state and district levels for this purpose.

Provide Electricity and internet

Fine. But most of the areas in our country do not have power connection and internet band width. The SC took care of this situation and ordered that in areas without electricity and/or internet, the states/UTs have to provide the same as expeditiously as possible using any mode of providing electricity, including solar/wind power.

Mandate to Store for 18 months

Supreme Court went into details and ordered that the CCTV camera footage should be stored in digital video recorders and/or network video recorders. Importantly, the recording system should be such that the data stored therein is preserved for 18 months, and said: "If the recording equipment, available in the market today, does not have the capacity to keep the recording for 18 months but for a lesser period of time, it shall be mandatory for all states, union territories and the Central government to purchase one which allows storage for the maximum period possible".

The top court has rightly recognized the role for State Human Rights Commissions and directed setting up of District level Human Rights Courts as prescribed under Section 30 of Human Rights Act. The court said in case of serious injury and/or custodial deaths, the injured persons shall be free to complain to the State Human Rights Commission as also to Human Rights Courts.

SC orders not implemented

It was not for the first time SC was dealing with this issue. On 3 April 2018 in SLP (Crl) No. 2302 of 2017, in Shafhi Mohammad v. State of Himachal Pradesh (2018) 5 SCC 311, it has directed that a Central Oversight Body (COB) be set up by the Ministry of Home Affairs to implement the plan of action with respect to the use of videography in the crime scene during the investigation. The Supreme Court in D.K. Basu Vs. State of West Bengal & Others (2015) 8 SCC 744, held that there was a need for further directions that in every State an oversight mechanism be created whereby an independent committee can study the CCTV camera footages and periodically publish a report of its observations thereon. The COB was further directed to issue appropriate instructions in this regard at the earliest. Court wanted COB to issue necessary directions to make videography a reality with implementation of first phase by July 2018, which did not happen. The crime scene videography ought to be introduced at least at some places as per viability and priority determined by the COB.

The Ministry of Home Affairs constituted COB to oversee the implementation of the use of photography and videography in the crime scene by the State / Union Territory Government and other Central Agencies, to suggest the possibility of setting up a Central Server for implementation of videography.

Directions were issued to the Administrators of the Union Territory, State Governments and other Central Agencies for effective implementation of the use of photography and videography at the crime scenes, and to furnish an Action Taken Report on the implementation of the use of videography in the crime scene.

Non-Compliance by states

The SC mentioned that nothing substantial was done for 2 and half years to implement the SC directions and impleaded all states and union territories to file affidavits explaining the compliance of its earlier orders. The compliance affidavits and Action Taken Reports were filed by 14 States (till 24.11.2020), namely, West Bengal, Chhattisgarh, Tamil Nadu, Punjab, Nagaland, Karnataka, Tripura, Uttar Pradesh, Assam, Sikkim, Mizoram, Madhya Pradesh, Meghalaya, Manipur; and 2 Union Territories, namely, Andaman & Nicobar Islands and Puducherry. (It means two Telugu states did not file). But they failed to disclose the ground position of installation of CCTV cameras in each police station. SC noticed that they are bereft of details with respect to the total number of Police Stations functioning in the respective State and Union Territory; total number of CCTV cameras installed in each and every Police Station; the positioning of the CCTV cameras already installed; working condition of the CCTV cameras; whether the CCTV cameras have a recording facility, if yes, then for how many days/hours, have not been disclosed.

When most of the states do not file affidavits, though mandated, and do not disclose the real status, can we hope that this judgment becomes a reality? The constitution of Oversight Committees in accordance with the Order dated 03.04.2018, and/or details with respect to the Oversight Committees already constituted in the respective States and Union Territory have also not been disclosed. The apex court instructed states and UTs to file compliance affidavits within six weeks.

SC reminded that these directions are in furtherance of the fundamental rights of each citizen of India guaranteed under Article 21 of the Constitution of India. It directed the states and UTs to implement 2018 order of SC both in letter and in spirit as soon as possible and file affidavits of compliance within six weeks.

Duties of State Level Oversight Committees

The constitution of Oversight Committees in accordance with Supreme Court Order dated 03.04.2018 should be done at the State and District levels. The State Level Oversight Committee (SLOC) must consist of: (i) The Secretary/Additional Secretary, Home Department; (ii) Secretary/Additional Secretary, Finance Department; (iii) The Director General/Inspector General of Police; and (iv) The Chairperson/member of the State Women's Commission. It shall be the duty of the SLOC to see that the directions passed by this Court are carried out. Amongst others, the duties shall consist of: a) Purchase, distribution and installation of CCTVs and its equipment; b) Obtaining the budgetary allocation for the same; c) Continuous monitoring of maintenance and upkeep of CCTVs and its equipment; d) Carrying out inspections and addressing the grievances received. Similarly, the District Level Oversight Committees should also be constituted with similar obligation.

Facilitate reporting of complaints

The Court directed facilitation of victims to complain. It said: "Whenever there is information of force being used at police stations resulting in serious injury and/or custodial deaths, it is necessary that persons be free to complain for a redressal of the same. Such complaints may not only be made to the State Human Rights Commission, which is then to utilise its powers, more particularly under Sections 17 and 18 of the Protection of Human Rights Act, 1993, for redressal of such complaints, but also to Human Rights Courts, which must then be set up in each District of every State/Union

Territory under Section 30 of the aforesaid Act. The Commission/Court can then immediately summon CCTV camera footage in relation to the incident for its safe keeping, which may then be made available to an investigation agency in order to further process the complaint made to it".

Union directed

The apex court directed the Union to install CCTV cameras and recording equipment in the offices of: (i) Central Bureau of Investigation (CBI) (ii) National Investigation Agency (NIA) (iii) Enforcement Directorate (ED) (iv) Narcotics Control Bureau (NCB) (v) Department of Revenue Intelligence (DRI) (vi) Serious Fraud Investigation Office (SFIO) (vii) Any other agency which carries out interrogations and has the power of arrest.

Police torture kills five persons a day

In India, the human rights of the arrested persons and prisoners is violated every day and perhaps every hour. The survey Reports and media count deaths on the top, and their details contain the number of tortured persons. It is a sad reflection of our level of civilisation and so-called conformity with human rights norms.

Number of custodial deaths are over five persons per day. The decade to March 2020 recorded 17,146 deaths in police and judicial custody. According to the latest data from the National Human Rights Commission (NHRC), in the seven months to July 2020, 914 deaths in custody, 53 of these in police custody. Of the 15,759 cases recorded over a decade in NHRC data, 92% of deaths were in judicial custody--which can extend up to 60 or 90 days--and 1,387 in police custody, which can last only 24 hours unless extended by a magistrate for up to 15 days. NHRC recorded 1,723 cases of deaths in judicial custody and police custody across the country from January to December 2019. These included 1,606 deaths in judicial custody and 117 deaths in police custody1 i.e. an average of five deaths daily. (NHRCMonthly Human Rights Cases Statistics from January to December 2019)

It's obvious that the deaths in police custody occur primarily as a result of torture. In 2019, NCAT documented death of 125 persons in 124 cases in police custody across the country. Out of the 125 deaths, 93 persons (74.4%) died during police custody due to alleged torture/foul play while 24 persons (19.2%) died under suspicious circumstances in which police claimed they committed suicide (16 persons), died of illness (7 persons) and death due to injuries after slipping from police station bathroom (1 person); and the reason for the custodial death of five (4%) persons were unknown.

The practice of torturing the suspects in police custody to punish them or gather information or extract confessions continued to be rampant. A 17- year-old boy (name withheld) in Tamil Nadu who was tortured to death to extract confession in a case of theft.

Apart from extracting confession, torture is routinely perpetrated to extract bribe from the detainees or their relatives. According to the India Corruption Survey 2019 conducted by Local Circles in collaboration with Transparency International India, three most corruption prone departments in India were Property Registration & Land Issues, followed by Police and Municipal Corporation. (India CorruptionSurvey 2019 , P.12,)

NACT explained different varieties of torture inflicted by police. Most common methods of torture are slapping, kicking with boots, beating with sticks, pulling hairs etc. It recorded that torture methods used by the police also included hammering iron nails in the body (victims: Gufran Alam and Taslim Ansari of Bihar), applying roller on legs and burning (victim: Rizwan Asad Pandit of Jammu & Kashmir), 'falanga' wherein the soles of the feet are beaten (victim: Rajkumar of Kerala), stretching legs apart in opposite side (victim: Rajkumar of Kerala), hitting in private parts (victims: Brijpal Maurya and Lina Narjinari of Haryana), stabbing with screwdriver (victim: Pradeep Tomar of Uttar Pradesh), electric shock (victims: Yadav Lal Prasad of Punjab; Monu of Uttar Pradesh), pouring petrol in private parts (victim: Monu of Uttar Pradesh), applying chilly power in private parts (victim: Raj Kumar of Kerala) beating while being hand-cuffed (victims: Sajith Babu and Rajesh of Kerala), pricking needle into body (victim: 13-year-old minor of Tamil Nadu), branding with hot iron rod (victim: 13-year-old minor of Tamil Nadu), beating after stripping (victims: Mohammed Tanveer and Lina Narjinari of Haryana; Minuwara Begum, Sanuwara and Rumela of Assam), urinating in mouth (victim: Amit Sharma of Uttar Pradesh), inserting hard blunt object into anus (victim: Diwakar Kumar of Bihar), beating after hanging upside down with hands and legs tied (victims: Mahavir Bhatia of Rajasthan; and Aaditya Chouhan of Madhya Pradesh), forcing to perform oral sex (victims: Hira Bajania and 12 others of Gujarat), pressing finger nails with pliers (victim: Anup Rabha of Assam), deprivation of food and water (victim: Anup Rabha of Assam), beating with iron rods after victim is suspended between two tables with both hands and legs tied (victims: Aaditya Chouhan and Yashwant Chouhan of Madhya Pradesh), forced to do Murga pose or stress position (victim: Lina Narjinari of Haryana), and kicking in belly of pregnant woman (victim: Minuwara Begum of Assam).

The Poor & Women victims

While rich and influential escape the torture, vulnerable sections fall prey for police torture. Majority of the victims belonged to the poor and marginalised sections of the society who are often the soft targets because of their socio-economic status. NACT counted the percentage of marginalized as 60 per cent.

The women continued to be tortured or targeted for sexual violence in custody and often, the victims belonged to weaker sections of the society. During 2019, NCAT documented death of at least four women during police custody, one committed suicide at home unable to bear custodial torture and another woman died due to torture outside police station. For example, from 3-7 July 2019, a 35-yearold Dalit woman was allegedly illegally detained, subjected to torture and raped in police custody by nine police personnel at Sardarshahar police station in Churu district, Rajasthan. Beside custodial rape, the victim was also allegedly subjected to torture including plucking of her nails. (Rajasthan:Dalit Woman Gang Raped in Police Custody)

The NCAT documented death of four children due to torture during police custody, one case of death due to torture in juvenile home and a number of cases of torture of children in 2019. The NCRB in its "Crime in India - 2018" recorded 3,164 cases of simple hurt and grievous hurt caused by the police on 3,467 minor victims. (NCRB, Crime In India 2018, Table4A.2(ii))

Under reporting of police violence

As per NHRC guidelines the custodial deaths should be reported within 24 hours of their occurrence, and a "failure to report promptly would give rise to presumption that there was an attempt to suppress the incident". But cleverly there is no provision in law for punishment for failure to report. The filing of a first information report is mandatory in the case of custodial deaths, but very rarely it is done. The NHRC also mandated that a magisterial inquiry be completed in two months and must determine the circumstances of death; manner and sequence of incidents; the cause of death, and so on. But not every death in police custody is reported by the police, The deaths that happen outside the lockup which are never reported to the NHRC."

Torture by armed forces

The use of torture by the armed forces consisting of the Indian Army and Central Armed Forces who are deployed in the insurgency affected areas and the border areas continued to be reported. (Urgent Campaign, 1 August 2019, OMCT, 'India: Impunity for Extrajudicial Killings in West Bengal',)

Torture by upper castes

The other non-State actors continued to perpetrate torture. The Dalits (Scheduled Castes) continued to face torture and other inhuman and degrading treatment at the hands of the upper castes. The incidents of caste atrocities continued to remain high with 42,793 reported cases in 2018.14 During 2019 the Dailts were killed, attacked, tortured, and subjected to other forms of cruel, inhuman or degrading treatment or punishment by the members of the upper castes.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/human-rights-day-third-degree-treatment-police-supreme-court-cctv-installation-167068?infinitescroll=1

Sneak Peek:

No. of words: 993 words

Note: In this article, the author has discussed the Right to cultural life and expression in the context of human rights and its impact in the light of this pandemic. A must read for every law aspirant. Enjoy this article!!

Article: 15

Reinvigoration of human rights is imperative to emerge from COVID-19 crisis

This article is about the Cultural rights

This Human Rights Day is an opportunity to revisit the culture-centric approach to human rights, by first improving the conditions of the creators of culture, its practitioners and workers.

The world honours Human Rights Day every year on December 10 to commemorate the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948. In its remembrance also lies the recognition of the fundamental contribution of the UDHR, the codification of the inalienability and universality of human rights. However, the idea and concept of what constitutes human rights has evolved significantly since.

Culture as an exercise, expression and source of community identity, often contested and always contextual, is one such value intrinsic to human rights. The right to participate in the cultural life of the community found sanctuary in the UDHR, while the International Covenant on Civil and Political Rights of 1966 gave it a political expression, linking the freedom of individuals very closely to their practise of cultural development. The socio-political transformation of the late 20th century further accentuated the need for a value-based approach to human rights and cultural co-operation became the focus of several international instruments. The common heritage of mankind, culture, was to be protected and promoted through the democratisation of its expression and actualisation of its means, as envisioned in the 1976 Unesco Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It. However, access to cultural participation and the instability of conditions enabling it, remains a debate that requires frequent revisiting, especially on this Human Rights Day.

The onset of the COVID-19 pandemic most significantly impacted rights to access and freedom, including to cultural life and expression. Spaces for the expression of individuality and the practice of collectivity shrunk with lockdowns and restrictions around the world. The first global mapping of cultural and creative industries in 2015 had estimated a sectoral contribution of $2,250 billion to the global economy, in addition to 29.5 million jobs worldwide. Even more so, the value and vibrancy of cultural contributions to human life, social communities and national identity remains invaluable. In addition, most cultural workers, particularly artists, remain a part of the informal economy or undocumented as professionals, owing to the distinctive nature of their work and cultural activities.

Given this scenario, both the professional and the public aspects of creative work were the early victims of the pandemic.

While the creative economy and cultural industry were deeply impacted, cultural practitioners, such as artists, were the hardest hit. Emergency funds for artists and cultural institutions were announced globally with countries like Kenya organising special monthly funds to grant artists minimum wage, the UK announcing monetary provisions for disabled artists, and Malta, Mauritius and Hungary announcing early tax breaks and reliefs, a few exemplary policy decisions in a long list of innovative action for culture.

The COVID-19 situation has revealed structural problems and longstanding challenges. The report of the United Nations Human Rights Council Special Rapporteur in the field of cultural rights, Farida Shaheed, has noted the impact of economic and social burdens on artistic freedoms and creativity. The deteriorating professional, social and economic state of artists directly raise concerns about the conditions of their dignity.

Human dignity can be understood as both a measure and aspiration of human rights. At its outset, the UDHR proclaims equal emphasis on the equality of the rights and the dignity of all human beings, raising entitlements to the realisation of cultural rights indispensable for the existence of dignity. There is no daylight between questions of preservation of dignity and matters of access to cultural life with its enabling conditions.

The constitutional purpose of Unesco harmoniously unites culture with universal peace, justice, fundamental freedoms and human rights. Unesco has delivered concrete instruments, conventions, recommendations and infrastructure dedicated to almost every aspect of cultural life and to that of cultural practitioners, thereby, to the normative development of human rights and human dignity. The 1980 Unesco Recommendation concerning the Status of the Artist is particularly notable as a framework for national adaptation. Its deliberations on social security, collective bargaining, legislative protection and an informed taxation system such as income averaging over several years, premised upon the due recognition of the peculiarity of cultural work and practice, are designed to not only safeguard against such cultural emergencies but mainly to improve the long-term welfare of artists. In South Asia, particularly in a country like India with a rich and diverse cultural landscape, there is an exigent need for such thinking to translate into actionable outcomes. India's international agenda should feature a strong domestic cultural policy. The challenges of cultural policy development and the wide scope for cultural measurement in India should further be addressed with more rigour and a collaborative effort from both the government structures and civil society.

Culture and creative expressions are bound by enabling conditions. By locating the rights of cultural practitioners within the realm of human rights, a new impetus is given to the spirit of leaving no one behind. In the declaration of the United Nations Decade of Action, culture has been granted a pioneering role in the attainment of the 2030 Sustainable Development Goals, leaving no doubt that a timely call to rethinking cultural policy must be made, especially in the South Asian context.

This Human Rights Day is an opportunity to revisit the culture-centric approach to human rights, by first improving the conditions of the creators of culture, its practitioners and workers. The reinvigoration of culture, human rights and human dignity as fundamentally interconnected values, is

imperative to emerge from the COVID-19 crisis and also the structural legacies it has unearthed. International obligations to culture should not be redolent of a glorious past of commitment to human rights, but rather be an active invocation to improve conditions for cultural and societal progress.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/reinvigoration-of-human-rights-is-imperative-to-emerge-from-covid-19-crisis-7100004/

Sneak Peek:

No. of words: 1137 words

Note: In this article, the author has explained the concept of federalism in India in the light of the contemporary situation. A must read for every law aspirant. Enjoy this article!!

Article: 16

Our misshapen federalism is not about Centre vs states, but co-produced by political culture in both

It is true that the Centre disproportionately controls resources in India; but very few states have shown a zeal to increase their own financial headroom by utilising whatever powers they might have on taxation.

The truth is that there never has been a serious principled constituency for federalism in India.

Federalism in India reminds one of the grinning Cheshire cat in Alice in Wonderland. At one point the cat disappears and all that remains is the grin, an enigmatic trace of doubtful significance. Federalism is such a vanishing act. The truth, however, is that there never has been a serious principled constituency for federalism in India.

Let us examine the sources of federalism scepticism. The Indian Constitution was designed to be opportunistic about federalism. As BR Ambedkar had put it, "India's Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances." As he went on to say, "Such a power of converting itself into a unitary state, no federation possesses." The ideological underpinnings of this flexible federalism are still the default common sense of Indian politics. The imperatives of security, state building, and economic development are always allowed to trump federal pieties.

Four things sustain federalism. But, in retrospect, they turned out to be very contingent political foundations for federalism. The first was a genuine concern about whether a centralised state could accommodate India's linguistic and cultural diversity. The States Reorganisation Act and the compromises on the issue of languages was a victory for federalism. It allowed India to use federalism to accommodate linguistic diversity. But ironically, it is precisely because this issue got defused through intelligent compromise that it is no longer a potent force in Indian politics. All governments that have wanted to undermine federalism, including the BJP, are often careful about not undermining this compromise. Since only an identity-based politics in a state can be a genuine threat to the Centre, taking that off the political agenda actually gives the Centre a freer hand on other aspects of federalism. So long as regional linguistic identities are not threatened there is no natural source of resistance to centralisation.

The second underpinning of federalism is actual distribution of political power. The rise of coalition governments, economic liberalisation, regional parties, seemed to provide propitious ground for political federalism. But one must not overestimate the commitment to federalism in that period of

fragmentation. Political federalism is quite compatible with financial, and administrative centralisation. But what fragmentation of power effectively meant was that each state could bargain for certain things; or very strong leaders could veto central proposals. It is striking that the period of fragmented power, strong chief ministers, did nothing to strengthen the institutions of federalism, for example, by making the council of chief ministers a more robust forum. "Federalism for me but not for thee" — this can be evidenced in the bifurcation of erstwhile Andhra, which was done against the resolution of the state legislature, and in Kashmir which was stripped of statehood. No chivalrous federalism warriors reached for their swords to defend the principle that a state can't be extinguished without its own consent. Regional parties do not necessarily imply a coalition for federalism.

In the current farmers' agitation, these contradictions are on full display. The federalism argument against the farm bills is the strongest legal argument. But you cannot both ask for a Central MSP guarantee and defend federalism at the same time. For its part, the central government itself allowed provisions that enable states to suspend labour laws if necessary, but is unwilling to do that in the case of agriculture.

The third thing that sustains federalism is the political and institutional culture. But alas, the culture of both the BJP and the Congress was, to put it mildly, committed to the most extreme interpretation of flexible federalism, including procedural impropriety to oust opponents. The only thing that might have changed significantly in the political culture is what Neelanjan Sircar and Yamini Aiyar call attribution effects in politics. Because of the increasing presidentialisation of national politics, a single-party dominance with powerful messaging power, and change in forms of communication, the attribution of policy successes or failures might change, diminishing the stature of chief ministers considerably. The other source of institutional culture might be the Supreme Court. But there is little in the Court's conduct that allows us to predict where it might come down on federalism issues. To be fair, there was mostly a bi-partisan consensus on honouring the technical recommendations of institutions like the Finance Commission, and we will have to see if this last bastion of formal impartiality is eroded.

The fourth thing that sustained federalism was what Louise Tillin has brilliantly analysed as "asymmetrical federalism" — special exemptions given to various states. But asymmetrical federalism has always been subject to three pressures. For Kashmir, asymmetrical federalism came to be seen as the source, not the resolution, of the security threat. Even in the North-east, local conflicts within the scheme of asymmetrical federalism and a discourse of security allowed the Centre to step in. And increasingly, there will be pressure on the question: Which laws under asymmetrical federalism are compatible with Article 14 of the Indian Constitution?

Other ironies abound. The most far-reaching change in the Indian Constitution on federalism was GST. It does increase centralisation in the system. But no matter what one thinks of GST, warts and all, it is a product of the cooperation of the states, who still have a significant role in shaping it. The states did push back against the possibility of the Centre reneging on its commitment on payments. But except in the case of financial meltdown at the Centre which seriously affects all states, there will not be much pushback.

So states will also use their autonomy selectively. Most states are reluctant to honour more decentralisation within, to rural and urban bodies. Again, ironically, BJP-ruled states like Haryana and Madhya Pradesh are jumping on the bandwagon for local domicile-based reservation in the private labour market. These are against the party's own obsession of "one nation, one everything," but also in contravention of basic constitutional principles. It is true that the Centre disproportionately controls resources in India; but very few states have shown a zeal to increase their own financial headroom by utilising whatever powers they might have on taxation.

So flexible federalism will be bent in all kinds of ways. But it is important to remember that this mess is not a product of Centre versus states. It has been co-produced by a political culture in both Centre and the states. Few are losing sleep over federalism, perhaps because there is only the mysterious grin, but no cat to bell.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/who-wants-federalism-7098577/

Sneak Peek:

No. of words: 1128 words

Note: In this article, the author is critically examining the status of person with disabilities in India. A must read for every law aspirant. Enjoy this article!!

Article: 17

Law promises people with disabilities equality of opportunity and accessibility, but our practices deny them that

It is critical that the government work with civil society and individuals with disabilities to craft an India where everyone feels welcome and treated with respect, regardless of their disabilities.

Today, December 3, is the annual International Day of Persons with Disabilities, established by the United Nations in 1992 to "promote the rights and well-being of persons with disabilities in all spheres of society and development, and to increase awareness of the situation of persons with disabilities in every aspect of political, social, economic and cultural life". It is also a stark reminder of how far we in India need to go in meeting the needs of the disabled.

Shreela Flather, a British MP of Indian origin, received a Pravasi Bharatiya Samman award in India a few years ago. Her wheelchair-ridden husband had come all the way from England to accompany her on this special occasion — but he was unable to go up on the stage with her, because there was no ramp. The organisers offered to lift him up to the stage but he rightly refused. Even as I burned with

shame that we could not manage this basic provision even at such a high-level occasion, I could well imagine what others in the same situation had to endure every day in India.

About a billion people internationally live with a disability, with 80 per cent of these being residents of the developing world. In 2007, the UN passed the Convention on the Rights of Persons with Disabilities. This was a landmark step toward treating disabled persons as full members of society, rather than objects of pity or charity — or, as was shamefully the norm for much of our past, fear and ridicule.

India is a state party to the convention, and the World Bank estimates that there may be well over 40 million Indians living with disabilities. Most Indians regard them with disdain or at best indifference to their plight.

Provisions exist in law, but getting the authorities anywhere in India to implement them is another story altogether. The Rights of Persons with Disabilities Act was passed in 2016 but our country is still largely devoid of ramps on its footpaths or government buildings. The best that can be said is that the passage of the law may have helped shift the treatment of disabled persons in society towards rights-focused thinking. But acting is a different matter.

The present government has sought to weaken this law's protections, decriminalising acts of discrimination against persons with disabilities in the name of "improving business sentiment". This is misguided and deeply harmful: We cannot erode the well-being of people with disabilities, thus entrenching the dangerously negative attitudes of many in society, in the name of commerce.

It's attitudes that need to change. I've met Ashla Krishnan in her wheelchair in Thiruvananthapuram. She tells me I shouldn't think of her as a quadriplegic, but as a "person with quadriplegia". Her paralysis, she says, does not define her. She can and does want to contribute to society, like any other person.

But as with Dr Flather years ago, people with disabilities want one thing from us — to make it possible for them to contribute with self-respect. They don't want helpful strangers to lift them onto a stage, or into an office or a restaurant. They want us to install the ramps that will permit them to accede to these places themselves.

The law promises them equality of opportunity and accessibility. Our practices deny them what the law promises.

There is some good news. Mainstream media has increasingly started showing positive representations of people with disabilities, from Taare Zameen Par to Barfi. Athletes with disabilities have reached the pinnacles of sport and done us proud repeatedly, most recently winning four athletics medals at the 2016 Paralympics in Rio de Janeiro. But that doesn't mean we can overlook the appalling treatment that people with disabilities have long received, and continue to receive, in India.

Indians with disabilities are far more likely to suffer from poor social and economic development. Shockingly, 45 per cent of this population is illiterate, making it difficult for them to build better, more fulfilled lives. This is compounded by the community's lack of political representation: Despite

the vast population of people with disabilities in India, in our seven decades of independence we have had just four parliamentarians and six state assembly members who suffer from visible disabilities. This is hardly a surprise when considering that, unfortunately, several political leaders have even used discriminatory language and derogatory comments to talk about people with disabilities.

This lack of representation, and these general attitudes, translate directly into policy that undermines the well-being of people with disabilities. Last year, for example, the government inexplicably decided to depart from convention and render people suffering from cerebral palsy ineligible for the Indian Foreign Service. Suggesting that persons with disabilities are unable to serve their country with loyalty, devotion, and strength is an insult to them, and to any Indian who wishes to see their fellow citizens treated equally, regardless of physical condition.

But it's not only about ramps for wheelchairs, text-to-speech facilities for the visually challenged or sign language explanations for the deaf. Some of the most debilitating disabilities are those that are not apparent to the naked eye.

In 2017, the Mental Healthcare Act recognised and respected the agency of persons with mental-health conditions, expanding the presence of mental-health establishments across the country, restricted the harmful use of electroshock therapy, clarified the mental-health responsibilities of state agencies such as the police, and effectively decriminalised attempted suicide.

Building on the extraordinary work of civil society activists like Mithu Alur and Javed Abidi, India has made some progress in the right direction. The government has had some admirable initiatives to improve the lot of Indians with disabilities, such as the ADIP scheme for improving access to disability aids. The Sugamya Bharat Abhiyan, or Accessible India Campaign, has aimed to make public transport, buildings and websites more accessible. But as is too often the case with this government, between rhetoric and reality there falls the long shadow of poor implementation. Unfortunately, the Accessible India Campaign has largely remained half-done since the scheme's inception in 2015.

These attempts at reform would mean far more were each step forward not accompanied by half a step back, as with the IFS ruling and the decriminalisation of discrimination. It is critical that the government work with civil society and individuals with disabilities to craft an India where everyone feels welcome and treated with respect, regardless of their disabilities. Only then can we welcome the next International Day of Persons with Disabilities without a sense of shame.

Courtesy: 'Indian Express' as extracted from:

https://indianexpress.com/article/opinion/columns/international-day-of-persons-with-disabilities-united-nations-india-7078236/

Sneak Peek:

No. of words: 1412 words

Note: In this article, the author is critically analyzing the recent transfers of two Chief Justices in the light of order passed by Justice Rakesh Kumar. As a CLAT aspirant it is a must read article. It will help you to enhance your legal acumen.

Article: 18

As Centre Transfers Two Chief Justices, Outgoing AP HC Judge's Order Lifts Veil on the Murky Deals

Justice Kumar – who retires on Thursday – inferred that by these transfers, the cases pending against CM Reddy might be delayed and the monitoring by the SC might hamper for the time being.

As Centre Transfers Two Chief Justices, Outgoing AP HC Judge's Order Lifts Veil on the Murky Deals

On Thursday, the Centre notified the appointment of Andhra Pradesh high court Chief Justice Jitendra Kumar Maheshwari as the Chief Justice of Sikkim high court, and the Sikkim high court Chief Justice, Arup Kumar Goswami as the Chief Justice of Andhra Pradesh high court.

Although these two appointments were a result of the recommendations of the Supreme Court collegium on December 14, they coincide with a controversial order passed on Wednesday by Justice Rakesh Kumar of Andhra Pradesh high court, who retires on Thursday. The coincidence is not without significance, as in his order, Justice Rakesh Kumar not only deplores the role of the Supreme Court's collegium in acquiescing to the Executive, but the inability of the judges of the higher judiciary – on the verge of their retirement – to resist overtures from the Executive in order to secure post-retirement sinecures.

Justice Rakesh Kumar's order was in connection with his refusal to recuse from hearing a challenge to the auction of State land. The recusal plea was moved by the state government, on the ground that Justice Kumar might have disqualified himself because of the observations he allegedly made against the state government while hearing another case.

Although Justice Kumar had asked the state government counsel to come prepared to answer why the court could not arrive at a finding that constitutional machinery in the state had failed, that was in another case, which was duly stayed by the Supreme Court. Justice Kumar, however, denied stating in this case that there is breakdown of constitutional machinery in the state, and that the bench would hand over the administration to the Centre, as alleged by the state through the additional advocate general, Sudhakar Reddy.

Justice Kumar concurred with the view that the state government's false statement in this regard was derogatory and prima facie contemptuous, and directed the high court registry to issue show cause

notice to the state government for the same. Justice Kumar also directed the registrar-general of the high court to initiate criminal prosecution against Reddy for perjury.

"Judiciary under attack from persons in power"

Opinions may differ whether Justice Kumar ought to have responded the way he did, beyond offering reasons for refusing to recuse, as prayed by the state government in a given case. As Reddy claimed that the state government's recusal application was based on the media reporting of the judge's observations while hearing the case, threatening him with contempt proceedings and criminal prosecution for perjury may seem disproportionate response from the bench.

However, Justice Kumar's observations – which appear extraneous to the facts of the case before him – must be understood in the context of his impending retirement and his feeling of helplessness to uphold the majesty of the court. As he mentions, "Now-a-days, a very disturbing trend has developed in our system. If one is influential, powerful, i.e., both in money and muscle, he feels that he is having every privilege to do anything as per his convenience and to the peril of system or poor citizen".

Referring to the Supreme Court's stay of his order asking why the high court could not arrive at a finding that constitutional machinery has failed in the state, Justice Kumar observed that one could draw an adverse inference against the acts/excesses by the police in the state.

Justice Kumar referred to the state government's recommendation to abolish the legislative council in the state only because it disagreed with the assembly's decision to establish three capitals and its action against the state election commissioner, because he was not proceeding as per its wishes. Justice Kumar alleged that the state police virtually indulged in a practice to protect the accused in FIRs registered following complaints by the high court registry.

Justice Kumar expressed his apprehension that bureaucrats of the state have been emboldened after "apparent success of the chief minister of the state" in addressing a letter to the Chief Justice of India (CJI) S.A. Bobde and making it public. In his letter, the chief minister, Jaganmohan Reddy, made serious allegations against Justice N.V. Ramana of the Supreme Court, chief justice of the Andhra Pradesh high court, and a number of sitting judges of the high court.

Justice Kumar pointed out that the chief minister was an accused in more than 30 cases, of which the Central Bureau of Investigation is investigating at least ten cases. "In those cases, where chargesheets have been filed long back, there is an allegation that he took several crores of rupees as bribe and committed serious offences under the Prevention of Corruption Act, 1988, and other offences", Justice Kumar observed.

"Surprisingly, though cases are pending since 2011 and onwards, till date, in none of the cases, charges have been framed. Is it not a mockery of the system?" he asked.

Justice Kumar also questioned the mysterious silence of the CJI over the chief minister's letter to him, by saying "we are not aware as to whether any contempt proceeding for such an action has been taken or not by him; but, it is a fact that recommendation has been made on December 14, 2020, by the collegium of the Supreme Court for transfer/appointment of chief justices, which includes

transfer of Chief Justice of AP high court to Sikkim high court and transfer of Chief Justice of Telangana high court to Uttarakhand high court".

A disturbing trend?

After noticing the apparent link between these two events, Justice Kumar observed: "Whether by this act of sending unceremonious letter to the CJI, the chief minister of Andhra Pradesh will get final relief or not, but fact remains that he succeeded in getting undue advantage at the present moment."

Justice Kumar inferred that by these transfers, naturally, the cases pending against the chief minister might be delayed and the monitoring by the Supreme Court might hamper for the time being.

"Similarly, by the transfer of Chief Justice of AP high court, the government of Andhra Pradesh is bound to get undue benefit," he added. Justice Kumar underlined the need for transparency in the transfer of high court judges or its chief justices, saying "after all, they are also holding constitutional post like members of the Supreme Court Collegium".

Many may question Justice Kumar's propriety in giving details of the CBI and Enforcement Directorate (ED) cases in which the chief minister is an accused, and the other cases in which he is alleged to have committed offences under the Indian Penal Code. Thus, he said there are 11 CBI cases, six ED cases, and 18 IPC cases against the chief minister. Of these in six or seven cases, he said, the state police submitted closure report, stating that they were false or mistake of fact.

He even alleged that the director general of police of the state is functioning as per the dictate of the government, and not in upholding rule of law. He claimed that he was constrained to record these facts because his impartiality was questioned by the state on the eve of his retirement.

Turning his ire to post-retirement sinecures for the judges as the reason for the judiciary coming under a cloud, he said, "If we start to restrict our expectation of reassignment/re-employment at least for a period of one year after retirement, I don't think that any political party, even party in power can undermine the independence of judiciary and we may be in a position to uphold the majesty of law without being influenced by anyone."

Justice Kumar concluded that those in power in the state are now seeking to attack the Supreme Court, after succeeding to attack other institutions such as legislative council, state election commission and the high court.

Considering the hard-hitting order delivered by Justice Kumar, it is possible that it may be recalled or set aside to avoid any embarrassment to the Supreme Court. But the allegations and insinuations which Justice Kumar made in his last order can help one to unravel the murky deals being made behind the curtain to resolve the gang war in the state, with repercussions in New Delhi.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/india-judiciary-chief-justices-ap-hc-order-jaganmohan-reddy

Sneak Peek:

No. of words: 1066 words

Note: This article is the initiation of case against prominent leaders of Myanmar related to committing atrocities against the Rohingya in Myanmar. It is suggested to have a fair idea about it.

Article: 19

Argentina Is Taking a Unique Route to Try Myanmar's Leaders for Crimes on Rohingya

Universal jurisdiction allows states to try persons accused of grave crimes regardless of the place where the crime was committed or the nationality of the accused or the victim.

In a landmark judgment delivered in May earlier this year, the Argentinian Federal Court of Appeals reversed a previous verdict and decided to pursue a case against Myanmar's leader Aung San Suu Kyi and other senior officers for committing atrocities against the Rohingya in Myanmar.

In September 2020, a clarification was sought from the prosecutor of the International Criminal Court (ICC) on whether the universal jurisdiction would duplicate or disrupt the ICC's investigation. Additionally, the matter is also pending in the International Court of Justice (ICJ).

The Rohingya refugee conflict began in 2012 in the Rakhine state in Myanmar where thousands of Rohingya were systematically killed and forced to flee to nearby countries which included India and Bangladesh. The admission of the claim in Argentina brings a sense of hope for justice for the persecuted community, which has been left homeless for years now.

While it is not clear how the court would go about gathering evidence and summoning Myanmar's top leaders, the fact that a court located in the opposite part of the globe has been able to take cognisance of the case under the principle of universal jurisdiction is quite remarkable. And it begs the obvious question — what legal framework does India have to deal with serious international crimes in India? What is universal jurisdiction and how does India approach it?

The use of universal jurisdiction globally

Universal jurisdiction is a unique concept which, in its broadest sense, allows states to exercise criminal jurisdiction against a person accused of grave international crimes regardless of the place in which the crime was committed or the nationality of the accused or the victim.

Certain countries have used this principle to try individuals in the past and as per a report published by Amnesty International in 2012, various states have incorporated different forms of universal jurisdiction for genocide, crimes against humanity and torture.

In certain countries, the constitution itself gives states the power. For instance, Section 118 of the Argentinean constitution allows for domestic jurisdiction over crimes committed outside Argentinean territory if the crime is incompatible with international law. Other countries have adopted different approaches to deal with universal jurisdiction. For instance, countries such as

Switzerland, the Netherlands, France etc. have passed legislation to give effect to universal jurisdiction and provided procedural requirements to exercise it. A recent study by TRIAL International analyses the scope and extent of universal jurisdiction in some of these countries.

International crimes and universal jurisdiction in India

India has so far failed to criminalise grave international crimes such as genocide and crimes against humanity. It ratified the Genocide Convention, 1951 in 1959. However, to date, there exists no domestic law on genocide. Also, India has not yet included the provision on crimes against humanity in its domestic criminal code. Although the Rome Statute of the International Criminal Court defines genocide, crimes against humanity and war crimes in 2002 (and the crime of aggression in 2010), India is not a state party to the statute.

One of the Acts that specifically deals with war crimes in India pertains to the Geneva Conventions Act, 1960 which was passed to give effect to the Geneva Conventions, 1949. Although the Act provides ground for the universal jurisdiction for the grave breaches of Geneva Conventions, the statute has rarely been used by courts and suffers from various infirmities. Lastly, while the Indian Penal Code, 1860 has a provision that provides for extra-territorial jurisdiction for crimes, the provision has a very limited scope, it is archaic, and does not specifically deal with the principle of universal jurisdiction.

Universal jurisdiction as a symbol of hope?

Universal jurisdiction has various limitations and it is certainly not a magic wand that provides a one-for-all solution to the problems. Summoning the authorities from a different country and taking them to a trial is no easy task. However, it is worth noting that universal jurisdiction has the potential to strengthen justice in the international sphere.

One of the classic examples in the recent past pertains to the case filed in 2010 in an Argentinian court against the human rights abuses committed under the Franco dictatorship in Spain. Although specific individuals in Spain could not eventually be tried, the process triggered the exhumation of bodies of those who had been buried in mass graves during Franco's dictatorship. Whatever may have been the political inclinations behind this case, the Argentinian court's decision coupled with the historical and political connect between Argentina and Spain created an impact that reverberated across judicial circles. These instances provide a sense of hope for the victims and encouraged them in their fight for justice.

Likewise, Myanmar's history is tied with that of India's. Actions of neighbouring states have the potential to create an impact and although India has accepted many refugees, efforts must be taken to pressurise Myanmar to cease the violations. Rohingyas in India have been living in constant fear, surrounded by an environment of hatred and animosity.

Furthermore, there have been instances where India has deported some refugees back to Myanmar. To cease the deportation of refugees, an intervening application was filed in the Supreme Court in 2017 as these actions ran contrary to various international norms. The case is still pending in the Supreme Court and no concrete outcome has come from it so far.

Sadly, there exists no legal structure in India to exercise universal jurisdiction for serious international crimes. To make universal jurisdiction a reality, it would be necessary to legislate on serious international crimes such as genocide and crimes against humanity.

India has seen its fair share of mass violence in different parts of the country and the need to introduce these laws is therefore imminent. At the same time, states need to make a stronger commitment to the world community towards better prospects of peace and justice.

Exercising universal jurisdiction can be one of the ways of furthering this commitment. Such an action would also be of symbolic significance for victims who can be assured that they are not alone in this fight and that the neighbouring states, in which they are seeking refuge, do share their quest for justice.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/rights/argentina-universal-jurisdiction-myanmar-rohingyas

Sneak Peek:

No. of words: 1967 words

Note: In this article, the author has critically examined the concept of state emergency and the power of the judiciary in such instances. It is a very informative text in order to understand the legal position about the subject. As a CLAT aspirant it is a must read article.

Article: 20

Failure of Constitutional Machinery in a State: What the Courts Can and Can't Do

While staying the Andhra Pradesh HC's order seeking to examine this issue, the Supreme Court failed to note that it too had passed a similar observation in 2007.

Article 356 of the constitution – dealing with provisions in case of failure of constitutional machinery in a state – begins under sub-clause (1) as follows:

"If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation, assume to himself…" [emphasis mine]

The key word here is "otherwise", which has been left undefined. Can the word "otherwise" include the finding or observations of a high court or the Supreme Court?

In the absence of the Governor's report recommending President's rule, the President can rely on any other material to arrive at the conclusion that the constitutional machinery in a state has collapsed. While considering the question of material, the Supreme Court had held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President dehors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose.

In other words, as the apex court had held, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. The apex court had qualified this by saying that although the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from the material is certainly open to judicial review.

In Rameshwar Prasad v Union of India, the apex court in a 3:2 decision had held that the dissolution of the Bihar legislative assembly in 2005 by the President on the basis of Governor Buta Singh's report, which recommended dissolution on extraneous considerations, was unconstitutional. As the assembly election had resulted in a fractured mandate, the governor said a flurry of defections and disqualifications could follow. The apex court held that it is for the Speaker to decide about the possible disqualification of members, if they violate the Anti-Defection Act.

While judicial review of constitutionality of the imposition of President's rule in a state generally arises after the executive exercises its prerogative and after subsequent parliamentary scrutiny, courts generally feel free to pass strictures against a government, if the facts in a given case before it warrant it.

Viewed from this perspective, merely asking the government's counsel to come prepared to answer why the court cannot record a finding on the breakdown of constitutional machinery in the state – as the Andhra Pradesh high court did on October 1 – need not lead to the inference that it would have resulted in the imposition of the President's rule.

The court's finding on the breakdown of constitutional machinery may have to be considered, if at all, as relevant material by the Centre to enable the President to satisfy himself from sources other than the Governor's report, as meant by the word, "otherwise" in Article 356(1). The Union Council of Ministers and the President may still disagree with such a finding of a court, as it is not binding on the government.

Last Friday, the Supreme Court stayed the Andhra Pradesh high court's October 1 order seeking Y.S. Jaganmohan Reddy government's response on whether there is a situation of "constitutional breakdown" in the state. The bench comprising the Chief Justice of India, S.A. Bobde, and Justices A.S. Bopanna and V. Ramasubramanian called the high court order "disturbing", before staying it.

Bar and Bench reported the Supreme Court bench observing thus: "In any case, have you seen an order like this? As an apex court, we find it disturbing." In 2007, the Supreme Court's two-judge bench made a similar observation in a pending case, although it did not make it a part of its order.

The high court order

The Andhra Pradesh high court bench comprising Rakesh Kumar and J. Uma Devi had passed the order in a habeas corpus case on October 1. The case, Reddi Govinda Rao, S/o Reddy Akku Naidu v The State of Andhra Pradesh and others was clubbed with 16 similar habeas corpus petitions alleging police excesses.

While hearing this case, the high court bench directed that "on the next date, learned senior counsel appearing on behalf of the State may come prepared to assist the court as to whether in the circumstances, which are prevailing in the state of Andhra Pradesh, the court can record a finding that there is constitutional breakdown in the state or not".

The state government filed an interlocutory application before the bench to recall the order. Declining the prayer to recall the order, the bench observed on December 14:

"Since on number of occasions, the court had noticed illegal picking up of persons by police and after filing of the Habeas Corpus writ petitions either they were being remanded or released. Even in this petition (Reddi Govinda Rao), after noticing such atrocities, this Court, on 12.02.2020, had summoned the Director General of Police, Andhra Pradesh, who appeared on 14.2.2020. Assurance was given by the DGP for educating police officers to act in terms of guidelines issued by the Hon'ble Supreme Court in D.K.Basu v State of West Bengal (AIR 1997 SC 610) and also

subsequent amendments in the CrPC. The DGP had assured that he will take proper steps henceforth".

On March 4, the bench had expressed its shock that the counsel for the petitioner in this case complained that either advocate on record or petitioner/detenu was directly or indirectly being threatened. The bench directed the DGP to ensure proper security to the counsel for the petitioner, and ensure that no such illegal act be repeated.

The bench also noted that after passing these orders, the high court and its judges were attacked on social media by number of persons including one MP, belonging to the party in power.

The bench expressed its surprise that the state government sought recall of its October 1 order rather belatedly on November 21, even though a few hearings had taken place during the interim period. In none of these hearings did the high court hear arguments on whether it could record a finding that constitutional machinery has failed in the state.

The bench held in its order on December 14:

"The court is of the opinion that if a party is aggrieved with an order of the court, it cannot be allowed to question the said order before the same court."

The bench reminded the state government that there was no restriction to approach the superior court, but it had participated in the proceedings on a number of dates, and only with a view to drag the present matter has the Interlocutory Application had been filed. The bench, therefore, rejected the state government's prayer to recall its October 1 order.

Importantly, the bench had no answer to the submission of the state government, that there was no pleading in the writ petition regarding the failure of the constitutional machinery, and therefore, the bench might not examine it, and the court should confine itself to the pleadings and the arguments advanced.

These aspects of the case tend to weaken the bench's case that its order was a result of its concern over the alleged police excesses in the state. If the court found prima facie evidence in the petitioners' allegation that their counsel were threatened by the state and non-state actors for seeking judicial remedy against police excesses, then the proper course would have been to initiate criminal contempt of court proceedings against the police on the ground that administration of justice was being interfered with.

Therefore, there is considerable force in the criticism that the high court's order was an instance of overreach, and judicial misadventure.

SC's benchmark and its dilution

On October 1, 2007, the Supreme Court bench of Justices B.N. Aggarwal and P. Sathasivam pulled up the Dravida Munnetra Kazhagam government in Tamil Nadu for going ahead with a state-sponsored bandh in the state over the Sethusamudram issue. "If there is no compliance with our order, it is complete breakdown of constitutional machinery. If this is the condition, we might then

have to direct the government to impose President's rule in the state," the bench was reported as having said.

The AIADMK told the court that that despite the court direction forbidding a bandh – the court passed the order at a rare sitting on Sunday, September 30, 2007 – there was a virtual bandh in the state.

"Is this a government? Is this the Tamil Nadu government? Is this the DMK government, a strong ally of UPA government? If this is the attitude of the DMK government, the UPA government should not feel shy of dismissing it and imposing President's rule," the bench was reported as having observed.

After blowing hot and cold, the bench agreed to hear the case as one of civil contempt, and at one stage, even threatened to arrest the then chief minister, the late M. Karunanidhi, for not responding to its contempt notice. The contempt case was a damp squib as the bench accepted the Tamil Nadu government's plea that it did not disobey the restraint order passed by the court and that it had taken all the steps necessary for preventing any disruption of public services and inconvenience to the general public. The bench concluded saying that the business community did not consider it proper to open its shops etc. in the wake of the hunger strike by leaders of political parties.

The Tamil Nadu precedent shows that the threat of extreme action is resorted to by the court just in order to discipline a rogue state government.

The Andhra Pradesh high court might have resorted to the same strategy, following the apex court's precedent, to make the state government accountable for the alleged police excesses in the multiple habeas corpus cases before it. A sense of exasperation – rather than a serious intent to execute its threat to dismiss the state government – underlines the Supreme Court's and Andhra Pradesh high court's interventions in 2007 and 2020 respectively.

The Supreme Court need not consider it as its responsibility to correct every instance of overreach or perceived misadventure by the high courts.

As happened in the Tamil Nadu case, the state governments at the receiving end of the court's overreach are not without remedy under our federal structure. The Supreme Court's intervention in such cases may only help to dilute the accountability of the state governments for their omissions and commissions, and the ability of aggrieved citizens to seek justice from the high courts under Article 226 of the constitution, when their civil liberties are at peril, due to police excesses.

Having said that, one cannot miss the irony in the latest intervention by the Supreme Court in the Andhra Pradesh high court matter.

The CJI Bobde is sitting on an explosive letter written by the state chief minister making serious allegations in public against the high court's attitude to its government in collusion with the Number 2 Judge in the Supreme Court. Whether the high court's October 1 threat in the course of the hearing of the habeas corpus cases is a result of the chief minister's public allegations against its judges is not clear.

If the CJI as the administrative head of the judiciary did not find the chief minister's letter 'disturbing' enough to order an immediate probe, his bench's description of the high court's October 1 order as 'disturbing' may appear to be a disproportionate response.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/andhra-pradesh-high-court-supreme-court-constitutional-machinery-state-government

Sneak Peek:

No. of words: 1538 words

Note: In this article, the author critically evaluates the recently filed Copyright infringement case against Sci-hub and its impact on India. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 21

Sci-Hub Case: The Court Should Protect Science From Greedy Academic Publishers

A court of law in India shouldn't allow itself to become a tool for perpetuating inequalities in access to scientific literature in the developing world.

Not many litigations have evoked strong, even panicky, reactions from researchers in natural sciences in India – but a copyright infringement suit filed by three publishing giants against Sci-Hub and Libgen before the Delhi High Court on December 21, 2020, has managed to do just that. The three are Elsevier, Wiley and American Chemical Society. Reactions to the 'development' ranged from wondering whether Sci-Hub will be banned in India to whether it is advisable for researchers to intervene in this litigation, to share their perspectives.

In fact, researchers at all levels have expressed concern – from undergraduate students who may have to write term papers to senior professors whose future research is at stake. And the reactions are not surprising: the Delhi high court now has the duty to determine the future of access to scientific literature in India. The first hearing is set for December 24.

The facts of the case

There are four plaintiffs in this case.

The first is the publication giant Elsevier, which publishes more than 2,500 journals, including The Lancet. As is evident from the statements in the suit, ScienceDirect, the proprietary database through which Elsevier generally provides access to their journal contents, acts as a toll-gate to a quarter of the world's peer-reviewed, full-text scientific, technical and medical literature.

The second and third petitioners are Wiley India Pvt. Ltd. and Wiley Periodicals Pvt. Ltd., and together they represent the publication giant Wiley. According to the suit, Wiley publishes more than 2 lakh articles every year in over 1,700 journals.

The fourth plaintiff is the American Chemical Society, which publishes more than 60 journals. More than 2,000 articles are published annually in its Journal of American Chemical Society alone.

The first defendant in the case is Alexandra Elbakyan, the founder of Sci-Hub. The second is Libgen, which provides free access to ebooks. Defendants 3 to 11 are various internet services providers (ISPs) in India. Defendant 12 is the Department of Telecom (DoT) and #13 is the Ministry of Electronics and Information Technology (MeitY).

In a nutshell, the publishing giants are demanding that Sci-Hub and Libgen be completely blocked in India through a so-called dynamic injunction. The publishers claim that they own exclusive rights to the manuscripts they have published, and that Sci-Hub and Libgen are engaged in violating various exclusive rights conferred on them under copyright law by providing free access to their copyrighted contents.

The publishers also contend that Sci-Hub and Libgen have created – and continue to create – numerous domains on the web so they can provide access to articles or book chapters published by the plaintiffs, even if some of their domains have been blocked by court orders in other countries.

They have also added ISPs as defendants because the details of those working to maintain Sci-Hub and Libgen aren't fully accessible, except that of Elbakyan, and to ensure the contents of the domains are blocked. DoT and MeitY have been made parties to the litigation to ensure they notify the ISPs and telecom providers to block access.

Relying on a previous judgment of the Delhi high court, i.e. UTV Software Communication Ltd. v. 1337X.to and Others, which dealt with websites providing access to copyrighted movies, the publishers are demanding that the court issue a dynamic injunction. That is, once a defendant's website is categorised as a "rogue website", the plaintiff won't have to go back to the judges to have any new domains blocked for sharing the same materials, and can simply get the injunction order extended with a request to the court's deputy registrar.

The problem

Now, if the Delhi high court issues a dynamic injunction against Sci-Hub and Libgen, the vast majority of researchers in India may not be able to access peer-reviewed articles and book chapters vital for their research and education, via these two platforms. The progress of science depends on access to existing literature; the denial of such access can also result in serious social, economic and public health tragedies.

For example, without access to the latest literature, how will healthcare professionals learn about the latest developments in any medical field? Thanks to the manner in which publication giants have been controlling access to peer-reviewed scientific literature today, most of it languishes behind paywalls that require hundreds to lakhs of rupees to unlock. The price for 24-hour access to one article ('Oral rimegepant for preventive treatment of migraine: a phase 2/3, randomised, double-blind, placebo-controlled trial') published in the latest issue of The Lancet, is $31.50 – approximately Rs 2,330 – nearly a hundred rupees an hour!

How many doctors and researchers in India's numerous public healthcare facilities and universities will be able to access all the relevant literature in this pricing model? Publishers may argue that their primary consumers are institutions, not individuals, but it's notable that even institutional subscriptions are not without severe restrictions on access beyond campus.

The COVID-19 pandemic has also illustrated how there can be situations in which researchers won't be able to visit their campus to access materials. So even if a researcher's institution may have an institutional subscription to a given journal, the researcher may in practice not be able to access the material using this subscription.

Both Sci-Hub and Libgen have been trying to address the problems of inequality in access through a revolutionary approach: by liberating access to the millions of manuscripts unjustifiably controlled by publishing giants. While one may agree or not on their approach, we can't ignore the practical demands of research and the inequality in access constantly that researchers from the Global South constantly have to deal with. And when a court has to deal with the issue of granting an injunction, it shouldn't ignore the context in which both Sci-Hub and Libgen have emerged as counter-movements against the propertisation of scientific communication.

Second: when a court decides on an injunction application, it needs to follow certain basic principles. In a landmark case before the US Supreme Court – eBay Inc. v. MercExchange, L.L.C. – the court reiterated the need to use the traditional four-factor test that courts apply. To get a permanent injunction, a plaintiff has to demonstrate the following:

1. The Plaintiff has suffered an irreparable injury;

2. Remedies available at law are inadequate to compensate for that injury;

3. That considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

4. The public interest would not be disserved by a permanent injunction.

If we applied these factors to the current context, it would seem that a permanent injunction shouldn't be granted, as doing so would disserve the public interest.

Third: we ought to critically reexamine the UTV software decision, which the plaintiffs relied on in their demand for a dynamic injunction. Dynamic injunctions provide an extremely broad remedy to IP owners without adequate judicial scrutiny, and they can have severe negative effects on diverse fundamental rights, including free speech. Any injunction should be limited to the specific links provided by the plaintiffs in their petitions and they should under no circumstances be extended to a complete website or new domains without adequate judicial scrutiny.

In the UTV software decision, the power to order blocking of websites "on being satisfied that the impugned website is indeed a mirror/redirect/alphanumeric website of injuncted Rogue Website(s) and merely provides new means of accessing the same primary infringing website" was conferred on the high court's deputy registrar. Such an approach takes away a very desirable critical, judicial examination on a matter as important as blocking websites/webpages.

Finally, if one looks at the plaint, it should be obvious that the publishers are only providing an illustrative list of copyrighted materials shared via Sci-Hub and Libgen. Note also that not all materials currently available on Sci-Hub or Libgen might be copyright-infringing. In some of these works, copyright might have expired; in some others, a publisher could be wrongly asserting copyright. So until a court of law determines with a proper trial whether all of Sci-Hub's contents are copyright-infringing, we can't jump to any conclusions.

So we need a proper trial to determine whether the plaintiffs' claims extend to all the materials they have made available, and to analyse whether the defendants can claim benefit of any of the limitations and exceptions provided under copyright law.

Many copyright scholars around the world still cite the judgments of the single bench and the division bench of the Delhi high court in the Delhi University photocopy shop case as judgments that considered the practicalities of education in India, and provided a balanced solution that doesn't unduly affect the authors' incentives.

In this regard, a dynamic injunction against Sci-Hub and Libgen could result in long-term harm to science in India and distort the fine balance within the copyright system. A court of law in India shouldn't allow itself to become a tool for perpetuating inequalities in access to scientific literature in the developing world. Let the current copyright infringement dispute be decided through a fair trial that deliberate the issues in a more holistic manner.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/sci-hub-elsevier-delhi-high-court-access-medical-literature-scientific-publishing-access-inequity

Sneak Peek:

No. of words: 2245 words

Note: In this article, the author has analyzed the impact of Notice issued by the Judiciary to Parliament. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the Act and make your own short notes too.

Article: 22

As Maharashtra Assembly Challenges Supreme Court on Arnab, Here's What Legal Precedents Say

Both houses have passed proposals refusing to take cognisance of any notice from the high court or the Supreme Court, thus reprising earlier disputes between the legislatures of Uttar Pradesh and Tamil Nadu with their respective high courts.

Can the high court or the Supreme Court issue a notice to the presiding officer of a legislature while hearing a pending matter? If issued, is the presiding officer bound to answer it? These questions have repeatedly come up over the years, without convincing answers emerging either from the legislature or the judiciary.

Therefore, when both the houses of the Maharashtra legislature recently unanimously passed "proposals" that the presiding officers of the assembly and legislative council would not respond to any notice issued by the high court or the Supreme Court in the breach of privilege matter against the Republic TV editor and anchor, Arnab Goswami, it was a déjà vu moment in India's constitutional history.

On November 24, Goswami urged the Supreme Court to issue a notice to the Maharashtra assembly speaker, Nana Patole, to clarify his stand on the claim of the assistant secretary of the assembly, Vilas Athawale. Athawale had earlier told the Supreme Court that he had written to Goswami on a matter of alleged breach of privilege motion at the Speaker's direction.

A bench headed by the CJI S.A. Bobde observed that it might be "necessary in all probability to serve the Speaker" to know his version.

On November 6, the apex court had issued a notice to Athawale asking him to explain why contempt proceedings not be initiated against him for his letter to Goswami which seemed to intimidate him for approaching the apex court on the issue of the alleged breach of privilege motion.

Goswami's counsel, Harish Salve, has urged the Supreme Court to issue a notice to the assembly speaker. Athawale's counsel, Dushyant Dave, however, has opposed Salve's plea saying that no contempt was made out, and there was no justification to issue a notice to the Speaker merely on the basis of Athawale's statement that he acted on the direction of the speaker.

On its part, the court suggested that the issuing of notice to the speaker may be justified because he should be given the opportunity of being heard, before deciding the matter. The bench's view was backed by amicus curiae Arvind Datar who agreed that the Speaker should be heard.

The matter has its origins in a letter Athawale wrote to Goswami on October 13 in which he alleged that the Republic TV owner-editor had submitted, in a petition he had filed, the proceedings of the assembly before the Supreme Court on October 8, 2020, although they were confidential. "You have knowingly breached the orders of the speaker of Maharashtra assembly, and your actions amount to breach of confidentiality. This is definitely a serious matter and amounts to contempt…" he had said in his letter to Goswami.

The apex court gave Goswami protection from arrest in pursuance of the proceedings pending in the assembly for alleged breach of privilege motion. The apex court termed Athawale's letter to Goswami as unprecedented, and said, prima facie, that it was intended to interfere in the course of administration of justice, and therefore, a serious matter amounting to contempt. The letter, the apex court suggested, intended to threaten Goswami with a penalty for seeking legal remedy under Article 32 of the constitution.

Goswami's plea was against the show cause notice by legislative assembly for initiation of breach of privilege motion against him for reportage related to the case of actor Sushant Singh Rajput's death. The assembly's notice alleged that certain remarks made by Goswami, in the course of the debates on Republic TV, against the chief minister, Uddhav Thackeray amounted to contempt of the house.

Maharashtra legislature cites constitution

Now, both the houses of the Maharashtra legislature, in proposals passed unanimously, stated that replying to notices from courts could mean accepting that the judiciary could keep a check on the legislature, which would be inconsistent with the basic structure of the Constitution. "The Constitution has set clear-cut boundaries for the three organs of the government – the judiciary, the legislature and the executive. Each organ should honour these boundaries. No one should encroach on each other's territories," Speaker Nana Patole was reported as saying. The chairman of the legislative council, Ramraje Naik Nimbalkar, reportedly was of the view that officials of the legislature responding to court notices would legitimise judiciary's control over the legislature, which would be inconsistent with the basic structure of the constitution.

The Maharashtra legislature's attempt to interpret separation of powers as the basic structure of the constitution in defence of its privileges vis-à-vis the powers of the judiciary would need to be tested in the light of the jurisprudence on the subject. The Maharashtra legislature has cited two articles of the constitution, to support its contention that its officials, including the presiding officers, are not answerable to the courts. They are Article 194 and Article 212 of the constitution.

The landmark Keshav Singh case

The Maharashtra legislature's proposal refusing to answer any notices from courts is akin to how the Uttar Pradesh legislative assembly had in 1964 put forward a claim to determine for itself the ambit of its constitutional power to punish citizens for its contempt. The claim was based on the belief that

such power to interpret the constitution was itself a privilege conferred upon the assembly by the constitution.

The assembly first ordered the arrest of one Keshav Singh for the contempt caused by his publications against a legislator. When the unrepentant Keshav Singh managed to secure bail from the Allahabad high court, the assembly ordered the arrest of two judges who entertained his bail plea, and the lawyer who argued on his behalf.

In response, the high court assembled en banc and injunced the legislature's orders. To resolve this confrontation, the President of India asked the Supreme Court for an advisory opinion on the matter. The apex court's advisory opinion emphasised that Indian legislatures function under a different constitution framework fromm their English counterpart – the latter exercise judicial powers that the former do not possess. The Indian constitution, the apex court ruled, does not confer every privilege and power of the House of Commons on the Indian parliament and state legislatures. They possessed only those House of Commons' privileges and powers that are actually recognised by English courts.

The apex court upheld the claim of the state legislature to punish strangers for contempt committed outside the houses of legislature, subject to the ultimate supervisory jurisdiction of the high courts and the Supreme Court. It made it clear that judges of the high court not only enjoy protection against the discussion of their conduct as judges in houses of the state legislature by reason of Article 211 of the constitution, but also immunity from proceedings by a house for any alleged contempt by merely performing a judicial function in exercise of their duties. The court made it clear that a citizen is not without remedy, if he is imprisoned for having done something which could not possibly constitute a contempt of a house of legislature, whenever the Speaker of a House issues a general warrant and precludes the courts from scrutinising the grounds upon which imprisonment was ordered.

The apex court ruled thus:

"In a democratic country governed by a written constitution, it is the constitution which is supreme and sovereign….When the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges all take oaths of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction….Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by and legislature in India in the literal absolute sense."

While the Supreme Court's advisory opinion in the case laid down the principles which ought to govern similar confrontations, the Allahabad high court, after considering the material facts afresh, held that Keshav Singh was properly punished, dismissed his petition, and sent him back to prison to serve the remaining part of his short sentence.

D.Murugesan v The Hon'ble Speaker

In this case, the Tamil Nadu legislative assembly ordered the arrest of A. Muthupandian, then news editor of the Tamil daily, Dinakaran in 1994, for breaching the assembly's privilege by publishing the expunged portions of its proceedings. Muthupandian immediately filed a writ petition before the

Madras high court challenging the punishment. Before he could be arrested, however, the assembly rescinded its decision, accepting the then chief minister, J.Jayalalithaa' s plea to show magnanimity. However, when the assembly noted his writ petition, it decided to revive his punishment, and detained him. The high court directed his release on bail, and later decided his writ petition.

As in Maharashtra, the Tamil Nadu assembly too passed a resolution not to accept notices from the high court in this case. The court, considering the public importance of the matter, directed publication of the notice in the newspaper, and afforded an opportunity to the respondents to make their submissions, if they wished. The court regretfully noted that the respondents including the speaker not only not appeared before it, but had refused to accept its notice thinking perhaps that they are not amenable to the jurisdiction of the court. "We must admit that we would be handicapped in their absence and would be passing judgment on their action without there being anything on record on their behalf. But that is a risk which we must take as we cannot refuse to perform our constitutional duty. That is, however, the risk that the respondents 1 and 2 have taken knowingly and voluntarily."

The high court held that while issuing notice to the respondents, it did not do so in a spirit of confrontation or to challenge their authority and jurisdiction. "It would have served not only the cause of justice but the dignity of legislature itself if the respondents had accepted the notice and made available to this Court their point of view for consideration. We are, however, under oath of our office to dispense justice without fear and favour and hence we must proceed to discharge our constitutional obligation in accordance with law," the high court reasoned.

The high court made it clear that the immunity under Article 212 granted to legisaltive proceedings would not be available to the respondents if the proceedings are held without jurisdiction, that is, in defiance of the mandatory provisions of the constitution or by exercising powers which the legislature does not under the constitution possess.

The high court held that there is nothing in the constitution which disabled a citizen who complains of a violation of his fundamental right under Article 21 of the constitution from filing a petition before a high court under Article 226 of the constitution, which is analogous to her or his right to approach the Supreme Court under Article 32, the Article Arnab Goswami used. The entertaining of a petition under Article 226 in such a case or entertaining an appeal against an order dismissing such a petition need not, therefore, be taken as an affront either to the speaker or the legislative assembly itself, the high court clarified.

The high court, however, found the assembly's initial decision holding Muthupandian guilty of breach of privileges and imposing a sentence of one week's imprisonment legal and valid. While the decision could be validly challenged on the ground of violation of Article 21 of the Constitution, the court held that it found no such violation in the instant case. The high court opined that the petitioners had an exaggerated notion about their status as presspersons and that no right to publish debates of the assembly could be claimed by the press except under the discipline under Article 194(3).

The high court found that the assembly's decision to revive its punishment, after rescinding it, only because Muthupandian had sought remedy from the high court could have amounted to contempt of

court, because it obstructed his approach to the court. However, it refrained from reaching that conclusion, because it noted that there were other reasons such as the media's inference that this marked a defeat for the chief minister – behind the assembly's decision to reimpose the punishment on the journalist. Nevertheless, finding the decision arbitrary and unreasonable, because the assembly kept the Damocles sword of punishment hanging on his head after rescinding it – thereby violating the constitutional discipline mandated by Articles 21 and 14 – the high court quashed the sentence imposed on Muthupandian.

By passing a proposal refusing any response to hypothetical notices from the courts, the Maharashtra legislature might have overreacted to possible judicial intervention in the ongoing breach of privilege proceedings against Goswami. But the Supreme Court, which has indicated such a possibility of issuing notice to the speaker, may still go ahead and decide the case legally without hearing the speaker, or the assembly's officials, if they refuse to respond to its notices.

As the Madras high court observed in the Muthupandian case, the frequent or indiscriminate use of the power to punish individuals for breach of privilege by legislatures in anger or irritation would not help to sustain their dignity or status, which are sacrosanct to Indian democracy.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/maharashtra-legislature-supreme-court-breach-of-privilege

Sneak Peek:

No. of words: 940 words

Note: In this article, the author has critically evaluated the Central vista case (Rajeev Suri v. Union of India & others). As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 23

When the Supreme Court's Vista of the Law is Clouded By Great Expectations

In a recent hearing in the Central Vista case, the court suggested that its decision not to grant a stay on construction was based on expectations rather than the law.

Often referred to as the most powerful court in the world, the Supreme Court of India sometimes acts in mysterious ways. The most recent instance was on December 7, 2020, during a hearing in Rajeev Suri vs Union of India & others. The case pertained to the 'Redevelopment of the Central Vista'.

This case has been going on since March 2020 and several hearings have been held. The order after the last hearing on November 5, 2020, said, "Heard counsel for the parties at length. Hearing concluded. Judgment reserved. Parties are free to file additional written notes by 16th November,2020."

One month after that hearing, on December 5, the speaker of the Lok Sabha announced that the prime minister will lay the foundation stone of the new parliament building on December 10. This announcement seems to have irked the Supreme Court, and it called for a suo motu hearing "in view of certain developments".

Though the order issued after the December 7 hearing merely records that "the solicitor general stated that there will be no construction activity of any nature on the concerned site(s) nor demolition of any structure will be done, including the further trans-location of tree(s) will be kept in abeyance, until the pronouncement of judgment in all these cases", several reports in the media captured the curious exchanges which took place during the hearing. Some of the statements made by the bench during the hearing, as quoted in the media, are given below:

"We never thought you will go ahead so aggressively with construction. The fact that there is no stay does not mean you can go ahead with everything."

"We have shown deference to you and expected that you will act in a prudent manner. The same deference should be shown to the court and there should be no demolition or construction."

"We thought we are dealing with a prudent litigant and deference will be shown. Just because there is no stay it does not mean that you can go ahead with everything," a visibly upset Justice A.M. Khanwilkar told solicitor general Tushar Mehta.

"Just because there is no stay that does not mean you can start construction. We did not pass any clear stay order because we thought you are a prudent litigant, and you will show deference to the court. The news items in the public domain show you are starting construction."

Each of these statements creates confusion about the working of the court. For example, what exactly do the justices mean when they say, "We never thought you will go ahead so aggressively with construction"? Do benches in the apex court make decisions based on what they 'think' the litigants will do? The confusion becomes compounded when this is combined with the next statement: "The fact that there is no stay does not mean you can go ahead with everything." It is not possible to figure out what else can 'no stay' mean other than that there is nothing preventing one from doing whatever one wants.

It is true that courts, following the doctrine of 'presumption of constitutionality of the law', generally avoid granting a stay against the government. However, this is not a case of a law or legislation but an executive action, so strictly speaking the doctrine of 'presumption of constitutionality of the law' should not apply in this case. Moreover, the petitioner – who had apprehensions of speedy government activity creating 'facts on the ground' which would be hard to reverse later – had specifically requested a stay. Therefore, the 'expectation' of the court that the Union of India would not do anything, even when there was no stay, was quite unrealistic.

The other statements quoted above suggest the court expected 'deference' from the government for the deference it had shown. The important questions that this raises are:

Should the apex court be deferential to any litigant? Though the 'executive' is one of the three 'pillars' or 'organs' of the 'state', should the court treat it differently from what might be called an 'ordinary' citizen-litigator? The answer is contained in Article 14 of the constitution, the right to equality, which says, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is understandable that the court should expect those appearing before it to be deferential, but is it appropriate for the court to expect deference in return for deference?

Is it appropriate for the court to classify litigants as 'prudent' or otherwise, and seemingly, by its own admission, deal with them differently? Where is the right to equality in that?

Is the court justified in having different expectations from different types of litigants, such as prudent and non-prudent?

The key issue that might hold a clue to the court's behaviour seems to be 'expectations':

It expects the government to be a prudent litigant.

It expects deference in return of deference.

It expects the litigant (the government) to somehow figure out that even though the court has not granted a stay, it actually does not want it to disturb the status quo.

With all due respect and deference to the Supreme Court, one wonders if the court should work on the basis of its expectations, or on the basis of the facts and circumstances of the case before it, and the law in force.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/law/supreme-court-central-vista-centre-expectations

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Sneak Peek:

No. of words: 1881 words

Note: In this article, the author has critically analyzed the recent judgment of Hon'ble Supreme Court of India. It is a very informative text to understand the legal position about the subject.

Article 24:

Why SC Refused to Quash FIRs Against Amish Devgan for 'Defaming' Sufi Saint

In its 128-page judgment, the SC's two-judge bench explains why his case did not qualify for quashing of FIR in the pre-investigation stage.

The Supreme Court's two-judge bench comprising Justices A.M. Khanwilkar and Sanjiv Khanna, in a judgment authored by the latter, dealt with the question of what constitutes hate speech rather elaborately. Such a lengthy examination of the merits of the case at the pre-trial stage by the apex court is hard to defend, especially when the bench makes it clear that it should not influence either the investigation or the trial. Yet, the bench makes a convincing case for denying Devgan's plea for quashing of the FIRs filed against him for his alleged derogatory remarks against Sufi saint Moinuddin Chishti.

The bench does so despite its agreement with the recent decision rendered by another two-judge bench of the court in Arnab Ranjan Goswami. In Goswami, the court, in almost identical circumstances, had refused to examine the question whether the proceedings arising out of the FIR filed against the petitioner should be quashed under Article 32 of the constitution on the ground that he must be relegated to pursue equally efficacious remedies under the CrPC before the high court.

"We should not be construed as holding that a petition under Article 32 is not maintainable. But when the High Court has the power under Section 482 (CrPC), there is no reason to by-pass the procedure under the CrPC…There is a clear distinction between the maintainability of a petition and whether it should be entertained," the bench in Goswami held.

Yet, the bench in Devgan noted that detailed arguments had been addressed by both sides on maintainability and merits of the FIRs in question and, therefore, dealt with by the court and rejected at this stage. "We do not, in view of this peculiar circumstance, deem it appropriate to permit the petitioner to open another round of litigation (before the high court); therefore, we have proceeded to answer the issues under consideration."

Devgan argued that criminal proceedings arising from the impugned FIRs ought to be quashed as these FIRs were registered in places where no 'cause of action' arose. The bench rejected the contention because Section 179 CrPC provides that an offence is triable at the place where an act is done or its consequence ensues. The debate show hosted by Devgan was broadcast on a widely viewed television network. The audience, including the complainants, were located in different parts of India and were affected by his utterances; thus, the consequence of his words ensured in different places, including the places of registration of the impugned FIRs, the bench reasoned.

Clause (1) of Section 156 of the CrPC provides that any officer in-charge of a police station may investigate any cognisable case, which a court having jurisdiction over the local limits of such station would have the power to inquire into or try. A conjoint reading of Sections 179 and 156(1) of the CrPC make it clear that the impugned FIRs do not suffer from this jurisdictional defect, the bench held.

Defence of causing slight harm

Devgan then relied upon the defence of trifle under Section 95 of the IPC. Saying that the bench is not inclined to entertain this defence at this stage, it pointed out that Section 95 is intended to prevent penalisation of negligible wrongs or offences of trivial character.

"Whether an act, which amounts to an offence, is trivial would undoubtedly depend upon the evidence collated in relation to the injury or harm suffered, the knowledge or intention with which the offending act was done, and other related circumstances. These aspects would be examined and considered at the appropriate stage by the police during investigation, after investigation by the competent authority while granting or rejecting sanction or by the court, if charge-sheet is filed. It would be wrong and inappropriate in the present context to prejudge and pronounce on aspects which are factual and disputed. The content by itself without ascertaining facts and evidence does not warrant acceptance of this plea raised by the petitioner. The defence is left open, without expressing any opinion," the bench held.

Hate speech

Interpreting the case law on Section 153A IPC, the bench held that deliberate and malicious intent is necessary and can be gathered from the words itself – satisfying the test of top of Clapham omnibus, the 'who' factor – person making the comment, the targeted and non-targeted group, the context, the occasion factor – the time and circumstances in which the words or speech was made, the state of feeling between the two communities, etc. and the proximate nexus with the protected harm to cumulatively satiate the test of hate speech. Good faith and no legitimate purpose test would apply, as they are important in considering the intent factor, the bench explained.

Interpreting "public tranquility" in clause (b) of Section 153A, the bench said it means ordre publique, a French term that means absence of insurrection, riot, turbulence or crimes of violence and would also include all acts which will endanger the security of the state, but not acts which disturb only serenity, and are covered by the third and widest circle of law and order. Public order also includes acts of local significance embracing a variety of conduct destroying or menacing public order.

The bench observed:

"We must act with the objective of promoting social harmony and tolerance by proscribing hateful and inappropriate behaviour. This can be achieved by self-restraint, institutional check and correction, as well as self-regulation or through the mechanism of statutory regulations, if applicable. It is not penal threat alone which can help us achieve and ensure equality between groups. In a polity committed to pluralism, hate speech cannot conceivably contribute in any legitimate way to democracy and, in fact, repudiates the right to equality."

Why case law could not help Devgan

In at least four cases, Manzar Sayeed Khan, Mahendra Singh Dhoni, Ramesh S/o Chhotalal Dalal v Union of India, as well as Balwant Singh, the Supreme Court had at the initial stage itself quashed the proceedings arising out of the FIR. The bench in Devgan explained why these cases could not be of any assistance to him in achieving a similar result.

In Balwant Singh, it was observed that the appellants were never leading a procession or raising slogans with the intent to incite people, indicating that the court took into account the 'who' factor as the appellants were unknown and inconsequential. This is of consequence as far as Section 153A of the Penal Code is concerned. Both the content and context, given the occasion, were highly incriminating and possibly warranted conviction, but as per paragraphs 10 and 11, the court was not convinced that the prosecution witnesses had spoken the whole truth and what slogan(s) was/were actually shouted. The decision in Balwant Singh had thus proceeded on failure of the prosecution.

In Manzar Sayeed Khan, the appellants had published a book titled Shivaji: Hindu King in Islamic India authored by James W. Laine, a professor of religious studies in Macalester College, US, which had led to the registration of an FIR against the Indian publisher and a Sanskrit scholar whose name had appeared in the acknowledgement of the book for having helped the author by providing him some information during the latter's visit to Pune. In Paragraph 19, it was observed that the author was a well-known scholar who had done extensive research before publishing the book. Further, he had relied upon material and records at Bhandarkar Oriental Research Institute (BORI), Pune. It was highly improbable to accept that any serious and intense scholar like the author would have any desire or motive to involve himself in promoting or attempt to promote any disharmony between communities, castes or religions within the state. Good faith and (no) legitimate purpose principle was effectively applied.

These principles were also applied by the court in Ramesh, holding that the television serial Tamas did not depict communal tension or violence to fall foul of Section 153A of the IPC and/or was the serial prejudicial to national integration to fall under Section 153B of the IPC. Reliance was also placed on the test of 'Clapham Omnibus'.

Mahendra Singh Dhoni was a case in which prosecution under Section 295A was initiated by filing a private complaint on the ground that the photograph of the well-known cricketer, as published in the magazine, was with a caption 'God of Big Things'. It was obvious that prosecution on the basis of content was absurd and too farfetched by any standards even if we ignore the intent or the hurt element, the bench explained.

Taking note of Devgan's apology, the bench also referred to respondents' submission that it is an indication or implied acceptance of his acts of commission. The bench observed:

"It is apparent that Devgan was an equal co-participant, rather than a mere host. The transcript, including the offending portion, would form a part of the 'content', but any evaluation would require examination and consideration of the variable 'context' as well as the 'intent' and the 'harm/impact'. These have to be evaluated before the court can form an opinion on whether an offence is made out. The evaluative judgment on these aspects would be based upon facts, which have to be inquired into and ascertained by police investigation. Variable content, intent, and the harm/impact factors are factually disputed by Devgan."

The legal bar against institution or continuance of the prosecution will arise only if there is requirement of prior sanction; or where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; or where the allegations in the FIR do not disclose a cognisable offence; or where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of who no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the bench elucidated.

Another qualifying category in cases where charge-sheet is filed would be those where allegations against the accused do constitute the offence alleged, but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. "Application of these principles depends on factual matrix of each case. Strict and restricted as the requirements are, they are at this stage not satisfied in the present case," the bench concluded.

The bench, however, found merit in Devgan's plea – also conceded by the respondents – that all the FIRs registered at different places against him for the same alleged offence could be transferred to Dargah police station, Ajmer, Rajasthan, where the first FIR was registered. The bench did not find any good ground or special reason to transfer the FIRs to Noida, Uttar Pradesh. The bench also granted Devgan's third prayer for security to himself and his family based on the threat perception by the Uttar Pradesh and Rajasthan governments. The bench granted Devgan interim protection against arrest subject to his joining and cooperating in the investigation.

Courtesy: 'The Wire' as extracted from:

https://thewire.in/media/supreme-court-amish-devgan-fir-quashing-refusal

Sneak Peek:

No. of words: 2980 words

Note: In this article, the author has critically examined the various events that took place in the recent past in the light of media trials and its implications as well. It will help you to enhance your legal acumen. A must read for every law aspirant. Enjoy this article!!

Article: 25

Hate Speech, Media Trial, Vilification : When Media Excesses Came Under Scrutiny In 2020

This year witnessed the Courts increasingly admonishing media excesses and regulatory authorities trying to enforce a semblance of accountability.

In the early days of April this year, when the country was in the grip of dread and anxiety on account of the COVID19 pandemic and the national lockdown, a section of media felt that it was the right time to unleash a communal propaganda. During the last week of March, around 1500 followers of Tablighi Jamaat sect held a congregation at Nizamuddin Markaz in New Delhi. There is no denying that the religious assembly of such a large group amid the pandemic was highly irresponsible. As it turned out, several attendees tested positive for coronovirus, many of them being foreign nationals. The Tablighi Jamaat congregation attracted widespread criticism, quite rightly, for their callous and thoughtless actions.

However, a section of mainstream seized this moment to escalate a vicious hate campaign by stoking communal sentiments. Prime time channel debates ran a narrative to blame the entire Muslim community and even launched a malicious campaign that the event was a deliberate ploy to spread coronavirus in India by depicting it as some sort of "Islamic insurrection", "jihad" etc. Hashtags and imagery targeting hate at Muslim community were used. Some media published wholly false rumours about Tablighi members attacking doctors and nurses who were trying to treat them(Refer this Newslaundry story for a detailed report about such communal campaigns).

For the discerning ones, it was clear that these reports were wholly unfounded. Eight months after such reports, we have with us a bunch of court judgments which disprove these reports and expose the communal mindsets which drove them.

In August, the Bombay High Court, while quashing FIRs/Chargesheets against Tablighi Jamaat foreigners, came down heavily on the media propaganda against them.

"There was big propaganda in print media and electronic media against the foreigners who had come to Markaz Delhi and an attempt was made to create a picture that these foreigners were responsible for spreading COVID-19 virus in India", the Court said adding that there was "virtually persecution" against these foreigners.

After noting that no offence was made out against them, the Court observed : "The material of the present matter shows that the propaganda against the so called religious activity was unwarranted".

The Court also added that they were made "scapegoats" and that the present numbers of COVID-19 cases in India show that the action against Tablighi Jamaat attendees was unwarranted.

Courts in Mumbai, Delhi, Bihar, Uttar Pradesh, Tamil Nadu have exonerated many Tablighi Jamaat members after holding that there was no basis for criminal prosecution against them. In one case, a court in Delhi observed that it was possible the Tablighi foreigners were 'maliciously prosecuted".

While the media houses which indulged in this shameless campaign are yet to face any action, it is a notable development that the Tablighi Jamaat issue is one of the many instances of media excesses getting called out by courts in 2020.

Media Trial in Sushant Singh Rajput Case

When popular Hindi film actor Sushant Singh Rajput was found dead in his Mumbai residence on June 14, no one would in their rights minds would have imagined even in their wildest dreams that it would be the starting point for a sustained, vicious media trial.

What we witnessed was an absurd, obnoxious and at times laughable series of media reports which sought to frame Rhea Chakraborty, Sushant's ex-partner, as responsible for his death. The media reportage was peppered with a heavy dose of misogyny, disregard for process of law and bordered on voyeurism.

In tune with the media narrative, the Supreme Court handed over the investigation to the CBI through a questionable verdict, even without finding any fault with the Mumbai police probe.

After the probes by the CBI and the Enforcement Directorate into murder angles and swindling charges against Rhea Chakraborty hit a roadblock, it was the Narcotics Control Bureau which satisfied public hysteria by arresting her under the NDPS Act. The case against her was preposterous. The NCB's lawyer argued in the Court that lending money to Sushant for buying a few grams of ganja amounted to 'facilitating' drug trafficking and not informing authorities about his drug consumption habit amounted to 'harbouring' of offender so as to attract the serious, non-bailable offence under Section 27A NDPS. The Bombay High Court rubbished these allegations. The Court observed it was ludicrous that Rhea has to face grave charges when Sushant, the ultimate beneficiary, can get away with minor penalties. The High Court granted Rhea bail observing that she was not part of drug dealers. But by that time, she had to spend almost a month under custody.

Meanwhile, a batch of PILs were filed in the Bombay High Court seeking to restrain the 'media trial' carried out in the case. A division bench of Chief Justice Dipankar Dutta and Justice G S Kulkarni made several critical oral observations against the media flouting journalistic norms while reporting criminal investigation such as :

"If you become the investigator, prosecutor and the judge, what is the use of us? Why are we here"

"If you are so interested in unearthing the truth, you should have looked at the CrPC! Ignorance of law is no excuse"

The bench also asked the lawyer of Republic TV if asking the public who should be arrested in a case is part of investigative journalism. This was in reference to the hashtag campaign '#ArrestRhea' run by the channel in Twitter following the death of Sushant Singh Rajput.

"Is this part of investigative journalism? Asking public about their opinion on who should be arrested?", the bench asked.

"Journalists were responsible back then & neutral, now media is highly polarised(sic)", the Court remarked. The Court also said that the concept of self-regulation of media has failed.

"We would like the media not to cross boundaries", the Court said while reserving judgment of the PILs. The bench indicated that it was considering to lay down guidelines to regulate media trial. The judgment in this case is awaited.

Sudarshan TV News Case

In what seems to be a campaign induced by a combination of jealousy, insecurity feeling and religious bigotry, 'Sudarshan TV News' announced in August that it will telecast a ten episode series in the wake of several Muslim candidates, particularly the graduates of Jamia Milia Islamia of Delhi, clearing the coveted civil services exam. Projecting this as a 'jihadist' conspiracy to 'capture' the posts in Indian civil services, Suresh Chavhanke, the chief editor of Sudarshan TV News, shared a trailer of the show in Twitter, which was brimming with over the top bigotry. Chavhanke even dared to tag Prime Minister Narendra Modi in his objectionable tweet.

The transcript of the show's trailer, which was captioned 'UPSC Jihad', was so blatantly offensive that a single bench of the Delhi High Court stayed the telecast of the program after prima facie observing that it was violative of the Program Code framed under the Cable TV Act. The Court asked the Ministry of Information and Broadcasting to take a decision on the complaints against the show.

Meanwhile, another petitioner had directly approached the Supreme Court against the show. The Supreme Court initially declined to put a stay on the telecast of the show, observing that it was difficult to pass a "pre-broadcast order" a few hours before the episode was scheduled to be aired.

When the Supreme Court considered the case against the show next on September 15, it found the four episodes of the show which had been telecasted by then to be offensive.

"You cannot target one community and brand them a particular manner. This is an insidious attempt to malign a community", a bench headed by Justice D Y Chandrachud fumed at the show.

"As a Supreme Court of the nation, we cannot allow you to say that Muslims are infiltrating civil services. You cannot say that the journalist has absolute freedom doing this", the judge said.

The Court stayed the telecast of the further episodes of the show after making a prima facie observation that "the object, intent and purpose of the program is to vilify the Muslim community with an insidious attempt to portray them as part of a conspiracy to infiltrate the civil services"

Double Standards by Centre

In March, the I&B Ministry passed an extraordinary order to suspend the telecast of two Malayalam channels "Asianet" and "Media One TV" for 48 hours over their reports about the communal riots which took place in Delhi in February. As per these reports, Muslims were attacked by Hindutva groups with the active connivance of Delhi police. Even without any finding that the reports were false or baseless, the Ministry was swift to penalize these channels.

However, such promptness was not forthcoming when it came to brazen instances of hate speech in media. For example, in the case of 'Sudarshan News TV', the Ministry vacillated in taking a stand. Initially, it gave green signal for the telecast of the show with a mild caution that the channel should ensure that the program should not have contents violating the Program Code.

In the counter-affidavit filed in the Court, the Centre did not take a clear stand with respect to 'Sudarshan News program'. Instead, the Centre diverted the issue by talking about the need to regulate digital media.

The SC bench criticized the Centre for not keeping a watch on the contents of the 'UPSC Jihad' show of Sudarshan TV, after it allowed its telecast on condition to comply with the Program Code.

"The Programme would have been over by now if the Court had not intervened", Justice D Y Chandrachud orally remarked.

After being pulled up by the Court, the Centre passed a revised order against the channel asking it to remove the objectionable contents from the show and submit the same before the authority for review.

It took several orders and observations from the Court for the I&B Ministry to conclude that the show was not in "good taste" and was "likely to promote communal attitudes".

Similar non-committal stance of the Centre was seen in the cases seeking action against media outltets for communalizing the Tablighi Jamaat issue. A bench headed by the Chief Justice of India lambasted the first affidavit filed by the Minstry as "extremely evasive and brazenly short of details".

In the second affidavit filed after the court's criticism, the Centre took a curious approach. There was no mention in it about any of the instances of the communal reporting carried by sections of media on the Tabligh issue. Instead, the affidavit stated that the media reports of the issue have been "largely factual" and "objective". This was based on a selective mentioning of instances of good reporting by certain media outlets. After referring to only the factual and objective media reports about the Tablighi Jamaat issue, the Centre denied that there was communal reporting of the matter. The Ministry blamed that the petitioners were making "vague assertions based upon certain "fact checking news reports" to contend that the entire media is perpetrating communal harmony and hatred towards one particular community..."

The Court expressed serious disappointment at the second affidavit as well.

"We are not satisfied with your affidavit. We had asked you to tell us what have you done under the Cable TV Act? There is no whisper about that in the affidavit. We must tell you that we are

disappointed with the Union's affidavit in these matters", the Chief Justice of India, S A Bobde, told the Solicitor General, Tushar Mehta.

Self-regulation of media

The efficacy of the concept of self-regulation of the media also came under much scrutiny this year.

While hearing the Sudarshan News TV case, the Supreme Court asked the News Broadcasting Standards Authority "'do you exist apart from your letterhead?'.

"Do you watch TV or not? Why have you not controlled what is going on in the news", a bench headed by Justice DY Chandrachud asked the NBSA's counsel. The Authority was termed "toothless" by the Court.

It may also be recalled that the Bombay High Court also remarked that self regulation of media has failed while considering the cases against media trial in SSR case.

Following such repeated criticism from the courts, the NBSA passed few orders to make its presence felt.

In October, the NBSA imposed a fine of Rupees One Lakh each on Zee News, Aaj Tak, India TV and News 24 for their insensitive reporting of Sushant Singh's death. The channels were also directed to air a public apology for such reports.

Earlier this month, the NBSA found the news channels Zee News, Zee 24 Taas, Zee Hindustani, TimesNow, India Today, AajTak, India TV, News Nation and ABP News at fault for their vilifying and slanderous reports linking Hindi film actor Rakul Preet Singh to drugs.

The deterrence effect of such belated and half-hearted responses by NBSA to violations of journalistic norms is a matter of debate.

Bollywood v TV Channels

This year also witnessed a significant development of the film industry coming together against certain media houses for their slanderous and defamatory reports.

Thiry four big production houses and four major associations of the Hindi film industry jointly filed a suit in the Delhi High Court seeking to restrain journalists such as Arnab Goswami and Pradeep Bhandari of Republic TV, Navika Kumar and Rahul Shivshankar of Times Now and several unknown defendants and social media platforms from publishing "irresponsible, derogatory and defamatory remarks against Bollywood members".

The plaintiffs included the production houses of Bollywood big names Aamir Khan, Sharukh Khan(Red Chillies), Salmaan Khan, Ajay Devgn, Anil Kapoor and major production houses such as Yashraj Films, Dharma Productions (of Karan Johar), Nadiadwala, Excel, Vidhu Vinod Chopra films, Vishal Bharadwaj, Reliance Big etc.

The film production houses and actors took exception to highly derogatory words and expressions used by channels for Bollywood such as "dirt", "filth", "scum", "druggies" and expressions such as

"it is Bollywood where the dirt needs to be cleaned", "all the perfumes of Arabia cannot take away the stench and the stink of this filth and scum of the underbelly of Bollywood", "This is the dirtiest industry in the country", and "cocaine and LSD drenched Bollywood".

On November 9, a single bench of the Delhi High Court told Times Now and Republic TV that they cannot run a "maligning campaign" and asked them to comply with the Program Code.

'Bring down the rhetoric' - Delhi HC to Arnab Goswami

In September, Delhi High Court told Republic TV Anchor Arnab Goswami to exercise restraint and 'bring down the rhetoric', in a plea moved by Sashi Tharoor MP seeking to stop defamatory broadcast against him in the case related to the death of his wife Sunanda Pushkar.

While issuing notice to Goswami to file a reply, the Single Bench of Justice Mukta Gupta highlighted that during the pendency of an investigation in a criminal case, media should refrain from running a parallel trial, or from calling someone guilty, or from making unsubstantiated claims.

The Chief Justice of India, while hearing a case related to Arnab Goswami, made certain oral remarks disapproving the style of reporting of Republic TV anchor.

"You can be a little old-fashioned with reporting. Frankly speaking, I cannot stand it. This has never been the level of our public discourse", CJI Bobde told Senior Advocate Harish Salve, who was appearing for Goswami.

"There has to be responsibility in reporting. There are some areas one has to tread with caution. As a court, our important concern is peace and harmony in the society", CJI told Salve in reference to the Maharashtra police case which alleged that Republic TV debates communalized the Palghar lynching and Bandra migrants gathering incidents.

Hate speech case against Amish Devgan not quashed

The Supreme Court refused to quash the FIRs registered against News18 anchor Amish Devgan over his remarks against Sufi saint Moinuddin Chishti. The judgment delivered in this case(Amish Devgan v Union of India)contains an elaborate discussion on the concept of 'hate speech'. It discusses the distinctions between 'hate speech' and 'free speech', the need to criminalize 'hate speech' and the tests to identify it.

"In a polity committed to pluralism, hate speech cannot conceivably contribute in any legitimate way to democracy and, in fact,repudiates the right to equality", the judgment authored by Justice Khanna observed.

The Court also observed that persons of influence have to be more responsible in speech.

"Persons of influence, keeping in view their reach, impact and authority they yield on general public or the specific class to which they belong, owe a duty and have to be more responsible", said the judgment delivered by a bench comprising Justices AM Khanwilkar and Sanjiv Khanna.

In this connection, it is worthwhile to mention that a PIL has been filed in the Supreme Court seeking the establishment of an 'independent media tribunal' to hold media acountable for hate speech, fake news etc.

While discussing these media excesses, one must also bear in mind that there is another side to the picture - there are still responsible media houses believing in and carrying out the core function of the fourth estate of hold power to account, which are facing increased pressure and threats from the establishments. The fact that India is ranked 142 out of 180 countries in the Global Press Freedom Index 2020 will put things in the right perspective. It is also notable the media houses, which are known for their repeated violations, also give the impression of being hand-in-glove with the establishment as they are seen consistently aiding pro-establishment narrative and attacking critical voices. Perhaps, that explains the sense of impunity enjoyed by them.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/hate-speech-media-trial-media-excesses-timesnow-republictv-zeenews-arnabgoswami-167763?infinitescroll=1

Sneak Peek:

No. of words: 1868 words

Note: In this article, the author has critically analyzed the Code on Wages, 2019 while comparing it with the Provisions of The Payment of Wages Act, 1936. It is very informative text to understand the subject.

Article: 26

Deriving The Meaning Of 'Wage': A Comparative Analysis Of The Payment Of Wages Act, 1936 And The Code On Wages, 2019

A long-standing industry demand was the rationalisation and codification of labour laws. While the industry demands simplification and minimum compliance, the labour unions on the other side paint a grim picture about the lack of compliances of even existing labour laws.

There were many attempts to revise the labour laws. The Union Government appointed the Second National Commission on Labour Laws, which submitted its report in June 2002. The Commission proposed that the existing set of labour laws should be narrowly divided into four classes and grouped together. The Union Government acting on the recommendations has proposed that four labour codes will be enacted, subsuming 29 legislations on labour laws. The Code on Wages, 2019 is the first of the lot to receive legislative approval and, subsequently, the President of India's assent on August 8, 2019.

The Code on Wages, 2019 (the Code) seeks to amend and consolidate the laws relating to wages and bonus and matters connected therewith or incidental thereto. It amalgamates and subsumes four

imperative labour laws - the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976.

The Code provides for the universal applicability of the provisions for prompt payment of wages and minimum wages to all workers regardless of the wage ceiling and sector, unlike the Payment of Wages Act, which is applicable to employees receiving wages below the statutory limit, and the Minimum Wages Act, which is applicable to employees engaged in scheduled establishments. The Code has expanded the definition of 'employer' as well as 'employee' after putting together separate prior legislations under a single umbrella, resulting in a wide-ranging applicability of the regulations which is now applicable to workers in both organised and unorganised sectors.

In order to encourage deregulation and promote ease of doing business, several changes were brought in via the Code on Wages, 2019. Additionally, the Code attempts to streamline India's labour law enforcement process by providing a uniform statutory framework for it. The new definition of the term wages under Section 2(y) of the Code is a significant reform implemented by the Code. It marks a departure under the aforementioned Acts from earlier meanings of wages. Thus, to comprehend its import it is imperative to analyse this definition and juxtapose it with that under the Payment of Wages Act, 1936

Wages under Code on Wages, 2019 – How different from that provided in the Payment of Wages Act, 1936

The definition of 'wages' varies across labour legislations in India. The Code on Wages, 2019 endeavours to provide a single uniform definition of wages as applicable to minimum wages, payment of wages and payment of bonus with an intent to minimise disputes and litigations and also reduce compliance cost for employers.

The Payment of Wages Act, 1936 applies to the payment of wages to persons employed in factories and to persons employed in any industrial or other establishment. However, the Code has broadened the scope by extending its applicability to all the establishments.

Section 2(y) of the Code defines Wages as all remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment. This part of definition is verbatim similar to that of the definition provided under Section 2(vi) of the Payment of Wages Act, 1936. The Payment of Wages Act, 1936 defined wages very comprehensively and broadly.

Under the Code, there are now three parts to the definition of wages: inclusionary part, exclusionary part and the conditions which limits the effect of exclusions. The following components form the inclusive part of the definition under the Code on Wages –

basic pay

dearness allowance

retaining allowance, if any.

Unlike the definition under the Payment of Wages Act of 1936, the definition under the Code aims to provide a list of items that are not included in this updated concept of wage such as –

any bonus payable under any law for the time being in force, which does not form part of the remuneration payable under the terms of employment;

the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government;

any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

any conveyance allowance or the value of any travelling concession;

any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment;

house rent allowance;

remuneration payable under any award or settlement between the parties or order of a court or Tribunal;

any overtime allowance;

any commission payable to the employee;

any gratuity payable on the termination of employment;

any retrenchment compensation or other retirement benefit payable to the employee or any ex gratia payment made to him on the termination of employment.

The first proviso to Section 2(y) under the Code states the exclusions mentioned must not exceed 50 per cent of all remuneration and, if they are exceeded, the excess sum shall be treated as remuneration and shall be regarded as wages. This is intended to ensure that organizations do not pursue compensation structures that result in a reduction of wages below 50% of overall remuneration. However, it is not wrong to contend that such an approach will be seldom effective.

The second proviso to Section 2(y) under the Code basically provides that for the purposes of equal wages to all genders, the emoluments specifically excluded under clauses (d), (f), (g) and (h) becomes relevant and shall be taken for the computation of wages.

Finally, the explanation offered under the definition of wages in the Code provides that if an employee earns remuneration in kind from his employer, the amount of which does not exceed 15% of the total salary payable to him shall be considered to constitute part of the salary of that employee. This is basically meant to disincentivize employers to pay in kind.

Issues with the new Definition

The inclusionary part of the new definition has only three items, which is two less than that provided under the Payment of Wages Act, 1936. Moreover, the list of exclusions under the Code is much longer than that of the Payment of Wages Act, 1936. What is even more startling in this regard is the fact that some of the inclusionary clauses under Payment of Wages Act, 1936 has now come to be a part of the list of exclusions. The remuneration payable under any award or settlement between the parties or order of a Court which was an inclusionary clause under Section 2(vi) – (a) of the Payment of Wages Act, 1936 is now excluded from the definition of wages by virtue of Section 2(y) – (g) of the Code on Wages, 2019. Similarly, any overtime allowance [2(vi) – (b)], commission payable to employee [2(vi) – (c)], and retrenchment compensation [2(vi) – (d)], which were previously protected have been excluded from the definition of wages and is now a part of the list of exclusions. [Section 2(y) – (h), 2(y) – (i), 2(y) – (k)]

Furthermore, the residuary clause in the veil of Section 2(vi)-(e) of the Payment of Wages Act, 1936 provided an added protection to the employees and working class. It sets forth that wages may include any sum payable to which the person employed is entitled under any scheme framed under any law for the time being in force. No such residuary clause is present in the Code on Wages, 2019.

The plausible explanation behind the new definition is to ensure that employers include the majority of the salary of an employee in the first three components, i.e. basic, dearness allowance and retaining allowance, in order to prevent inclusion of other components in the wages component at a later stage. While this is a move undertaken with good intentions, but since the government actively controls incentives, it may lead to problems, making it impossible for employers to formulate their own wage structures. In particular, this would be troublesome for employees who use variable and deliverable associated performance-based components to earn significant chunks of their wages. In the case of sales managers, for example, who draw different amounts depending on the nature of their travel, performance goals, etc.

Furthermore, the inclusion of gratuity payments and other retirement benefits into the definition of wages through first proviso seems vague as this runs counter to the basic purpose behind such payments and would lead to an unwanted increase in the cost of the employer. Additionally, it would make the whole payroll system complicated and eventually the end results would remain somewhat similar leading to a great deal of confusion.

As already mentioned, the Code excludes 'remuneration payable under any award or settlement between the parties' from the definition of wages without providing any explanation. All salaries are negotiated in a unionised community under agreements between the employer and unionised employees, which mostly last two to three years or more. To suggest that none of these mutually agreed and settled compensation components can be regarded as 'wages' for some purposes is quite pointless. However, the second proviso clarifies that this element along with few others will be included for the purposes of equal wages to all genders, it still does not make the reason for its exclusion for other purposes intelligible.

In order to summarise this new Code, from the point of view of giving a uniform effect to the four major labour laws of this country, it can be said that this Code is of great significance. In addition,

the Code has implemented much-needed reforms in the labour sector through which the convergence, rationalisation and simplification of labour-related regulations is now on course.

From the above discussions, it is correct to conclude that in an effort to simplify the law, the Code on Wages, 2019 appears to have created some further chaos and confusion. A simpler approach would have been to address the concept of wages based on core concepts (and if possible, through illustrations and examples, as many other statutes do), instead of a complex definition with plenty of other inclusions, exclusions, provisos and explanations.

Although the intentions behind the introduction of a uniform definition of wages are fairly positive, their impact remains to be seen. The Code endeavours to offer a new meaning to the old labour laws of centuries which were enacted historically at different points in time and to deal with different situations. The combining of asymmetrical laws into a single code is not an easy task and will undoubtedly create a set of new problems. The first and only important thing required for achieving the desired results is to adequately enforce the requirements of the Code in a standardised way which can be done only by improving the standard of regulatory authorities.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/labour-law-wages-the-code-on-wages-2019-payment-of-wages-act-1936-167422

Sneak Peek:

No. of words: 2000 words

Note: In this article, the author has examined the recent decision of the Hon'ble Supreme Court in the matter of Vidya Drolia and others v. Durga Trading Corporation. This will help you to explore the journey of legal developments.

Article: 27

The End Of A Saga- The Conundrum Of Arbitrability Of Landlord-Tenant Disputes

A long due controversy on arbitrability of tenancy disputes has finally been put to rest by the Hon'ble Supreme Court of India. A bench comprising of Hon'ble Justice N.V. Ramana, Justice Sanjiv Khanna and Justice Krishna Murari on 14 December, 2020 in the matter of "Vidya Drolia and others v. Durga Trading Corporation" ('Vidya Drolia -II'), has overruled the ratio laid down in Himangni Enterprises v. Kamaljeet Singh Ahluwalia ('Himangi Enterprises') and held that the tenancy disputes are now arbitrable as the Transfer of Property Act, 1882 ('TP ACT') does not foreclose arbitration, save and except for those tenancy disputes which are governed by rent control legislations as specific forums have been given exclusive jurisdiction to decide the special rights and obligations of the parties.

The Supreme Court also took a pro-arbitration stance by overruling the ratio in N. Radhakirshnan v Maestro Engineers and ors. and held that while deciding an issue of public policy or public interest, reference to dispute resolution mechanisms cannot be held foreclosed.

The Journey So Far

Over the years, various conflicting judgments were pronounced by various High Courts in India on the issue whether disputes arising under a special statue/general statue can be a subject-matter of arbitration. The string of judgments have been interpreted below-

a. January 7, 1981: Back in 1981, the Supreme Court in the judgment of Natraj Studios (P) Ltd vs Navrang Studios & Anr ('Natraj Studios') dismissed an application under Section 8 of the Arbitration and Conciliation Act, 1940 as the tenancy was protected under the Bombay Rents, Hotel & Lodging Houses Rates control, 1947 and ruled out arbitration of lease disputes as they were to be adjudicated under special legislation and undermined public policy.

b. April 15, 2011: In 2011, the aforesaid ruling was upheld in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd[v] ('Booz Allen'), wherein it was held that in eviction or tenancy matters which are governed by special statues and where tenant enjoys statutory protection, only the specified court has been conferred exclusive jurisdiction.

c. September 13, 2012: The Full Bench of the Delhi High Court in the case of HDFC Bank Ltd v. Satpal Singh Bakshi took a contrary view and held that the disputes which are to be adjudicated by

the DRT under the DRT Act, are arbitrable as there was no prohibition on jurisdiction by necessary implication.

d. July 25, 2013: On the contrary the Andhra Pradesh High Court in the case of Penumalli Sulochana vs Harish Rawtani extended the rule evolved in Booz Allen and held that disputes under a lease deed, governed by the TP Act are non-arbitrable.

e. April 1, 2015: In 2015, the Calcutta High Court through the case Ambuja Neotia Holdings Pvt. Ltd. v M/S Planet M Retial Ltd., held that lease deed disputes, governed by the TP Act are arbitrable, as the TP Act codifies the general law of transfer of property and is not a special statute.

f. August 17, 2016: Later in 2016, in the case of Vimal Kishor Shah v Jayesh Dinesh Shah again a contradicting view taken by the Court in holding that the disputes under the Trusts Act were held to be non-arbitrable by necessary implication, as the Trusts Act had conferred specific powers on the principal judge of the Civil Court. Further the principle was followed by another Division Bench in Emaar MGF Land Limited v. Aftab Singh, a case relating to the Consumer Protection Act, 1986 wherein the Court held the exemption from rent control legislation can be withdrawn and thereupon Arbitration Act would not apply.

g. October 12, 2017: Considering the above paradox, the Supreme Court in the case of Himangi Enterprises held that the suit was governed by the TP Act, and thus would be triable by the Civil Court and not by the Arbitrator. The judgment effectively left no scope for arbitrating lease disputes in India irrespective of whether such disputes arose from special legislation.

After analysing the aforesaid jurisprudence, a coordinate bench of the Supreme Court in the case of Vidya Drolia v. Durga Trading Corpn, ('Vidya Drolia- I') observed that the above issue needs to be authoritatively decided by a larger bench. Upon such reference, the Supreme Court in the instant case of Vidya Drolia -II has overturned the decisions of Himangi Enterprise and HDFC bank ltd. to hold that the landlord-tenant disputes are arbitrable except when they are covered by specific forum created by rent control laws. The Court further that:

Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally would not affect third-party rights or have erga omnes affect or require centralized adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.

Right in rem v/s Right in personam

The Booz Allen Case marks the difference between right in rem and right in personam. It was observed that the right in rem is a right exercisable against the world at large and is not amenable to arbitration, whereas in case of rights in personam, an interest is protected against a specific

individual and is referable to arbitration. Further, the Court opined that matters relating to tenancy issues are matters related to public policy as it considers protection of the tenants as a 'class' and therefore, should be adjudicated by courts or public forums and not by arbitration.

Further, the Bombay High Court in its decision in Kingfisher Airlines Limited v. Prithvi Malhotra Instructor narrowed down this principle by holding that rights in personam would not be arbitrable as a matter of public policy if a statute vests exclusive jurisdiction upon a particular court or tribunal.

Finally, the Apex Court after analysing the above principles, referred on the reasoning given by the Booz Allen Case 'that subordinate rights in personam arising from rights in rem have always been considered to be arbitrable' and basis the same, the Court explicitly held that the disputes under the TP Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam which arises from rights in rem.

In view of the above interpretation, the Court laid own a four-fold test for determining when the subject matter of dispute in an arbitration agreement is not arbitrable:

(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The Court clarified that these tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

'EXISTENCE' or 'VALIDITY' of an Arbitration Agreement?

To determine the concerned issue, it is important the analyse the law laid down by the Court while interpreting section 11(6A) of the Act. Section 11(6A) of the Act restricts the examination by the courts of an application under section 11(4), for the appointment of an arbitrator, to the 'existence of an arbitration agreement'. The same principle was affirmed by the Supreme Court in the decision of M/s Duro Felguera S.A. v. M/s Gangavaram Port Limited wherein the court interpreted these terms to mean that the courts are restricted to determining only the existence of an arbitration agreement.

Later the Supreme Court in Reckitt Benckiser (India) Private Limited v. Reynders LabelPrinting India Private Limited and Others reiterated the above position, that the courts should delve into only the existence of an arbitration agreement rather than validity.

Interestingly, the observation of R. Nariman J. in the case of Garware Wall Ropes Limited v. Coastal Marine Constructionsand Engineering Limited cannot be side-lined. Justice Nariman opined that an agreement becomes a contract only if it is enforceable by law. This enforceability by law would be decided on the basis of contract law which does not allow enforcement merely based on the existence of an agreement. Instead, contract law allows the courts to delve into the validity of an agreement. Thus, the decision in this case indicates that the examination of the validity of the arbitration agreement is also covered under the scope of section 11(6A).

In line with the findings given by Justice Nariman, the Apex Court upon necessary deliberation also held that the expression 'existence of an arbitration agreement' in section 11 would include aspect of 'validity' of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test. The Court opined, in cases where the subject matter of arbitrability is clearly barred, the court can cut the deadwood to preserve the efficacy of the arbitral process. The scope of the court to examine the prima facie validity of an arbitration agreement includes the following issues:

Whether the arbitration agreement was in writing? or

Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?

Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

On rare occasions, whether the subject matter of dispute is arbitrable?

The Court overruled the ratio laid down in SBP v. Patel engineering ltd and further opined that, examination by the Court on the subject of arbitrability may not be appropriate at the stage of section 8 of the Act keeping in mind the principles of severability and Kompetenz-kompetenz, which prefers the tribunal as the first authority to determine and decide on all questions of non-arbitrability and jurisdiction, however, as an exception a party may approach the Court under Section 8 or 11 of the Act, if a prima facie case (summary findings) of non-existence of valid arbitration agreement is made out.

Concluding remarks:

This judgment is a positive step in the right direction wherein a pro-arbitration stance has been taken by the Supreme Court which will eventually make arbitration more robust in India. The judgment puts an end to a long debate regarding arbitrability of the tenancy disputes in India. Further, by reiterating the ratio laid down in Avitel Decision the Court has clarified that is not open to a party to resist arbitration by taking bald pleas of 'fraud'.

It can be argued that this judgment may lead to some debate on the issue whether the question pertaining to arbitrability of the subject-matter of dispute should be determined at the stage of section 11 or by the tribunal under section 16 of the Act. Moreso, it will be really interesting to see the effect of the judgment on the pending matters which are already filed in the court as parties may file section 8 applications requesting to refer the matter for arbitration.

All in all, this judgment reaffirms integrity and efficacy of arbitration as an alternative dispute resolution mechanism in India.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/tenancy-disputes-arbitrability-supreme-court-vidya-drolia-ii-tp-act-167352

Sneak Peek:

No. of words: 1915 words

Note: In this article, the author has critically analyzed the Right to Shelter with the help of various cases. It will help you to explore the journey of the legal development. It will also help you to enhance your legal acumen.

Article: 28

Reconstructing The 'Right To Shelter'

In India, where majority of the population belongs from the rural areas, and the wealth is endowed with only 2 to 3% of the financial holders. It is expected that the most valuable thing one owns, is the shelter over their head, which acts as a dignified shield. The debate around 'Right to shelter' has always been tabled in context with the poor or the vulnerable class, because they are mostly exploited and neglected by the stake holders. Recently, the Karnataka High Court directed the State to reconstruct the huts, which were burnt due to misinformation/rumors. This direction is not only a positive ray for those dwellers, but also another brick into the 'Shelter-jurisprudence'.

The Indian Constitution guarantees every individual a dignified life without any external exploitation. Article 21 which has been the grundnorm of personal liberty under Part-III, also the Right to Shelter is implied a fundamental right under the garb of Article 21 itself. Recently, an incident took place around January, which continued up to March- April in the State of Karnataka where some poor migrant labours (who were mainly migrated from districts of North Karnataka, Hubli and other States) were evicted from their native houses/shelters and the concerned huts were demolished. On 19th January, this happened in daylight that too in presence of the BBMP and Marathahali Police (as contended by the Petitioners in the Writ Petition). These migrants were targeted and rumors were circulated that they are living illegally with a Bangladeshi identity, in pursuance of this misinformation the authorities took such coercive steps.

Right to Shelter has been one of the most important facet of Article 21 and there having been some landmark decisions by the Supreme Court which have upheld it as a fundamental right. When the Karnataka High Court got to know about the incident, it took Suo Moto cognizance and directed the authorities to provide the concerned information. Lately, when the matter was posted before the bench, it was observed by the court that: "Prima facie it appears to us that this is a very high handed action on the part of the interested persons of destroying the huts, thereby, violating the fundamental rights under Article 21 of the Constitution of India of the hut-dwellers."

Ignorance is not a 'bliss'

There were more than 300 slums which were burnt down, along with them, the hope, ray of light and livelihood of many shredded away. A student, Thimmappa B, told the Times of India that he lost of all his belongings, including the uniform, study material and all the concerned accessories. The bench noted that the State is obliged to compensate these hut-dwellers accordingly and opined that "The State must make inquiry to ascertain the whereabouts of the occupants of the huts which were destroyed in the fire. The State will have to ensure that compensation is paid to them on account of destruction of their goods, they will also have to be rehabilitated. The statement of objections should state steps taken in this behalf. "Apart from compensation to the affected families for loss of household articles, there was no genuine effort by the state to rehabilitate the families. The huts were destroyed by third parties, thus the state ignored high handed conduct on part of miscreants who were interested in destructing the huts."

On December 4, the High Court directed the State to reconstruct the huts at its own cost, and such compensation should be paid without any restraints. The time limit which has been given is two months, within which the construction should take place. Coming down heavily on the State, the court had rightly observed that "The State government remained passive for a long time and made no effort in order to take action against miscreants who destroyed the structures/huts. Houses were erected on lands vested with the state government, therefore in our view prima facie, the state failed to uphold Fundamental Rights, governed under Article 21 of Constitution." On the other side, the State pleaded that it had no knowledge about the said destruction, to which the court retaliated and observed that - "It is not as if houses were destroyed in one day. On March 28, some huts were burnt and on March 30, few more huts were burnt. This is not a case of solitary incidents. All this was done while the state was aware of this incident. Till this court intervened there was no attempt made for compensating the persons affected."

The whole incident was based of 'presumption', the concerned authorities presumed that these poor migrants are illegal Bangladeshi residents. For instance, even if they were, is this the procedure to evict anyone who's residing somewhere in an unorganized sector? The same incident took place in Delhi, where 100-150 Jhuggies were demolished without any notice being served, also in such cases, is it not the duty of the authorities to keep a check that whether these poor migrants are able to understand the conditions of the said notice or not? Apart from eviction, there are statutes which call for rehabilitation of such dwellers, if their land is taken, but no such policies are implemented in reality. For instance, Under the Delhi Slum and JJ Rehabilitation and Relocation Policy, 2015 there are certain conditions which have been prescribed for those who are residing in these Jhuggies. The relocation policy states that if - JJ clusters which have come up before 01 January 2006 shall not be removed without rehabilitation.

The 'Shelter-jurisprudence' at par

In the times when the world is tackling against the global virus, such decisions are always welcoming and acts as the ray of hope for these sinking dwellers. The observations made by the Supreme Court in Chameli Singh v. State of U.P, is pertinent to note, which was also referred by the Karnataka High Court during the course of hearing. The Supreme Court had rightly observed that "Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter,

therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right."

Everyone has the right to fair hearing, and the other party should always be heard without any restraints. The Supreme Court in, Shakthivelnagara Gudisalu Nivasigala Kshemabhivrudhi Sangha, Bangalore v. State of Karnataka, had rightly observed that even those who are living in an unorganized sector are entitled to 'notice' or 'fair-hearing'. It was noted by the bench that:

"I therefore see no reason to confine the right of hearing or notice only to those who own either the land or the buildings in the slum area. If what is important for any such right to accrue is a possible prejudice on account of the issue of a notification, there is no denial that such a prejudice is bound to be suffered even by a person who does not own the land nor even a building in the strict sense of the term but is simply surviving more often than not in sub human conditions, in some hut or such other structure which he may have put up for a shelter. After all how can we forget that a slum takes birth almost invariably by the poorest finding some open space for a small tent, a mud hut, or a wooden or other structure to take shelter in. Merely because such a structure may not be capable of being described as a 'building' can hardly warrant denial of a right which must belong to all no matter there station in life."

In one of the landmark cases, the Supreme Court dealt with the poor dwellers in Mumbai who were residing on the pavements. In Oliga Tellis v. Bombay Municipal Corporation, the court observed that --

"An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which people their desertion of their hearths and homes in the village s that struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat."

Hence, the directions laid down by the Karnataka High Court to the State government accelerates the 'Shelter-jurisprudence' and it has also been directed to pay a compensation of Rs. 14,000 per family, those who have been suffering or are at a loss because of the said eviction. It is important to note that

previously, the State finalized the compensation at Rs. 6,000 which was not accepted by the High Court and the bench retaliated accordingly: "Prima facie it appears to us that for an act of violation of fundamental rights under Article 21 of the Constitution of India, the destruction of the houses of poor people, the compensation is unreasonably low. The State must reconsider the decision to pay only Rs. 6,100 and we make it clear that the reconsideration shall be done within two weeks accordingly.

To conclude, it is noteworthy to note that shelter is something which is really an essential element of one's life, one may live without a job, but without a shelter, the dignity hits back. As the court had rightly observed in Shantistar Builders v. Narayan Khimalal Totame, that "the right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect – physical, mental and intellectual."

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/shelter-right-to-shelter-karnataka-high-court-article-21-shelter-jurisprudence-supreme-court-jhuggies-167215

Sneak Peek:

No. of words: 1525 words

Note: In this article, the author has critically examined the Goods and Service Tax Law and its implications. As a CLAT aspirant it is a must read article. It will help you to enhance your legal acumen.

Article: 29

Transitional Provision: A Light On Hit-And-Run Mechanism Under The GST Law

Indirect Tax regime witnessed a paradigm shift with the Goods and Services Tax Act, 2017 (hereinafter referred to as the 'GST Act' in short) coming into force w.e.f 01st July, 2017. What is officially known as the Constitution (One Hundred and First Amendment) Act, 2016, the GST Act, conferred concurrent taxing power on the Union as well as the State Government including Union Territory with legislature to make laws for levying tax on every transaction of supply of goods or services or both.

The GST Act sought to subsume various Central as well as State indirect tax legislations, which seems nothing but a farrago of levies imposed at different echelons. Removal of 'cascading tax effect' has always been a complex assignment when it comes to indirect tax legislation and so has been for the GST Act also. Cascading effect in literal term is called tax on tax, which occurs when the goods or services or both are taxed on every stage of production and continues till it reaches the final consumer. It means each succeeding transfer being taxed is inclusive of tax charged or levied on preceding stage.

Cascading Tax Effect in pre-GST regime era

The Indirect Taxation Enquiry Committee constituted in 1976 under L.K. Jha, recommended, inter-alia, implementation of input tax credit mechanism of value added tax at manufacturing level (MANVAT). In 1986, the recommendation of Jha committee was partially implemented which was called modified value added tax (MODVAT). Input tax credit, in principal means reducing the tax liability, at the time of sale by claiming credit of the tax to the extent it was paid at the time of purchase. However, at the inception it was limited to the selected inputs and manufactured goods having one-to-one correlation between manufactured good and input.

The Tax Reform Committee, in the year 1991 was appointed which recommended the expansion of tax regime by bringing services under the ambit of taxation. As explained above the credit for manufacture was provided under the MODVAT and with introduction of Service Tax, credit was also allowed for those services which can be classified as input service required for final rendition of services. In the year 2000, the MODVAT was then replaced by a single and unified provision thereby allowing cross utilization of credit called as Central Value Added Tax (CENVAT). CENVAT, has been a pivotal concept under the erstwhile indirect tax regime and has been fruitful, in removing the cascading effect to a great extent. It has served as a beneficial piece of legislation by

amplifying its scope thereby allowing the credit of service, input goods and capital goods to be used for payment of central excise and service tax. So far as indirect tax legislation at the level of State is concerned, introduction of VAT has removed the cascading effect by giving set-off for tax paid on inputs as well as tax paid on previous purchases and has again been an improvement over the previous sales tax regime. Both CENVAT as well as VAT however, still struggle on coadunation dearth. There still are certain taxes at state level such as Entertainment Tax, Luxury Tax which are not subsumed under the VAT and therefore, VAT could not be utilized for payment of these taxes.

As India moved towards the value added tax both at centre as well as state level, a formidable task of integration of Centre VAT and State Vat was still buoyant mirage. As an inevitable consequence of reform process, the Government fathomed the conundrum of integrating the Centre VAT and State Vat and finally came out with what can be said to be a biggest fiscal reform in the Country i.e., the GST Act.

Cascading Tax Effect in post-GST regime era

GST Act, came to be implement with an object inter-alia, to annihilate the cascading effect and lower down the burden of tax on ultimate consumer. The GST had to be more au fait, when it comes to removing of cascading effect as it only would deal with the credit accruing under the GST i.e., input tax credit but would also provide for the credit already accrued under the erstwhile indirect tax however, not utilized i.e., transitional credit.

Implementation or replacement of new fiscal law from an older version has never been easy, as there exists impediments for transition from old law to new law and therefore, to cull out those impediments, law provides for transitional provisions. GST Act is no different so far as transition provision is concerned. Transitional arrangement for input tax credit is provided under section 140 of the GST Act, which initially read as under:

"(1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed."

The provision was enacted in such a manner so as to claim the amount of input credit admissible in existing law as well as GST regime. The purpose of enacting transitional provisions was apparent, to remove the cascading effect which can be faced by the taxpayers, whilst taxpayers walking from the gate of old law and entering into new law. The manner for claiming transitional credit has been provided under Rule 117 of the CGST Rules, 2017, which further provides for time period of 90 days for filing form GSTR TRAN-1 for claiming input tax credit. Interesting to note is that the legislature made blunder in failing to provide legal empowerment under section 140 to prescribe for time limit. So rather than providing under the main provision it was provided under the delegated legislation.

Realizing the mistake, the government came with an amendment in the section 140(1) of the Central Goods and Services Tax Act, 2017 and inserted "within such time" w.e.f 01.07.2017, brought in force w.e.f. 18.05.2020. The amendment brought in force w.e.f 18.05.2020, clearly has a

retrospective effect and the same came as result to judgment pronounced by various High Courts all throughout the Country accepting that the transitional credit is a vested right and the same cannot be taken away by stipulating time frame in Rules and time the prescribed therein is directory in nature and not mandatory. Therefore, claim of transitional credit is allowable even after the lapse of time notified.

Transitional arrangement provided under the GST Act, however has been a matter of debate since inception. Various Courts throughout the country has developed their own jurisprudence whilst providing relief to the taxpayer from the Government's hit and run method.

Judicial Intervention

The matter came up before the Punjab and Haryana High Court, as Adfert Technologies Pvt. Ltd. v/s Union of India, wherein the Court deciding the matter in favour of the assessees, held the transitional credit admissible even after lapse of time. The controversy also saw the doors of Bombay High Court and the Court, laying new stone to concrete the controversy in the case of Nelco Ltd. v/s Union of India, held the transitional credit to be vested right of a assessee and the same cannot be taken away by prescribing time limit in the Rules. It was further held that the time period prescribed in rule is directory in nature and not mandatory. Similar view has been taken by the Delhi High Court in the case of Brand Equity Treaties Ltd. v/s Union of India, it has been held therein that the time prescribed under the Rule 117 of the CGST Rules, 2017, for filing claim of transitional credit in directory in nature and would not result in forfeiture of right.

Interesting to see is whilst the SLP filed against the order of Punjab and Haryana High Court, has been dismissed by the Supreme Court. The Supreme Court has granted stay in an appeal against the order of Delhi High Court.

The Government has brought in force the notification No.43/2020 Central Tax on 16.05.2020, which seeks to in force the amendment in Section 140 as introduced vide Finance Act, 2020. The actions of the Central Government shows that an attempt has been made to fill the lacunae in law and nullify the effect of orders passed by various High Courts. The actions on the part of Government, however, would hardly make any difference.

Analysis

The retrospective amendment given to the section 140 of the Central Goods and Services Tax Act, 2017, would hardly make any difference, as even the amended provisions would not result in lapse of credit. The action of the Government in challenging the decision of the Delhi High Court, appears to be bereft of any logic. As on one hand the Government is introducing schemes like Sabka Vishwas Legacy Dispute Resolution Scheme ("SVLDRS"), to stimulate the liquidity in market, collect funds and resolve ongoing dispute pertaining to pre- GST regime and on the other hand by not allowing credit to the assessees, are giving rise to unwarranted litigation.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/indirect-tax-gst-supreme-court-amendment-sec-140-central-goods-and-services-tax-act-167249

Sneak Peek:

No. of words: 1134 words

Note: In this article, the author has critically examined the concept and ambit of public authority under RTI Act. It is a must read article as it will enables you to understand the concept of public authority and its intricacies.

Article: 30

Can A Twitter Account Of The Government Be Considered A 'Public Authority' Under The RTI Act?

For information like money spent on advertisements, accounts blocked, audience targeted, and other stats, can the Twitter handle of let's say the Prime Minister - which is not independent of his prime ministry - be considered a 'body' under the definition of 'public authority' in the RTI Act?

It is not Twitter, the platform, which is mooted to be under RTI scrutiny but an account of the Government on Twitter. Government accounts, such as that of the Prime Minister, are utilized for official purposes i.e for discharging public functions. Such an account is used as a channel for communicating and interacting with the public about his administration. The PM's tweets produce a high level of mass engagement. The Account and the webpage associated with it as well bear all the trappings of an official, state-run account.

The tweets of the Prime Minister's account show him to be engaged in the performance of his official duties such as announcing policies, publicizing legislations, delivering speeches, meeting with dignitaries, etc. The account is, thus, used by the Prime Minister, in his official capacity not his personal capacity. In addition, other Twitter accounts of the Government go further and engage in real-time communication, such as resolving grievances of the public. Further, the tweets would constitute 'public records' by 'record creating agencies' such as the PMO, under the Public Records Act, 1993.

What is an 'authority'?

Krishna Iyer, J. has defined 'authority' from the Law Lexicon by P. Ramnath Iyer to say that an "Authority is a body having jurisdiction in certain matters of a public nature" and from Salmond's Jurisprudence, to say that the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons," must be present in addition to constitute an 'authority'.

A Governmental Twitter account has the ability to affect the rights and liabilities of a user which may have far-reaching consequences, and thus can be considered an authority. For example, a federal court of appeals in the US reaffirmed the holding that the blocking of certain users by the account of

the President while in power violates their freedom of speech, and of press, and that the "interactive space" associated with tweets constitutes a 'public forum'.

The Twitter account of the Prime Minister, for example, was intentionally opened for public discussion and the PM, upon assuming office, uses the Account as an official vehicle for governance and has made its interactive features accessible to the public. Such a space constitutes a public forum.

And such a public forum is controlled by the 'authority' in the form of the Governmental Twitter account, by having the choice to block the access of certain users to such a forum. An example is when the Twitter account of the PMO blocked the Twitter accounts of around 10,000 people.

Such an 'authority' can arguably be considered as a part of State under article 12 of the Constitution, and be made amenable to writ jurisdiction under article 32 for enforcement of fundamental rights such as freedom of speech and expression under article 19(1)(a).

An authority as an 'instrumentality or agency'

It has been held by the Supreme Court that "any entity having a juridical existence" would be considered to be an instrumentality or agency of the State, if it is found on having found to be "an alter ego, a double or a proxy or a limb or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on, by whatever name called, of the State".

An 'authority' can also be an 'instrumentality or agency' of the State, provided there is governmental ownership and/or control. In this case, the authority in the form of the Governmental Twitter account is owned and controlled by the Government. Thus, the Governmental account can also be considered as an 'instrumentality or agency' of the State.

It has also been held by the Supreme Court that whether an independent entity satisfies the test of instrumentality or agency of the government does not depend on whether it owes its origin to any particular Statute or Order but really depends upon a combination of one or more of the relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

Further, it has been held by the Central Information Commission (CIC) that an instrumentality or agency of the State is to be treated as a public authority.

What is a public authority?

A public authority, as has been held by the Supreme Court, is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit.

A 'public authority' under the RTI Act, 2005 has been defined as follows –

""public authority" means any authority or body or institution of self government established or constituted—

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any

body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;"

It has also been held by the Supreme Court that the word 'includes' when used, "enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include", thus expanding the horizon of the word 'public authority'.

Therefore, in accordance with the rule of ejusdem generis, the definition can be extended to include an official Twitter account that is owned and controlled by the Government and is used for discharging public functions. More so when the definition of 'public authority' under the RTI Act, 2005 has a wider meaning even than that of 'State' under Article 12.

The words "Any person or authority" used in Article 226 are broad enough to cover any other person or body performing public duty. The form of the body concerned is not very much relevant, as has been held by the Supreme Court. Thus, an account in its abstract form is a representation of the state, and is involved in discharging public functions and thus, can be amenable to writ jurisdiction under article 226 as well for the enforcement of non-fundamental, statutory rights under the RTI Act, in addition to fundamental rights under article 32.

Courtesy: 'Live Law' as extracted from:

https://www.livelaw.in/columns/government-twitter-account-rti-public-authority-167664?infinitescroll=1

Sneak Peek:

No. of words: 478 words

Note: In this article, the author has appreciated the decision of the court in Sister Abhaya Murder case. It is suggested to have a fair idea about it.

Article: 31

Murder in the convent: On Sister Abhaya murder case

The verdict of a special CBI court in Thiruvananthapuram sentencing to life a former Catholic vicar, Thomas Kottoor, and a nun, Sister Sephy, upon finding them guilty of murdering a 21-year-old novitiate, Abhaya, at a convent in Kottayam, marks a welcome outcome to a long and tortuous investigation and prosecution process. It spells a modicum of relief to the lone surviving kin of Abhaya, her brother, and to those who kept an unflinching faith in the justice system. It was in 1992 that Sr. Abhaya, a pre-degree student, was found dead in a well at the St. Pius X Convent hostel where she was an inmate. The police and the Crime Branch hurriedly concluded it as a case of suicide. But a people's action council led by activist Jomon Puthenpurackal sought judicial intervention, which resulted in the CBI taking over the investigation in 1993.

Despite a forensic report suggesting the possibility of homicide, the CBI found itself up against a wall for want of material evidence that was originally collected by the police but later destroyed. Between 1996 and 2005, it approached the chief judicial magistrate, Ernakulam, thrice with closure petitions. In the first, it said the investigation was inconclusive; it was concluded as a case of murder in the second instance, but without any evidence to track down the culprits; and in the last, the agency again pleaded helplessness in taking the case to its logical conclusion, but the court would have none of it. In 2007, Fr Kottoor, Sr Sephy and Fr Jose Poothrukayil, another priest, were subjected to narco-analysis following which they were arrested a year later by Nandakumar Nair, Dy SP of CBI, who has pursued the case ever since. But the Kerala High Court found gaping holes in the CBI's contentions and sought to monitor the case for a brief period. There also arose questions, separately, whether the narco-analysis reports and the forensic report of Abhaya's swab examination had been tampered with. While the CBI also arraigned some Crime Branch and police officers as accused, charging them with destroying vital evidence, they were exculpated citing lack of evidence. The CBI court allowed the discharge petition of Fr Poothrukayil and the High Court said that narco-analysis was inadmissible as evidence. During the trial, eight of the 49 prosecution witnesses turned hostile, but a petty thief who had gone to the convent on the night of Abhaya's death, stood his ground. The case, which exposed the faultlines in the criminal justice system, is far from closed. The Church has issued an ambivalent statement, as the convicts are planning to go in appeal. The CBI is also moving court challenging Fr Poothrukayil's discharge without trial. But the conviction brings hope that the powerful and the influential will not be able to get away with murder.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/editorial/murder-in-the-convent-the-hindu-editorial-on-sister-abhaya-murder-case/article33405415.ece

Sneak Peek:

No. of words: 1358 words

Note: In this article, the author has critically examined the recent decision of Andhra Pradesh High Court decision in which the author raises concerns that it will open up the gates for misuse of the Article 356 of the Constitution of India. It will help you to enhance your legal acumen. A must read for every law aspirant. Enjoy this article!!

Article: 32

Article 356 and an activist judiciary

The A.P. High Court's recent order is worrisome — it opens up the possibility of judicial use or misuse of the Article

'In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself,' said James Madison. Judicial activism may be good as a rare exception but an activist judiciary is neither good for the country nor for the judiciary itself as it would encourage the government to appoint committed judges. Sometimes even the collegium's recommendations on transfer of judges and chief justices today looks more like an executive order transferring IAS officers.

The recent order of the Andhra Pradesh High Court directing the Andhra Pradesh government to come prepared to argue on the 'breakdown of constitutional machinery in the state' is shocking as it opens up the possibility of use or even misuse of Article 356 by the judiciary. Though the Supreme Court of India has stayed the order, we need to go deeper into this observation and look at the controversial provision of Article 356 because of which the High Court could make such an observation. The devil is in the provision itself.

Behind the inclusion

No liberal democratic Constitution in the world has a provision such as Article 356 that gives the central government the power to dismiss a democratically-elected State government except the Constitution of Pakistan. Both India and Pakistan borrowed this provision from the Government of India Act, 1935. Interestingly, the leaders of our freedom struggle were so very opposed to this provision that they forced the British government to suspend it; thus, Section 93 of the Government of India Act, 1935 was never brought into effect. The provision which we had opposed during our freedom struggle was incorporated in the Constitution strangely in the name of democracy, federalism and stability.

On June 11, 1947, it was agreed in the Constituent Assembly that the Governor could use this emergency power. By this time the Governor was supposed to be elected by the people of the State rather than nominated by the Centre. Govind Ballabh Pant did say that by mere elections, Governors will not become all wise. G.B. Pant and Hirday Nath Kunzru opposed it and termed it as virtual

reproduction of the 1935 Act. H.N. Kunzru defied the whip and voted against it. Laxmi Kant Maitra and Tangutri Prakasam said that Indian Governors would not behave like British Governors who acted as agents of the Centre. Alladi Krishnaswami justified the provision in the name of representative government at the Centre. Subsequent decades proved all of them wrong both in respect of Governors as well as the central government.

The power of a word

After several revisions, provision became Article 278 (now Article 356). H.V. Kamath termed it as a surgical operation for a mere cold. He criticised the word 'otherwise' and said only god knows what 'otherwise' means. As the Governor had been made a nominee of the Centre by this time, he asked why the President could not have confidence in his own nominees. He went on to say: "if he cannot have confidence in his own nominees, let us wind up this Assembly and go home." 'Otherwise' can include anything including a presidential dream of breakdown of constitutional machinery in a state. Though Shibban Lal Saksena was happy about Parliament's power to ratify President's Rule in States, he did concede that this was a 'retrograde step' and that 'we are reducing the autonomy of the states to a farce.' P.S. Deshmukh too favoured deletion of the term 'otherwise'. Naziruddin Ahmad said that "I think we are drifting, perhaps unconsciously, towards dictatorship. Democracy will flourish only in a democratic atmosphere and under democratic condition." In a strongly worded observation, he said the drafting committee had become a 'Drifting Committee' as it had gone against the original draft. 'Otherwise' can include anything including a presidential dream of breakdown of constitutional machinery in a state.

The Andhra Pradesh High Court could pass such an order due to this very term 'otherwise'. But for this word which negates the ideals of constitutionalism by giving unlimited powers to the Centre, the High Court could not have overstepped the line as it did. But this is not the first instance of judicial overreach on this issue. On August 13, 1997, a Patna High Court Bench of Chief Justice B.M. Lal and Justice S.K. Singh while disapproving the functioning of the Rabri Devi government had observed that the Governor's report was not conclusive regarding the invocation of Article 356, and the High Court could also report to the President about the breakdown of constitutional machinery in the State.

The record

Article 356 has been used/misused more than 125 times though B.R. Ambedkar had assured that it would remain a dead letter. Both on Article 356 and the Governor, experience has proven Ambedkar wrong. In almost all cases it was used for political considerations rather than any genuine breakdown of constitutional machinery in the States. All Presidents signed presidential proclamations without demur except K.R. Narayanan who twice returned the cabinet's recommendation on October 22, 1997 in respect of the Kalyan Singh government in Uttar Pradesh which had just won the controversial confidence vote and stating that imposition of President's Rule would be constitutional impropriety. He also returned the cabinet's recommendation on September 25, 1998 in respect of the Rabri Devi government in Bihar, and in an unprecedented detailed note, rebutted all the charges made by the Governor Sunder Singh Bhandari.

Inflicting more wounds

In the very first invocation of Article 356 in 1951, Jawaharlal Nehru removed the Gopi Chand Bhargava ministry in Punjab though he enjoyed the majority. In 1959, it was used against the majority opposition government of the E.M.S. Namboodripad government in Kerala and Governor B. Ramakrishna Rao in his report argued that the government had lost 'support of [the] overwhelming majority of people' and belittled the fact of it enjoying the confidence of [the] House which he said was an important consideration at the time of formation of government not its continuance. Strange logic indeed.

Indira Gandhi has the dubious distinction of using Article 356 as many as 27 times, and in most cases to remove majority governments on the ground of political stability, absence of clear mandate or withdrawal of support, etc. She did not spare even Chief Ministers of her own party. But the Janata government did worse than Mrs Gandhi by removing nine majority Congress governments in one stroke on April 30, 1977. The Supreme Court of India upheld it in State of Rajasthan v. Union of India (1977). Mrs Gandhi replied in the same currency on her return to power in 1980 by removing nine Opposition majority governments at one go. Subsequent governments too acted in similar fashion including the Narendra Modi government which invoked Article 356 in Arunachal Pradesh on Republic Day itself, in 2016.

The most notable case of non-use of Article 356 was the refusal of the P.V. Narasimha Rao government prior to the demolition of the Babri Masjid on December 6, 1992 as in the draft Constitution, emergency power could be used to safeguard the 'legitimate interests of minorities' and the government was fully aware of a breakdown of constitutional machinery in Uttar Pradesh. However, the subsequent dismissal of three Bharatiya Janata Party governments in Madhya Pradesh, Rajasthan and Himachal Pradesh, though upheld by the Supreme Court in S.R. Bommai v. Union of India (1994) was wrong as the Rashtriya Swayamsevak Sangh ban was better implemented in these States and much greater violence had taken place in the Congress-ruled States of Gujarat and Maharashtra.

Today, when many constitutional experts are of the view that the judiciary is increasingly becoming more executive-minded than the executive itself, the observations of the Andhra Pradesh High Court are a worrisome sign. Ideally, the word 'otherwise' should be deleted from Article 356 and the provision be used only sparingly and to never remove a majority government.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/lead/article-356-and-an-activist-judiciary/article33419769.ece

Sneak Peek:

No. of words: 708 words

Note: In this article, the author is examining the recent CIC order in the matter pertaining to Electoral Bonds. The author has criticized the order of CIC as it has closed the doors for transparency in electoral bonds. Do follow this new development of law.

Article: 33

The broken bonds of democracy

An unsettled law is as dangerous as bad law

A recent order by the Central Information Commission (CIC) has again revealed the inherent problems surrounding the Electoral Bond Scheme of 2018. This order passed in an appeal against the State Bank of India (SBI) has effectively shut the door to seek any details about donors and donees relating to electoral bonds under the Right to Information (RTI) Act. With no other recourse available, the Supreme Court is the only surviving arbiter on adjudicating the vires of electoral bonds.

An illegal scheme

The scheme creates banking instruments for donation of funds to political parties facilitated by the SBI. It conceals the identity of the donors and donees as well as the amount of donation. In effect, the scheme is not transparent, promotes arbitrariness and is therefore illegal.

The scheme facilitates undisclosed quid pro quo arrangements between donors, who are likely to be corporates, and political parties. Such an arrangement goes against best practices of electoral democracy and is repugnant to the freedom of speech and expression. In People's Union for Civil Liberties v. Union of India (2003), the Supreme Court held that the freedom of speech and expression also contained the fundamental right of a voter to secure information about the candidates who are contesting the election. When the voter is permitted to know if an electoral candidate is facing any cases, should she not be equally entitled to know who is financing the expenses of the party and its candidate?

The CIC order has upheld the contention of the SBI that it is not required to furnish the details of donors, donees and donations, under the RTI Act. In doing so, SBI has relied on two grounds provided under Section 8 of the RTI Act, which exempts disclosure of information: that the information sought has been held in fiduciary capacity and that there was no public interest involved in the application. Both grounds do not stand a bare scrutiny of law. It is also trite that any exemption provided under Section 8 should be read only in a very narrow sense. Section 8(2) directs that when public interest outweighs any harm to protected interests, the information sought for may be accessed. This Section begins with a non obstante clause. Therefore, it overrides the grounds erroneously relied upon by the CIC.

The public interest in the present matter is undisputable. The CIC, in an earlier order, deemed political parties to be public authorities under the RTI Act. The funds received by parties from donors would naturally be of interest to voters in order to understand their financing and functioning. Donations by corporate entities would also be of interest to their shareholders and potential shareholders. Therefore, the failure of the CIC in appreciating the present issue as one of high public importance and resorting to technical objections defeats the objects of the RTI Act itself.

The final arbiter

The CIC order effectively shuts the door on any RTI requests with regard to electoral bonds and any concomitant information. There is no other recourse but for the Supreme Court to determine the law with regard to the scheme and the interpretation of the CIC. A batch of petitions filed by the Association for Democratic Reforms and the Communist Party of India (Marxist) are sub judice. Therefore, the CIC's decision, if carried to the Supreme Court on appeal, may also be tagged and heard altogether.

It is worth remembering that the writ petitions pending adjudication were filed over three years ago and that the respondents have also filed their pleadings. In its counter affidavit filed before the Supreme Court in 2017, the Election Commission argued the case for "declaration of donation received by political parties and also about the manner in which those funds are expended by them, for better transparency and accountability in the election process".

The public scrutiny of parties and political candidates is an essential and inalienable part of a free and fair democratic process. By suppressing knowledge of political financing, we are breaking the basic bonds of democracy holding the country together. An unsettled law is as dangerous as bad law. The Court must conclusively settle the questions around the constitutionality of electoral bonds.

Courtesy: 'The Hindu' as extracted from:

https://www.thehindu.com/opinion/op-ed/the-broken-bonds-of-democracy/article33447535.ece

Sneak Peek:

No. of words: 1420 words

Note: In this article the author has critically analysed the Vodafone judgment and its impact on India. It is a very informative text to understand the legal position about the subject. As a CLAT aspirants do follow it and go for that Vidhigya 360 analysis of the judgment and make your own short notes too.

Article: 34

Sovereignty v. Foreign Investor Protection: Which is greater? Analysis of Vodafone and White Industries

A growing criticism is that BITs impinge upon, and potentially dilute, the sovereignty of the host country, and give a foreign investor an unduly higher or advantageous position.

Do bilateral investment treaties (BITs) go beyond investor protection, and potentially dilute or impinge upon the sovereignty of India?

BITs are investment treaties entered into between two countries, with a view to protect the investment made by investors of both countries in the corresponding country. BITs are primarily investor-friendly fiscal and monetary measures taken by the two contracting countries, so as to encourage inflow of foreign direct investment (FDI) into each of the countries, from the other.

Clauses and conditions of BITs are aimed at controlling the regulatory behaviour of the host state, so that there would be certain limitations or restrictions put upon the host state from interfering with the rights of a foreign investor.

A growing criticism is that BITs impinge upon, and potentially dilute, the sovereignty of the host country, and give a foreign investor an unduly higher or advantageous position, than even the citizens of the host country.

As with any other contract, BITs have a dispute resolution mechanism built into them, primarily consisting of investor-state disputes being resolved by way of arbitration before an international arbitral tribunal. Through this, an investor can raise and file a dispute directly against the host country, and seek compensation/damages from such host country.

Understanding White Industries Australia Ltd. v. The Republic of India

The White Industries case is probably one of the first and earliest examples of an investor raising a dispute and succeeding against India in an international forum, by invoking the dispute resolution mechanism under a BIT.

White Industries, an Australian company, had in 1989, entered into a contract with Coal India Ltd. In view of certain disputes and differences between the two contracting parties, White Industries invoked arbitration against Coal India, in which White Industries succeeded in May 2002.

Eventually, the matter reached the Supreme Court of India, where it remained pending for almost 10 years, and White Industries was unable to enforce the arbitral award.

Being aggrieved by such judicial delays, White Industries invoked the dispute resolution mechanism under the India-Australia BIT, and filed international arbitration proceedings against India.

In what is considered to be a brilliant legal strategy, White Industries invoked the Most Favoured National (MFN) clause of the India-Australia BIT. This meant that although a specific term or condition may not be stipulated in the India-Australia BIT, it could adopt and incorporate, through the MFN clause, a contractual term from another BIT – in this case being the India-Kuwait BIT.

White Industries asserted that judicial delays in India had not allowed it to have an effective means of asserting claims and enforcing its rights under a commercial arbitration award in its favour against Coal India Ltd.

The Investor-State Dispute Settlement Tribunal, by its award in 2011, held in favour of White Industries, thereby making India liable to make payment of over 4 million Australian Dollars.

Understanding Vodafone International Holdings BV v. The Republic of India

In 2007, Hutchinson Telecommunications International Limited, a Hong Kong entity (HTIL) sold its stake in a Cayman Islands entity to Vodafone International Holdings BV, a Netherlands entity (VIHBV), which indirectly held shares of Hutchinson Essar Limited, an Indian company (HEL). This transaction was for a consideration of USD 11.1 billion, which was paid to HTIL, which earned capital gains on the sale. The Indian tax authorities made a demand for about USD 2.2. billion upon VIHBV.

VIHBV challenged the demand. However, the Bombay High Court held in favour of the Indian tax authorities. In appeal, the Supreme Court, in January 2012, reversed the decision of the Bombay High Court, thereby quashing the demand of the Indian tax authorities in favour of VIHBV. This should have put the matter to rest.

However, in what can be interpreted as an intent to side-step the decision of the Supreme Court, the Indian Parliament passed the Finance Act 2012, which inter alia provided for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act (2012 Amendment), which effectively meant that the decision of the Supreme Court was nullified, and retrospective effect was given to a tax law. In view of this, the Indian tax authorities once again renewed its demand for tax from VIHBV.

Aggrieved by such amendments and renewed tax demands, VIHBV directly invoked international arbitration against India claiming that such action on the part of India violated the ‘fair and equitable treatment’ guaranteed to Vodafone under the India–Netherlands BIT.

On 25 September 2020, the international arbitral tribunal held in favour of Vodafone, holding that the company is not liable to pay such tax in India.

Critical analysis of the two decisions

Delays and pendency in Indian Courts

The White Industries case brought to the forefront a commonly known and severe problem of judicial delays and backlog in India.

Despite knowledge of these delays, the decision of the White Industries case squarely puts the blame and fault upon India, as a country, for White Industries not having been provided with an "effective means of asserting claims and enforcing rights".

The fact that a foreign company can get such special and greater legal standing through a BIT, which is not available to an ordinary litigant, impinges upon the sovereignty of India, and takes away from the most basic right of equality. This decision also implies that the Indian Judiciary would be accountable to another nation's private entity with respect to its functioning in regular course, which ought not to be the case.

Vodafone case and tax sovereignty

Coming to the recent Vodafone case, it is a well-established legal principle and principle of international law that imposition of tax is the sovereign right of every country. Therefore, the terms of a BIT ought not to be able to override or supersede India's sovereign right to tax.

The decision by Vodafone to agitate this issue at an international forum by directly invoking the India-Netherlands BIT, rather than exhausting domestic legal remedies first, has short-circuited and bypassed the due and proper legal processes which had in fact supported Vodafone.

Vodafone had a clearly available alternate and efficacious remedy of challenging the constitutional validity of the amendments, thereby seeking striking down of the retrospective amendment by the Courts in India. Especially since the Supreme Court had previously held in favour of Vodafone.

The decision of the Supreme Court in favour of Vodafone in fact showed that India has a robust and well-functioning judiciary, and that foreign investors should have full faith in our judicial system.

Conclusion

With due respect, it is stated that the decision in the White Industries case is incorrect. This is primarily because White Industries ought to have been reasonably aware of judicial delays in India, prior to initiating any dispute in India. A foreign investor invests in India knowing the general conditions under which the country is governed, and sees benefit of investing in India primarily due to lower costs. Therefore, such foreign investor cannot and should not be the recipient of only the benefits of transacting in India, without also accepting or dealing with its setbacks. Also, a private foreign investor, through a BIT, making the Indian judicial system accountable to it, in fact impinges upon the sovereignty of India.

On the other hand, with respect to the Vodafone case, the important questions that need adjudication are (i) whether an international arbitral tribunal, by enforcement of a BIT, can overrule or supersede the host country's sovereign right to tax, and can strike down or dilute the decision of a country's legislature and (ii) whether a foreign investor must exhaust all domestic remedies before invoking arbitration under a BIT.

In a recent article, it has been stated that Solicitor General for India Tushar Mehta has advised the Government of India to challenge the Vodafone decision on the following question of law " …the power of an arbitral tribunal to virtually and substantially declare a parliamentary legislation of a competent Parliament of a sovereign nation to be non est and unenforceable…"

Therefore, it is suggested that India should challenge the Vodafone decision of the international arbitral tribunal, primarily on the grounds of lack of jurisdiction and availability and non-exhaustion of alternate efficacious domestic remedies, before invoking the BIT.

While investor protection is important, it is also important for India, as a country, to preserve and safeguard its sovereignty.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/sovereignty-foreign-investor-protection-analysis-vodafone-white-industries

Sneak Peek:

No. of words: 1648 words

Note: In this article, the author has discussed the concept of BIT arbitration award in the light of the Vodafone judgment and the author is suggesting reforming the existing legal regime for the better enforcement of the BIT awards. It is in furtherance of the last article. A must read for every law aspirant. Enjoy this article!!

Article: 35

BIT arbitration awards: Enforcement regime in India

The need of the hour is striking the balance between upholding India's reputation to abide by its international commitments as against its ability to change tax laws to meet its economic requirements.

On September 25, 2020, the Permanent Court of Arbitration at the Hague ruled in favour of Vodafone in its claim against the Government of India challenging its demand of capital gains tax on the basis of a retrospective amendment of the Income Tax Act, 1961.

The Tribunal held that the Indian government seeking ₹22,100 crore in taxes from Vodafone, notwithstanding the decision of the Supreme Court discharging Vodafone from this tax liability, using retrospective legislation, was in "breach of the guarantee of fair and equitable treatment" provided under the India-Netherlands BIT. The Tribunal also directed the Indian government to pay Vodafone approximately ₹40 crore towards partial compensation for legal costs.

The reasoning and analysis of the Tribunal's decision on the breach of the 'fair and equitable treatment' (FET) obligation remains unknown, as the award order is not available in the public domain.

However, FET clauses are aimed at protecting investors against serious instances of arbitrary, discriminatory or abusive conduct by host States. The Vodafone award raises interesting questions on the impact of a ruling of an international tribunal on the legislative measures of a host State, and the scope of FET obligations in the context of taxation law, which can only be answered if the award is made available to the public.

Whether the dispute arising from enforcement of tax law be covered under a BIT

It has been widely argued and debated whether the Permanent Court of Arbitration had jurisdiction over the tax dispute under the India-Netherlands BIT. The operative part of the award seems to have concluded that indeed it has the jurisdiction. As the text of the award is not available, it would be mere conjecture to argue whether or not the rationale behind this decision is legitimate and fair. The government may raise the jurisdiction issue before the seat court in Singapore.

It is important to note that tax laws have always been considered to be the sovereign right of a country, regardless of its commitment to meet treaty obligations. The issue here appears to be the change in tax law after the highest court of the country has decided how to interpret the previously existing tax laws. Therefore, whether the sovereign right of a nation extends to overturning a legitimate outcome of the prescribed judicial process in a country remains an issue.

As there are several of these tax cases under BIT arbitration, there is a genuine concern for the government to avoid an unfavourable precedent. India's Model BIT was therefore revised in 2016 to meet the dual objectives of balancing investment protection with host State's right to regulate and reduce the scope of discretion by arbitral tribunals while interpreting the terms of such a treaty. The Model BIT excludes certain regulatory measures from its scope. The decision to exclude any laws or measures regarding taxation from the ambit of future BITs that India proposes to sign is evidently in response to the issues raised by Vodafone against retrospective application of taxation law.

The need of the hour is striking the balance between upholding India's reputation to abide by its international commitments as against its ability to change tax laws to meet its economic requirements, especially in times when India needs to be seen as a preferred destination for foreign investments.

Nevertheless, the Vodafone saga is far from over, unless the government decides to honour the award. As mentioned above, the government has the option to challenge the award by initiating proceedings at the seat court in Singapore. Even if the challenge is dismissed, the next major hurdle for Vodafone may potentially be enforcement of this award in India. In the forthcoming sections, we analyse the prevailing uncertainty in the enforcement regime for BIT arbitration awards in the country.

Issues besieging enforcement of BIT arbitration awards in India

India is not a signatory to the International Centre for Settlement of Investment Disputes (ICSID) Convention. Therefore, it does not have an obligation to recognise and enforce BIT awards as if they were final judgments of local courts. In such a situation, the regime for enforcement of BIT awards in India remains nebulous.

The question of applicability of the Arbitration and Conciliation Act, 1996 (Act) to arbitrations initiated under BITs is a predominant cause of concern. Conflicting views have emerged from different High Courts on this issue.

In a case dealing with grant of an anti-arbitration injunction preventing the claimant from continuing proceedings before an investment arbitral tribunal constituted under the India-France BIT, the Calcutta High Court proceeded on the assumption that it had the jurisdiction to intervene under Section 45 of the Act.

On the other hand, in two cases before the Delhi High Court, also dealing with grant of anti-arbitration injunctions, applicability of the Act to investment treaty arbitrations has been expressly excluded. The rationale of the Court for excluding the applicability of Part 2 of the Act was the commercial reservation adopted in the definition of a 'foreign award' in Section 44. The Delhi High Court observed that,

"Investment Arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature). The roots of Investment Arbitrations are in public international law, obligations of State and administrative law."

These decisions may have a direct impact on the issue of enforcement of BIT awards under the Act.

Further, a BIT award cannot be treated as a 'foreign decree or judgment' for the purposes of execution in India under Section 44A of the Code of the Civil Procedure, 1908 (CPC), since it is neither a 'judgment', nor has it been delivered by a 'Court' as defined in the CPC. Therefore, if the decisions of the Delhi High Court are followed strictly, award holders in investment treaty arbitrations may only be able to recover the award amount by filing a fresh suit. In such a situation, the arbitral award may only have evidentiary value, defeating the very purpose of speedy resolution of investment treaty disputes by arbitration.

Having said that, the rulings of the Delhi High Court are in conflict with the international position where an investment treaty arbitration qualifies as 'commercial' for New York Convention purposes. To add to the perplexity, courts in India in several cases have emphasised that the term 'commercial' must be given a wide import. Even Article 27.5 of the 2016 Model BIT provides that a claim submitted to arbitration under the BIT shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention. T

he customary international law principle of pacta sunt servanda, as codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) has also received recognition in international investment law (albeit with exceptions) so that parties do not act in a way that would defeat the objectives of the treaties they conclude. It may also be relevant to point out that the Delhi High Court in the case of Union of India v. Vodafone Group PLC United Kingdom & Anr. has held that bilateral investment treaties ought to be interpreted by invoking the principles of customary international law and VCLT, such that due protection is afforded to the investors. The Delhi High Court relied upon the judgments of the Supreme Court and Delhi High Court, to conclude that although India is not a signatory to the VCLT, principles thereof provide broad guidelines as to the interpretation of a treaty in the Indian context.

In the judgment of Union of India v. Khaitan Holdings (Mauritius) Ltd., the Court has held that it is a principle of public policy that the government has to honour its commitments under a treaty. In People's Union for Civil Liberties v. Union of India and Vellore Citizens' Welfare Forum v. Union of India, the Supreme Court has also opined that customary international law, if not contrary, shall be deemed to be incorporated in the domestic law.

While the Court in Vodafone (Supra) and Khaitan Holdings (Supra) did not consider enforcement of such an award, the observations made therein may be relied upon to counter arguments resisting enforcement. Therefore, when the question arises, it may be hoped that the courts will hold BIT awards to be enforceable in India under the New York Convention

Conclusion

India was the ninth largest recipient of Foreign Direct Investment (FDI) in 2019. An abundance of natural resources, human capital, infrastructure, technology and practicing democracy indeed makes India an attractive destination for foreign investment. Needless to say, an effective dispute resolution mechanism is key for promoting 'ease of doing business' in the country. The issue of enforcement of a BIT award has not reached Indian Courts yet, however, the mechanism for enforcement cannot be left ambiguous and unattended.

In view of the recent Vodafone decision, and the line of pending investment treaty cases against India, a reformed and a more balanced legal regime for BIT arbitral awards will aid in swift resolution of disputes. The enforcement regime will benefit greatly either if India accedes to the ICSID Convention or brings in amendments to the extant domestic laws to explicitly include investment arbitral awards within the scope of India's commercial relationship reservation to the New York Convention. Further, a liberal approach towards the timelines and pre-conditions for access to the ISDS mechanism under the 2016 Model BIT will help with inspiring investor confidence.

These reforms, if and when brought about, will be in line with the other initiatives of the government to accelerate the growth of an economy reeling from the massive setback induced by the COVID-19 pandemic.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/bit-arbitration-awards-enforcement-regime-in-india

Sneak Peek:

No. of words: 1634 words

Note: In this article, the author has discussed the seizure powers of the ED with the help of PMLA. As a CLAT aspirant, you did not need to mug up the facts of the case but just to have a fair idea about it.

Article: 36

Illegal foreign-asset seizures: Has the Enforcement Directorate forgotten the PMLA?

The most recent instances of high-handedness pertain to the manner in which the ED has been seizing its victims' assets, misleading Indian courts, and misinterpreting key provisions of the PMLA to foreign counterparts.

India's foremost legislative weapon against money laundering is the Prevention of Money Laundering Act, 2002 (PMLA), put into action by the Enforcement Directorate (ED).

Though a domestic legislation, its contours are distinctly international, emerged as it did from a Special Session of the United Nations General Assembly held in 1998, requiring Member States to adopt an internal money-laundering legislation within a common international framework.

The timing was appropriate too. Crime had evolved into a high-stakes multinational reality, and inward-looking local laws had only worked to its advantage.

Closer to home, cricket's surging popularity gave rise to a massive underground betting industry, controlled by criminal dons who had ensconced themselves in the safe havens of the Middle-East. At the peak of their influence, they pumped their ill-gotten wealth from criminal activities like extortion, drugs, betting etc. into legitimate businesses ranging from movie production to construction. Seemingly unaffected by law enforcement agencies and safe from the jurisdiction of our courts, these dons carried out their transactions using well established 'hawala' networks, capable of transmitting hundreds of crores of rupees overseas without relying on formal banking channels.

Not to be left behind, corrupt public servants and shady businessmen were active aids in these transactions. Defence deals like the multi-million-dollar Bofors gun purchase acquainted the Indian public with fixers and commission agents who scoured the corridors of power to strike lucrative deals. More recently, in cases like the AgustaWestland chopper scam, foreign investigating agencies have claimed that millions of euros of bribe money travelled into dummy companies incorporated in overseas tax-havens and were then routed back to India against fraudulent invoices via conduits owned by the relatives of top politicians, bureaucrats and military officials.

In high-stakes cases where corporate entities are involved, it has emerged that those looking to conceal their wealth from the eyes of investigating agencies and the tax-man in their home country, utilize offshore banks and trusts that offer multiple layers of confidentiality to keep the underlying asset nearly anonymous.

Thus, when viewed in this context, it becomes immediately clear that Indian law enforcement agencies did need modern tools to combat multi-national white-collar crimes. The Criminal and Penal Codes, though relatively effective tools to deal with investigation and prosecution of domestic offences, simply lacked the modern mechanisms needed to tackle complex multinational financial crimes.

It was in this context that the PMLA, enacted in 2002, came not a moment too soon, packed as it was with provisions that would enable the Indian government to seek the assistance of its foreign counterparts to investigate crimes and, in appropriate cases, even obtain orders of seizure over foreign assets suspected to be from criminal proceeds.

Laudably, the intent behind the law was to create a common international framework between India and other reciprocating nations to facilitate robust domestic prosecutions against offenders and to bring back assets bought from criminal proceeds.

But while drafting the new law, Parliament was mindful that the principles of natural justice would be assiduously adhered to and no innocent person should suffer motivated prosecution.

Procedure and Practice under Chapter IX: An Imbalance

Of late, there are growing murmurs that the ED treats the statute of its creation as a suggestion book rather than a binding rulebook. Even its conviction figures are dismal. In 2018-19, more than 200 investigations were concluded by the agency, however conviction was secured in merely four cases. Notably, since the Act came into effect back in 2005, merely thirteen persons have been convicted.

The trend shows that more often than not, the accused ends up being acquitted by our courts, which deserve wholehearted credit for preserving and upholding the rule of law. Former Chief Justice of India JS Khehar in the case of State of Gujarat v. Kishanbhai & Ors. rightly observed,

“Every acquittal should be considered as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted.”

However, the most recent and egregious instances of high-handedness by the agency pertain to the manner in which it has been seizing its victims’ assets, in some cases by misleading Indian courts and by misinterpreting key provisions of the PMLA to its foreign counterparts. These are provisions which are in fact meant as safeguards against exactly such underhanded and illegal action. And the scope for mischief is indeed wide, since the PMLA vests enormous discretionary powers in the officers of the agency to carry out asset attachments, searches and seizures – including freezing and attaching foreign bank accounts and immovable properties.

I am particularly referring to the provisions relating to attachment of foreign assets, contained in Chapter IX of the PMLA. This Chapter explains the basis of the Central government’s power to enter into agreements with foreign nations to (1) aid ongoing investigations and enforce provisions of the Act, and (2) to exchange intelligence and information to prevent the commission of offences under the Act.

These two objectives, laudable in their intent, are operationalized under Sections 56 to 61 of the PMLA. An even more granular analysis brings us specifically to Sections 57 and 60, of which the former permits the Indian government to issue 'Letters of Request' to contracting States in the course of an ongoing investigation, if the investigating officer feels that certain evidence is required and might be available in a foreign jurisdiction. In such a situation, the ED is required to move an application before a Special Court (a specially designated Sessions Court), which is required to consider such a request squarely within the parameters of sub-section 1, and if satisfied, accedes and issues the letter to the foreign contracting State.

Notably, nowhere in the provision is there a power even remotely or indirectly contemplated, permitting the agency to seek a 'hold' or 'seizure' of a foreign asset via such a Letter of Request.

This is for three carefully considered reasons, which the draftsman of the law was acutely aware of. First, a request for information under Section 57 is intended only as an evidence-building exercise to be carried out in the 'course' of an investigation and not as a punitive measure. Second, such evidence discovered and recorded overseas is meant to aid and be a precursor to, an attachment order by the agency under Sections 5 or 17, both containing power to seize, as such evidence would enable the Director to strengthen his/her 'reasons to believe' which is mandated by law to be recorded in writing prior to issuing an order for asset seizure.

Third, the power to seize or confiscate a foreign asset or bank account is expressly provided under Section 60 of the PMLA. This provision compels both the ED and the Special Court to first verify the existence of an underlying attachment or confiscation order with written 'reasons to believe' on the basis of available material that the asset in question is derived from proceeds of crime and that its custodian is likely to frustrate confiscation efforts, and only then is a request for seizure to a foreign state permissible. Essentially, what this clearly implies is that the threshold to get a 'letter of request' issued by a Special Court is much lower in the case of Section 57 as compared to Section 60.

Is the Indian Enforcement Directorate misleading Special Courts and Foreign Agencies?

But what if officials of the agency were sneakily getting foreign letters of request issued under Section 57, much beyond the scope of what was allowed, from unsuspecting Special Court judges? To make matters worse and indeed embarrassing for the Indian government, what if these officials were to submit these letters to their foreign counterparts and obtain seizures on foreign assets?

Financial crimes, due to their very nature are categorized as 'grave offences', which makes it even more pertinent for the investigating agencies to function within the contours of the legislation under which it is created and to remember that it owes a high degree of 'duty of care' to not only the court, but even to an accused person. As observed aptly by Justice Indira Banerjee, when a statute has drastic penal provisions, the authorities investigating the crime under such law, have a greater duty of care, and the investigation must not only be thorough, but also of a very high standard.

It is equally important that the investigating agency discharges its functions fairly, as was also observed by the Supreme Court in the case of Sidhartha Vashisht v. The State (NCT of Delhi).

"In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play

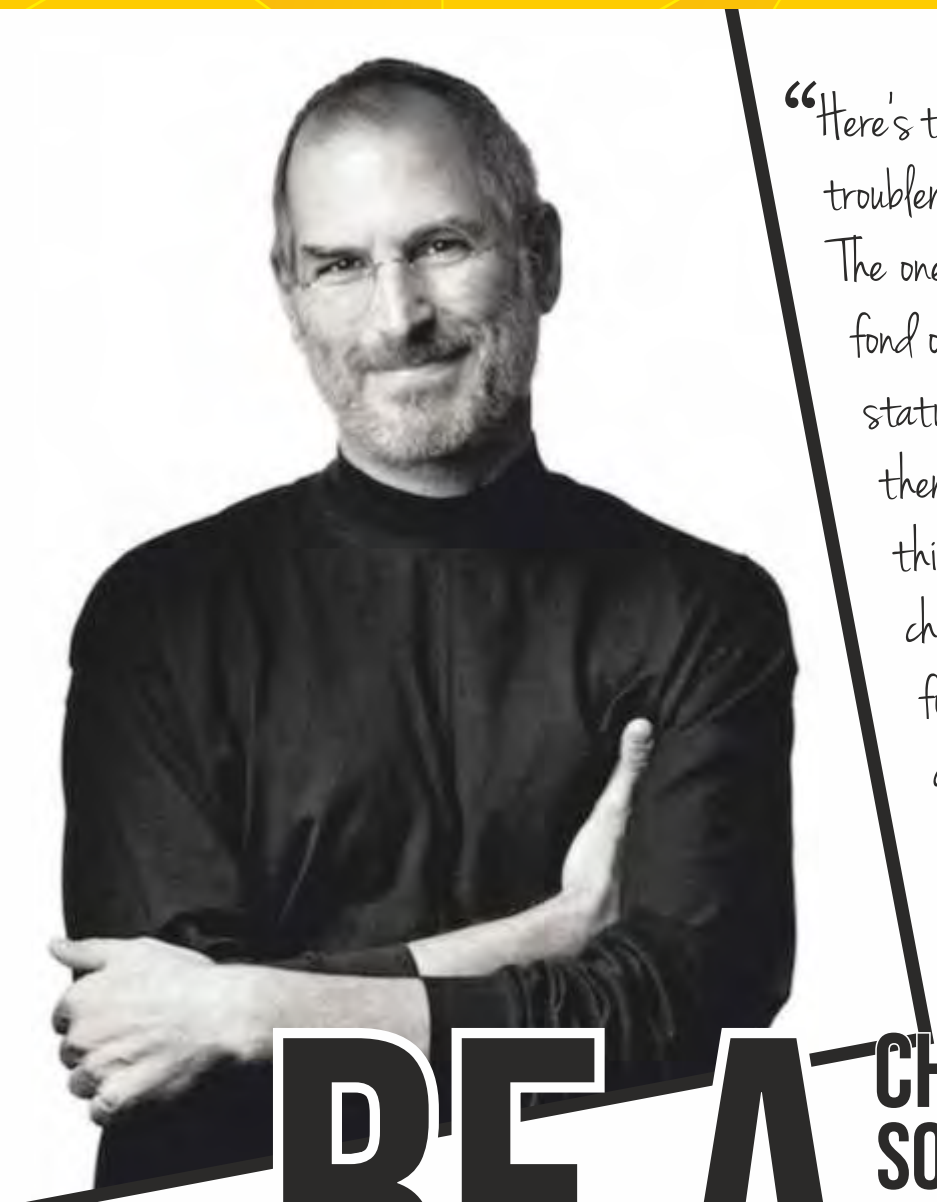
balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

Thus, if the allegations of jugglery against the Enforcement Directorate were to be indeed true - and from first-hand experience I can tell you that it is - in my humble opinion, it must attract attention and reprimand from the Office of the Prime Minister himself, and the head of the ED must explain the misdeeds of his Department, in what would amount to committing fraud on foreign states who have placed their trust in the integrity of India's investigative agencies and its practices.

Courtesy: 'BarandBench' as extracted from:

https://www.barandbench.com/columns/illegal-foreign-asset-seizures-has-the-enforcement-directorate-forgotten-the-pmla

THINK BIG THINK DIFFERENT



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

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