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TRICKERIES OF THE MONEY BILL

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The Supreme Court has now heard oral arguments in *Revenue Bar Association (RBA) v. Union of India*, in which the validity of the Finance Act of 2017, insofar as it affects the structure and functioning of various judicial tribunals, is under challenge. At first blush, a dispute over the apparent inscrutabilities of a tribunal's working might strike us as uninteresting and, perhaps, even unimportant. But, as the *RBA*'s arguments show us, how the court decides the case will likely have a profound bearing on India's constitutional arrangements.

Ordinarily, the Finance Act, which is enacted at the beginning of every accounting year, seeks to give effect to the government's fiscal policies. In 2017, however, the state wielded the statute like a blunderbuss. It not only set the fiscal agenda for the year ahead but it also toppled the existing regime governing the working of 26 different judicial bodies. Until recently, each of these panels was governed by a separate statute, and those laws individually contained a set of principles providing for, among other things, the criteria employed to select and remove members to and from these bodies, and for salaries, allowances and other such service conditions of the members.

The Finance Bill, 2017 from all sides

But, in one fell swoop, the Finance Act not only abolished some of the tribunals but also altogether repealed the standards provided in the different statutes. In their place, the law vested in the Central government an absolute, untrammelled power to make rules to effectively govern the operation of the tribunals.

The petitioners argued that this move runs sharply athwart judicial independence. The new law, in their belief, deputed to the executive what was really an essential legislative function. Many of these tribunals, which included the National Green Tribunal (NGT), the Income Tax Appellate Tribunal, the National Company Law Appellate Tribunal, and the Industrial Disputes Tribunal, they pointed out, performed roles that were originally undertaken by the higher judiciary. To assign to the executive's whims the task of establishing the criteria employed in selecting members to the panels and to provide for the members' service conditions was, therefore, pernicious to the basic principle of separation of powers. Consider one of the consequences. Despite the Supreme Court's previous ruling that the chairperson of a judicial tribunal ought to be equivalent to the Chief Justice of the high courts, as a result of the rules now made in furtherance of the Finance Act, in 13 different tribunals, a person who is merely qualified to be appointed as a judge of a high court can be selected as the presiding officer.

The RBA's case, though, goes beyond questions concerning delegation of power. Of equal concern is the enactment of these stipulations through the wangled mechanism of the Finance Act. Substantive matters concerning the governing of tribunals, one would think, can scarcely be considered as a fiscal measure. Yet the draft law which introduced these provisions was classified as a money bill, and the sanction of the Rajya Sabha was altogether dodged. Although this too might appear on first glimpse to be a quarrel over esoteric matters of procedure, the consequences are enormous, travelling, as they do, to the heart of India's democratic apparatus.

In B.R. Ambedkar's vision, the Constitution embodied not only a charter of rights but also a foundation for republican governance. His worries that democracy in India was "only a top-dressing on an Indian soil, which is essentially undemocratic", saw him lay stress on a need to diffuse constitutional morality among India's citizens. Citing the classical historian, George

Grote, while moving the draft Constitution on November 4, 1948, Ambedkar said constitutional morality had to be seen as representing “a paramount reverence for the forms of the Constitution”. Since such reverence had to be cultivated, he thought it imperative that the Constitution commend the minutiae of administration rather than leave such matters purely to the legislature’s wisdom. In the absence of such prescriptions, democracy, he feared, would wallow in decline.

The Constitution’s verbosity has been a source of antipathy to many. Too long, too rigid, too prolix, Sir Ivor Jennings, a preeminent British constitutional expert, reportedly said, of the document, in a lecture delivered at the University of Madras in 1951. But only years later Jennings was lauding India for representing the region’s most successful constitutional experiment. This volte face, as it happened, was occasioned by those provisions of administrative intricacies, which Jennings had initially found so troubling, and which Ambedkar had thought indispensable. And it is those provisions that are today under siege.

One such clause, Article 110(1), grants to the Lok Sabha Speaker the authority to certify a draft law as a money bill so long as such legislation deals only with all or any of the matters specifically listed in the provision. These include subjects such as the imposition or abolition of a tax, the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India, and, significantly, also any matter otherwise incidental to the subjects specified in Article 110. The ensuing clause clarifies that a draft law will not be a money bill for the reason that it also provides for the imposition or abolition of a tax. In other words, substantive laws, which are not merely incidental to the subjects enlisted in Article 110(1) cannot be finagled into a bill that also happens to contain taxing rules. It is precisely such trickery that the petitioners contended the Finance Act of 2017 indulges in.

The Union government, for its part, argued that the Speaker of the Lok Sabha was not only correct in making the classification, but that, in any event, her decision was beyond judicial review. To this end, the government relied on Article 110(3), which states that in cases where a dispute arises over whether a bill is a money bill or not, the Speaker’s decision shall be considered final. But, as the Supreme Court has repeatedly held, the finality accorded to the Speaker’s decision does not altogether oust the court’s jurisdiction. The irrevocability of such decisions operate only within the realm of Parliament. For the Constitution expressly vests in the Supreme Court and in the high courts the power to review governmental actions, and issue prerogative writs every time those actions exceed the Constitution’s remit.

Ultimately, the Speaker derives her power from the Constitution. In classifying a draft law as a money bill, therefore, her decision has to be demonstrably justifiable. An immunity from judicial scrutiny would effectively allow the government to elude the Rajya Sabha’s constitutional checks by simply having the Speaker classify a draft law as a money bill regardless of whether it, in fact, meets the conditions stipulated in Article 110(1) or not.

The idea behind a money bill is derived from British parliamentary custom. But unlike in Britain, where judicial review of the Speaker’s opinion is unambiguously prohibited, in India, Article 110 avoids creating any such bar. Money bills exist simply to ensure that the Rajya Sabha isn’t allowed to bring down a government by refusing it access to the exchequer for everyday governance. To use it as a means to nullify the Upper House’s democratic role in making substantive legislation denigrates the Constitution’s form which Ambedkar and the Constituent Assembly considered inviolate.

As the lawyer Gautam Bhatia wrote in these pages (“**The imperial cabinet and an acquiescent court**”, March 8, 2019), the Supreme Court has already squandered at least two opportunities in recent times to provide a sense of sanctity to the Constitution’s carefully structured

arrangements. The dispute over the Finance Act of 2017, therefore, assumes particular significance. In deciding the case, the court will do well to pay heed to Ambedkar's warnings, by recognising that the niceties of constitutional form are not a matter of trifles.

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