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IN ARTICLE 370 HEARING, THE ORIGINAL TEXT AND SPIRIT COUNT

Relevant for: Indian Polity | Topic: Indian Constitution - Amendments, Schedules, and Important Articles

August 01, 2023 12:16 am | Updated 08:22 am IST

‘At stake in the case is not only the bare relationship that the Constitution establishes between the Union and the States but also the sanctity attached to the various subtleties in this relationship’. File | Photo Credit: Sushil Kumar Verma

Tomorrow, August 2, the Supreme Court of India will begin hearing oral arguments in the case concerning Article 370 of the Constitution. The changes made to Article 370 through measures that commenced with a presidential order issued nearly four years ago, on August 5, were, by all accounts, seismic in proportion. Amendments were made to make applicable the entirety of India’s Constitution to Jammu and Kashmir (J&K). The State was also sundered into two Union Territories: J&K and Ladakh.

These decisions were made at a time when the State was under President’s Rule with no elected Legislative Assembly in place. Both in the lead up to the events and in the months following them, sweeping limitations were placed on civil liberties in the region. But the Court has already made it clear that what it will consider is not the consequences of the measures adopted but their legality. In other words, the question that it will strive to answer is whether as a matter of law the decisions made on Article 370 are ultra vires the Constitution.

The Indian Independence Act, 1947, which established the independent dominion of India, allowed the Government of India Act, 1935, to serve as an interim constitution until the country adopted its own. The statute permitted princely States to accede to India by executing an instrument of accession. In the case of J&K, the instrument came with qualifications that were ultimately written into Article 370.

These caveats stipulated that Parliament could legislate for J&K only over matters concerning external affairs, defence, and communications. Where Parliament intended to legislate over areas otherwise provided for in the instrument of accession, it could do so by consulting the State government. But where it proposed to enact laws beyond the agreed subjects, it required additional ratification by the State’s Constituent Assembly.

But after 1957, when J&K’s Constitution came into force, its Constituent Assembly was disbanded and replaced by a Legislative Assembly. Article 370, however, remained unaltered. Its chief drafter, Gopalaswami Ayyangar, had described the State Constituent Assembly’s recommendation, as mandated by clause (3) to Article 370, as a “condition precedent” to any

effort at abrogating the provision.

Now, with the Constituent Assembly disbanded, this clause had, for all practical purposes, become nugatory. Thus, Article 370 came to be seen, together with the State's new Constitution, as the only means of governing J&K.

When changes were made to alter this arrangement the Union government seemed quite conscious of the limitations within the existing text of Article 370. Therefore, it chose to look elsewhere, specifically at Article 367. Nestled inside a bunch of miscellaneous provisions in Part XIX of the Constitution, Article 367 comprises a set of general rules for interpreting the Constitution. It was this Article that the President's order on August 5, 2019, amended with a view to transforming the existing status of J&K.

The President achieved this by adding a new clause to Article 367, which stipulated that wherever the term "Constituent Assembly of the State" was used in Article 370, it would now refer to the "Legislative Assembly of the State." As a result, the basic thrust of Article 370 was abrogated, without complying with the precondition that Ayyangar thought obligatory.

Consider the consequences: with J&K under President's Rule, the Governor came to act not only as the State's Legislative Assembly but also as its Constituent Assembly. Buoyed by this new position, the President followed his decision with a declaration under Article 370(3) that with effect from August 6, 2019, "all clauses of the said Article 370 shall cease to be operative." And the new Article 370 proclaimed that all provisions of the Constitution would apply to J&K.

The President's order no doubt asserts that it was made with the concurrence of the "government of the state of Jammu and Kashmir." But seeing as the State was under President's Rule, that assent was made by J&K's Governor. In other words, the Union government was effectively assenting to its own decision, and, in this case, a decision with far-reaching consequences, without so much as consulting — let alone securing the concurrence of — the State's democratically elected representatives. This, the petitioners in the Supreme Court say, ought to be regarded as a colourable exercise of power.

In the petitioners' argument, representative democracy is a basic feature of the Constitution. Any interpretation of the Constitution must strive, they say, towards enhancing this value. What is more, even the framers of Article 370, they add, were of the view that any overriding of the provision can only be done through the procedure contemplated in clause (3), that is with the concurrence of the State's Constituent Assembly. Once the Assembly stood disbanded, this option ceased to exist.

The Union, for its part, argues that this is not the first time that different provisions of the Constitution have been made applicable to J&K. There have been numerous instances of presidential orders made through the erstwhile Article 370(1)(d), by securing the concurrence of the State government wherever necessary.

But, as the petitioners point out, there is a difference here, and this might well be where the case turns. Previous presidential orders, including the order introducing the controversial Article 35A, were made without altering the text of either Article 1 or Article 370 in any manner. This is critical because on a conjoint reading of clauses (c) and (d) of Article 370(1), what seemed to follow was that the President could make applicable to J&K, "such of the other provisions of the Constitution" — i.e., provisions other than Articles 1 or 370 — with modifications or exceptions as deemed necessary.

No doubt, the President's order on August 5, 2019, only alters the text of Article 367. But as a

consequence it upsets the existing text of Article 370, something that had up until this point never been attempted. By amending Article 370 through changes made to Article 367, the petitioners claim that the Union has done indirectly what it could not have done directly.

India's Constitution establishes a system of governance, where power and authority are divided between the Union and the States. The political scientist Louise Tillin has described this balance as representing a form of asymmetric federalism, where some States enjoy greater autonomy over governance than others, a feature reflected in various constitutional provisions, especially in Articles 371 to 371J.

The Supreme Court has routinely described federalism as representing an essential component of the Constitution. Therefore, when arguments are heard on the validity of the decisions made on Article 370, the Court will have to be guided not only by the text of the provision's original version but also by the spirit that pervades through the document's basic structure.

How arguments play out in court and how the Court ultimately decides on the legality of the President's order will have a deep bearing on the future of our constitutional law. The Indian Constitution brims with moral values. It also houses a series of procedural minutiae. To that end, the Court might want to ensure that fidelity is maintained both to these moral values and to the systems and processes that make up the administration of the country's laws. At stake in the case is not only the bare relationship that the Constitution establishes between the Union and the States but also the sanctity attached to the various subtleties in this relationship.

Suhrith Parthasarathy is an advocate practising in the Madras High Court

Source : www.thehindu.com Date : 2023-08-07

SENSE OF PROPORTION: THE HINDU EDITORIAL ON THE RAHUL GANDHI CASE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

August 07, 2023 12:20 am | Updated 12:20 am IST

In staying the conviction of Congress leader Rahul Gandhi in a case in which he was found guilty of defaming all those who have 'Modi' as their surname, the Supreme Court of India has restored his membership of the Lok Sabha as well as a much-needed sense of proportion in public affairs. The Bench, headed by Justice B.R. Gavai, has noted the absence of a substantive reason for the trial court awarding Mr. Gandhi a two-year prison term, the maximum sentence for criminal defamation, for his remark "Why do all these thieves have the Modi surname?" made during the 2019 general election campaign. It also noted that had the sentence been even a day shorter, he would not have been disqualified from the Lok Sabha. The Court has obviously seen that the quantum of sentence was the same as the prison term that is required to get someone disqualified as a legislator, as well as from contesting elections for six years after completing the term. The Bench has also noted that the only reason given by the trial court in favour of the maximum sentence was that Mr. Gandhi had also been admonished by the Supreme Court in contempt proceedings in 2019, and subtly questioned its relevance by remarking that had the court admonition come prior to his speech, he would have been more careful.

A regrettable feature of the judiciary these days is that one has to go all the way to the Supreme Court for justice. In the case of Mr. Gandhi, a dodgy defamation case in Surat resulted in his being found guilty of defaming an amorphous collective of people with a particular surname and sentenced to a two-year prison term. The Lok Sabha Secretariat promptly notified his disqualification the very next day after his conviction. Even if there was an arguable case for the remarks amounting to defamation, the imposition of the maximum permissible sentence was quite perverse. It was unfortunate that both a district court in Surat and the Gujarat High Court declined to stay his conviction, an intervention that could have restored his membership, with grandiose comments to the effect that the offence was grave, that it was marked by "moral turpitude" and that he did not deserve the benefit of stay of conviction because the object of the law was to keep offenders out of public office to maintain purity in politics. The Lok Sabha Secretariat should show the same promptitude in restoring his membership and enable him to participate in parliamentary debates, especially the upcoming one on a no-confidence motion moved by the Opposition. The cause of ensuring purity in politics is certainly not served by keeping out elected representatives from Parliament on the basis of a case that rests on flimsy grounds. Indeed, such a process of disqualification actually subverts democracy.

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Rahul Gandhi / judiciary (system of justice) / parliament / Lok Sabha / Gujarat / Surat / prison / General Elections 2019 / laws / democracy / politics (general)

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IN ‘DEMOLITION RAJ’, THE HIGH COURTS AS BEACONS

Relevant for: Indian Polity | Topic: Executive: Structure, Organization & Functioning ; Ministries and Departments of the Government

August 12, 2023 12:16 am | Updated 09:04 am IST

‘It is time the High Courts stepped up to perform the stellar role given to them by Article 226 of the Constitution, a power greater than the corresponding power the Supreme Court has’ | Photo Credit: Getty Images/iStockphoto

In the districts of Gurugram and Nuh in Haryana, there have been clashes between Hindu and Muslim communities. People have been killed and public property damaged. Tensions are running high. A good administration would have moved in to restore law and order, maintain peace, arrest the culpable, and commence the legal process of charge and prosecution. It would have also housed people left on the streets due to property damage.

Also read |Did you issue notice before demolitions, Punjab and Haryana HC asks Haryana

However, in today’s India, good administrations are not the norm. Following the example of its peers in Uttar Pradesh, the Haryana government has taken to demolishing the houses of persons it suspects to have been involved in the violence. Overnight and without notice.

And although there has been loss of both Hindu and Muslim lives, it is only the houses of the Muslim community that are targeted. Selectively and exclusively. More people are left on the streets. And the rule of law is also demolished, most notably Article 14 enshrining the equality of law and equal protection of law. That has given way to political expediency and capital, the electoral advantages of teaching a lesson to the minorities, to the rising crescendo of hate-politics, all with an eye on the next general election.

In all this, where do the courts sit, the guardians of the Constitution and protectors of the rights flowing therefrom? When the bulldozers in Uttar Pradesh were rampaging, the Supreme Court of India was moved. Its response was tepid, hearing the government say that these were illegal constructions and the law was taking its course. And it stopped with making a general observation that all procedures should be followed. But what was expected were hard questions: Why are you targeting one community? Why is it only these houses when there are thousands of illegal constructions? Why the quick speed demolition? What happened to notice and inquiry? And hard action has to follow when hard questions are not answered satisfactorily. Rebuild houses. Pay interim compensation to those affected. Take action against the official demolishers. If that had been done in the first instance by the Court, other State governments

would be wary. Precedents are not just for the law reports, but guides for future actions.

Unfortunately, we are at a stage where the Supreme Court seems to be giving in a little more than it should. Look at the repeated extensions to the Director of the Enforcement Directorate in blatant disregard of several Supreme Court orders. But still the Court does not draw a line.

It is a simple fact of constitutional realpolitik — if you do not draw the Lakshman Rekha and if you do not punish every transgression, that line will resemble the one on the kabbadi field where there will be forays with impunity. Look at the enormous delays in hearing cases relating to the dilution of Article 370 and conversion of Jammu and Kashmir into Union Territories, electoral bonds, demonetisation, immunity of legislators under Article 194, validity of the Assam Accords and amendments to the Citizenship Act to the extent that we now have a doctrine of adjudication by fait accompli — the illegality complained of has been in force for such a long time that it cannot be remedied, and must therefore be accepted.

And we have several instances of fine lawyers being nominated for High Court judgeships by the collegium — Somasekhar Sundaresan, Saurabh Kirpal, R. John Sathyan, and one of the country's finest judges, S. Muralidhar as Chief Justice of the Madras High Court. But the government sits on the files and the Court does not display the rod.

Which is why every assertion of what a court should do is a welcome one; and very welcome when it comes from a High Court. In the Haryana demolitions, it is the Bench of Justices G.S. Sandhawalia and Harpreet Kaur Jeevan who have asked the most pointed question: Is this ethnic cleansing? Asking the question is as powerful as dealing with the answer — that a court in India should have to voice the question is a damning indictment of the powers that be. The court went further and put an immediate stop to the demolitions. It also recorded the State Home Minister's justification of the demolitions and immediately reminded him of Lord Acton's immortal classic — "power tends to corrupt. And absolute power corrupts absolutely". And this was done suo motu, on the court's own motion. Bravo, my Lords, we are grateful. Every candle lights up the darkness, and this is no small beacon.

But commentators and public opinion makers have asked two other uncomfortable questions. Could not the Supreme Court have taken suo motu action? Why is it that no one approached the Supreme Court?

As the Bob Dylan song goes,'The answer, my friend, is blowin' in the wind'.

When in times of trouble, I recollect what Justice Vivian Bose had said. One has to read his judgment in State of West Bengal vs Anwar Ali Sarkar, a case that concerned an act of the West Bengal government which allowed the State to establish special courts for the trial of certain offenders without any reasonable basis for differentiating such offenders from others.

And, 'When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows … they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim… The question with which I charge myself is, can fair-minded, reasonable, unbiased and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad' (deletions mine).

We have had many disappointments with our recent esteemed senior judges, and a former Chief Justice of India has raised eyebrows sharply with his newly found doubts about the basic structure after his nomination to the Rajya Sabha. It is time we recalled the greats of our jurisprudence, kept them in mind and lived by the truths they told. And it is time the High Courts stepped up to perform the stellar role given to them by Article 226 of the Constitution, a power greater than the corresponding power the Supreme Court has. They performed spectacularly during the dark Emergency, but they, and us, were let down even more spectacularly by the Supreme Court. For rising to the task again, the judges of the High Court of Punjab and Haryana have shown the path.

Sriram Panchu is Senior Advocate, Madras High Court

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Source : www.thehindu.com Date : 2023-08-14

REBOOTING THE CODES: THE HINDU EDITORIAL ON THE IPC, CRPC AND EVIDENCE ACT

Relevant for: Indian Polity | Topic: Indian Constitution - Historical underpinnings & Evolution

August 14, 2023 12:20 am | Updated 12:20 am IST

Few would disagree that laws require an overhaul from time to time so that they could be abreast of developments in technology and changes in society. However, it does not mean that whole new Codes be introduced and given abstruse names, when, in substance, the old laws are essentially retained. The first criticism about the Bharatiya Nyaya Sanhita (BNS, to replace the Indian Penal Code), the Bharatiya Nagarik Suraksha Sanhita (BNSS, to replace the Code of Criminal Procedure) and the Bharatiya Sakshya Bill (to replace the Indian Evidence Act) is that it is unnecessary to refer to them wholly in their Hindi names. Every law in India has an official translation in the respective official language of every State; so the need for the IPC, CrPC and Evidence Act to be referred to in their Hindi names alone is questionable. The criminal procedure law was re-enacted in 1973, and it is known as the CrPC, 1973, as distinct from its 1898 version. The objective to have Hindi names is apparently an attempt to symbolise the de-anglicisation of criminal law. However, a preliminary scroll through the new laws indicates that much of the original language is retained. It raises a doubt whether the changes are far too few to warrant their being enacted afresh, as deletions and amendments may have achieved the same purpose. It is some consolation that the ‘Sanhitas’ are to be scrutinised by a Parliamentary Standing Committee, as the consultation process appears inadequate.

In substance, the deletion of ‘sedition’ is welcome, and its apparent equivalent, the new Section 150, does not use overbroad terms such as promoting ‘disaffection’ against the government or bringing it into ‘hatred or contempt’. It criminalises promoting secessionism, separatism and armed rebellion, but it also targets ‘subversive activities’ and ‘endangering the sovereignty, unity and integrity of India’ — terms that should not be allowed to be misused. Another potentially misusable provision is in the new Section 195 (equivalent to Section 153B IPC): it penalises making or publishing “false or misleading information jeopardising the sovereignty, unity and integrity or security of India”. While ‘mob lynching’ and ‘organised crime’ are new sections, a significant omission is ‘hate speech’ even though defining it and punishing it have been under discussion for some years. The procedure code enables conduct of trial of proclaimed offenders in absentia. Making videography of seizures mandatory is welcome. So too the provision for deemed sanction if authorities fail to grant it within 120 days. However, the remand provisions seem to permit police custody beyond the current 15-day limit, attracting some criticism. The new laws need critical scrutiny, but not new names.

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IS THERE A NEED TO REPLACE THE IPC, THE CRPC AND THE EVIDENCE ACT?

Relevant for: Indian Polity | Topic: Indian Constitution - Historical underpinnings & Evolution

August 18, 2023 02:04 am | Updated 02:50 am IST

Unbridled reign: The new CrPC seems to give a lot of discretionary powers to the police, like the ‘right to handcuff’. | Photo Credit: Getty Images/iStockphoto

On August 11, 2023, Union Home Minister Amit Shah introduced three Bills in the Lok Sabha; the Bharatiya Nyaya Sanhita Bill to replace the Indian Penal Code, 1860, the Bharatiya Nagarik Suraksha Sanhita Bill to replace the Code of Criminal Procedure, 1973 and the Bharatiya Sakshya Bill to replace the Indian Evidence Act, 1872. The proposal raises questions on whether the existing laws were being misused for them to be changed, and the amendments made in the new Bills. In a conversation moderated by **Sonam Saigal, Prakash Singh** and **Shahrukh Alam** discuss whether the existing laws need to go. Edited excerpts:

How different are the new Bills different from the prevalent laws?

Prakash Singh: It is true that the Indian Penal Code (IPC), the Code of Criminal Procedure (CrPC) and the Indian Evidence Act were fully operational, their sections were utilised in the criminal justice system and the public had become used to it. But it would be an exaggeration to say that they reflected the changing values and the democratic aspirations of the people. Much water has flowed down the rivers ever since the IPC was enacted in 1860. The entire socio-economic scenario and political complexion have changed. I think a need was felt that these laws should reflect the change. What they (the government) have done is undertake a tremendous exercise. For example, in the IPC, 175 sections have been amended, eight new sections have been added and 22 sections have been repealed to generate the Bharatiya Nyaya Sanhita Bill.

Editorial | **Rebooting the codes: On the IPC, CrPC and Evidence Act**

Shahrukh Alam: It is very true that the codes (IPC, CrPC and Evidence Act) probably did not fully reflect the changes in society. But there seems to be some ambiguity about how these news laws would relate to all the precedents, jurisprudence and case laws that were developed on the basis of the old codes.

There is a debate going on across the world in terms of criminal justice jurisprudence, which talks about keeping someone in detention without being charged. In Scotland, the amount of time for which you can keep someone in detention without bringing charges against them is six

hours. However, in our country, it was 60 days and the new Bill proposes 90 days. So, it seems we are going in the opposite direction. The new CrPC seems to have formalised this principle not just for acts related to terrorism, but for any IPC offence.

Explained |**Sedition 'repealed', death penalty for mob lynching: the new Bills to overhaul criminal laws**

The new CrPC also seems to give a lot of discretionary powers to the police, like the 'right to handcuff' which we have never had in India. Now there's discretion to handcuff, to arrest women after sunset in exceptional circumstances, and to use any force and means necessary when arresting a person. That could legitimise encounters and all kinds of violence.

The new Bharatiya Nyaya Sanhita Bill allows custody from 15 days which can go up to 90 days. As a former police officer, do you think it is needed?

Prakash Singh: There is a general consensus that these Bills should not be pushed in a hurry. Now that the Bills are in the public domain, let the general public comment on them.

Opinion | **New Bills and a principled course for criminal law reforms**

As far as handcuffing is concerned, I don't think anyone understands how big of a concern it is for the police. It is alright for the Supreme Court to say in the D.K. Basu vs State of West Bengal (1996) case that people should not be handcuffed. But if you see the practice in many democratic countries, there are stringent provisions about handcuffing. I have seen heads of state being handcuffed. In India, even if a man is a member of the mafia, you can't handcuff him. And then why should you force me (the police) to touch somebody? He may be suffering from some skin disease. One doesn't know how filthy or dirty he [the accused] is, so I don't want to hold him by his hand.

Shahrukh Alam: This (right to handcuffing) has become part of the actual provision in the Bill. So we have gone past the stage of debate. Case laws like D.K. Basu and Kedar Nath Singh vs State Of Bihar (1962) (judgment by the Supreme Court of India that upheld the validity of sedition), have set down some laws.

Also read | **Congress demands larger debate on three Bills to replace criminal laws**

But the new Bill causes a rupture. This is a repeal and a revocation. This is not an amendment.

What would you say are the similarities between the existing laws and the new Bills?

Shahrukh Alam: I think the new Bills are very similar to the existing laws. Violence is still going on and detention without charges is still going on. The Bills endorse, legitimise and formalise these practices, so there is no substantial departure. Substantive sections have been jumbled which has caused more ambiguity and confusion. For instance, the Bill replaces sedition with 'subversive activities', which makes it very vague and broad. Terrorist acts have also been defined under the new Bills, even though we have special legislation like the Unlawful Activities (Prevention) Act (UAPA). Also, if you damage property, that could constitute a terrorist act. Another section talks about provocation and intimidation of the government. But anything can provoke the government, and that would be considered a terrorist act.

Also read | **New criminal laws portend great danger to democracy, says Teesta Setalvad**

Prakash Singh: A lot of it is old wine in new bottles. But of course, there are changes. The Bills

have introduced certain new sections. For example, in the Bharatiya Nyaya Sanhita Bill, terrorism has been defined, organised crimes have been added, and sedition has been repealed. ‘Subversive activities’ have been added and it needs to be defined. There are new provisions regarding community service; mob lynching has been defined as an offence; stricter punishment has been proposed for crimes against women.

But what is worrying me the most is that the number of important sections have been changed. For example, Section 302 of the IPC will become Section 101 and Section 420 will become Section 316. For the last 164 years that we have had the IPC, these Sections are there in the public mind. The whole of India knows that Section 302 is murder, 420 is cheating, 379 is punishment for theft and 395 is punishment for dacoity. By changing the numerical figure, the documentation is going to be a huge problem in the National Crime Records Bureau and Crime and Criminal Tracking Network and Systems. I wish some sections that are very common and are in the public consciousness are retained.

Usually, laws are changed when they become obsolete. Are there any provisions in the IPC, CrPC and the Indian Evidence Act that, according to you, are being misused?

Prakash Singh: Certain sections are misused, but the misuse of an Act does not make it irrelevant. You have to find ways to prevent the misuse.

Also read | **New criminal laws will have no bearing on UAPA and MCOCA: official**

Shahrukh Alam: The courts had already decriminalised consensual sex between adult gay men. Section 377 was read down but non-consensual sex was still an offence. However, the removal of the Section in the new Bill leaves no scope for prosecuting rape in the case of adult men, or transsexual people. The new rape provisions are gendered and apply only to women. Also, the new Bill reflects a lot of issues that have come up in political debates recently. For instance, mob lynching has been recognised as a separate offence in the new Bill and the sentence is seven years. It is a fact that people are being killed for who they are. But interestingly, again, it has become discretionary. The sentence ranges from seven years to life sentence and death.

On the other hand, Love Jihad, which has been defined as ‘concealing your identity before marriage’ in the Bharatiya Nyaya Sanhita Bill has been made into a separate offence and the sentence is 10 years. In the same Bill, sexual offences are a separate chapter, but that is limited to sexual offences with respect to women. It [the government] has forgotten about sexual offences perpetuated by men on men or women on women.

Are there welcome changes in the new Bills?

Prakash Singh: Yes certainly. The fact that they have attempted to define terrorism, is a step in the right direction. It is good that organised crimes have been defined. Once the trial concludes, the judgment has to be given within 30 days and only two adjournments are allowed. I think these are welcome changes with the intention of expediting the criminal justice system.

Shahrukh Alam: There are some provisions that say if you can’t finish the trial within six months in petty offences, then that person will not be tried. So that is welcome. But this pertains to only petty offences and has not been linked with serious offences.

Substantive sections have been jumbled which has caused more ambiguity and confusion. For instance, the Bill replaces sedition with ‘subversive activities’, which makes it very vague and broad.

Prakash Singh is a former IPS officer and Shahrukh Alam is an advocate at the Supreme Court.

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DECODING THE PRESIDENT'S SPEECH

Relevant for: Indian Polity | Topic: The President and the Vice-President of India

August 22, 2023 12:15 am | Updated 12:15 am IST

President Droupadi Murmu addresses the nation on the eve of the 77th Independence Day, on August 14, 2023. | Photo Credit: PTI

In her address to the nation on the eve of this Independence Day, President Droupadi Murmu said, "Our Constitution is our guiding document". At this time of great political and ideological contestation, it is reassuring to hear the Head of State forthrightly say these words. This is because they connote that neither the ideologies nor the politics of different political parties and formations should go beyond the boundaries set by the Constitution. Besides, this crucial sentence in the address was a simple and lucid declaration that India would steadfastly remain a constitutional democracy.

President Murmu struck many notes in her address which represent India's current national needs as well its aspirations for a better world. Among these she focused on living in harmony with nature, the empowerment of women, and the value of education in social transformation. Her words on education were based on her own experience. As she put it, "Having been a teacher also, I have realised that education is the greatest tool of social empowerment". The President also dwelt on India's economic progress. More importantly, even as she encouraged the nation, she reminded it of the long distance that remains to be covered till we achieve the aspirations of the leaders of the freedom movement.

Amidst points covered in her address, two deserve special analysis. One goes to the heart of the present ideological contestation; the other to the Constitution as a "guiding document" and the aspiration, as the President eloquently said, of moving forward towards "making India an inclusive and developed nation by the year 2047".

The first point. Government leaders have mentioned, both in domestic and foreign forums, that India has suffered 1000 years of slavery. This is in keeping with the ruling dispensation's interpretation of Indian history of what is commonly referred to as the 'Medieval Period'. Prime Minister Narendra Modi said in his Independence Day speech: "...Our country was invaded 1,000-1,200 years ago. A small kingdom and its King were defeated. However, we would not have known that this event would lead India into a thousand years of subjugation". It is not clear which invasion Mr. Modi had in mind. What is important is the reference to "a thousand years of subjugation".

In the past, government leaders did not venture into stigmatising the medieval era as one of foreign domination and enslavement. Such a categorisation was limited to the colonial period.

Consequently, liberation from foreign rule meant freedom from British rule. President Murmu seems to have favoured this traditional interpretation. She avoided any mention of “a thousand years of subjugation”. Her choice of words indicates that, for her foreign domination means the period of British rule. This is illustrated by the following formulation in her address: “India is the mother of Democracy and since ancient times we had democratic institutions functioning at the grass roots. But long years of colonial rule wiped them out... We won freedom from foreign rule... With our independence began the era of foreign rulers withdrawing from many colonies and colonisation drew close to its end”.

Now, the second point. President Murmu wisely reminded all Indians that their identity as “citizens of India” was above all their other identities. At the same time, she recognised that “each of us has many identities”. In view of the vastness of India and its huge population — we are now the world’s most populous country — it cannot but be so, but as the President said, they are subsumed within our Indian identity. Indeed, can there really be a higher status for those who live in this great land than that of “citizen of India”? Among the identities the President mentioned were caste, creed, language, region, family, and profession. What was significant was that she omitted religion as an identity marker. She did not even use the word faith. It can be argued that creed embraces religion or faith. However, while a creed may form part of a religion, the two are not synonymous. This is also made clear by the President’s speech in Hindi when she used the word “panth” instead of “dharma”.

The use of these different words is part of the ideological contestation underway. As the President said, the Constitution is the nation’s guiding document and the terminology used in it should prevail. This writer would humbly submit that as the first citizen of the country, she should follow the words used in the Constitution. The Constitution mentions religion and faith, not creed. And the Hindi translation of religion in the official Hindi version of the document is dharma, not panth. Dharma is also the word used in Hindi for faith, which finds mention in the Preamble to the Constitution.

Can the submissions put forward here regarding the use of words be categorised as merely quibbling or nitpicking? This writer believes that this is not so because some words acquire the position of ‘code words’ and become markers for ideologies. Besides, words matter, especially when used by the highest constitutional authority of the country. The President’s life story is truly inspirational. In the midst of great personal tragedies, she has maintained a calmness that reflects that she has imbibed what Krishna taught Arjuna before the war began. The nation needs from her equanimity, care and constitutional precision amid the raging political and ideological battles.

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A STRONG CASE TO RESTORE SECTION 8(4) OF THE RP ACT

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

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‘The issue of instant disqualification needs to be addressed urgently’ | Photo Credit: Getty Images/iStockphoto

Rahul Gandhi of the Congress party was disqualified on being convicted and sentenced to two years imprisonment in a 2019 defamation case. The disqualification was instant because of the Supreme Court of India’s judgment in Lily Thomas vs Union of India (2013). Through this judgment, the Court invalidated Section 8(4) of the Representation of People Act 1951, which had allowed a three-month period within which to appeal. Disqualification was not to take effect during this period; when the appeal is admitted, disqualification would depend on the final outcome of the appeal.

Thus, under the legal provision cited, there was no instant disqualification of sitting members of the legislature. But after the Court struck down this provision of the Representation of People Act 1951, according to the opinion of some experts, a sitting legislator is disqualified the moment the court orders conviction and sentence under Section 8(3) of the Representation of People Act. The top court said that Article 102(1) does not create any difference between the sitting member and a candidate so far as disqualification is concerned. It held that Parliament has no power to grant exemption to sitting members for three months and thus struck down Section 8(4) as ultra vires the Constitution.

So now, only Section 8(3) remains in the Act which deals with disqualification of persons convicted and sentenced to two years imprisonment. This section simply says that a person who is convicted of an offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of conviction. It does not say that such a person stands disqualified from the date of conviction. So, there is no ground indeed to conclude that the disqualification takes place the moment the court pronounces a person guilty. The only condition is that such a person shall be disqualified from the date of conviction. So, it appears that the act of the instant disqualification of Mr. Gandhi did not have a sound legal basis; particularly so when we consider the words “He shall be disqualified”, which could only mean that some authority has to officially declare him disqualified.

The opinion of this writer, which was expressed in few articles, is that the authority that/who can declare a sitting legislator disqualified could be the President of India exercising this power

under Article 103. Although the Supreme Court did not accept this proposition in Lily Thomas, in Consumer Education & Research ... vs Union Of India & Ors (2009), a three-judge Bench held that a declaration by the President, under Article 103, that the sitting member has incurred disqualification is necessary.

Thus, the scheme of Section 8(3) seems to be that when a sitting member is convicted and sentenced to imprisonment for two years or more, he shall be disqualified with effect from the date of conviction. Further, it is the President who shall disqualify him under Article 103. The Secretariat of the House to which the member belongs has no recognisable authority to declare that a member stands disqualified as soon as he is convicted by a court of law.

A question of legal importance that arose in the context of the disqualification of Mr. Gandhi was whether the stay of only sentence can lift the disqualification or whether stay of conviction is necessary. In the 1980s and 1990s, some of the High Courts (Allahabad High Court in Sachindra Nath Tripathi vs Doodhnath, 1987 and the Himachal High Court in Vikram Anand vs Rakesh Singha, 1994) had held the view that disqualification remains intact on staying the sentence. But the Madras High Court took a different view in the Jayalalithaa case (2001). It held that “the moment the sentence is suspended[,] conviction should be deemed to have been suspended or otherwise the framers of the code would have taken care to provide for stay of conviction or suspension of conviction also”. However, in Rahul Gandhi’s case, though the Supreme Court stayed the conviction, it did not express any opinion on the question of whether a stay of conviction is also necessary or on suspending the disqualification.

It must be remembered that disqualification arises only when the sentence is imprisonment for two or more years. As the Court observed in its recent order in Rahul Gandhi’s case, if the period of imprisonment was less by one day the disqualification would not have occurred. It would mean that disqualification is directly relatable to the quantum of sentence and not conviction. But this is a point the lawmakers and the judiciary will have to deal with.

The judgment in Lily Thomas can play havoc with the careers of sitting legislators in the country. Instant disqualification on conviction and sentence will upset their entire legislative career without giving them breathing space because the courts in general have a very dilatory system in dealing with appeals, revisions and such. But the case of the Agra court staying the conviction of Bharatiya Janata Party (BJP) MP Ram Shankar Katheria within 24 hours of conviction in a criminal case, thus saving his House membership is one of the rarest exceptions.

It is heartening that a court like the Agra session court exists in our country. But the issue of instant disqualification needs to be addressed urgently as it may affect the career of legislators. The Supreme Court struck down Section 8(4) on the ground that Parliament has no power to provide for a special dispensation for convicted legislators because Article 102(1) does not permit such differentiation between them and the candidates. But so far as differentiation goes, the Constitution in fact permits it under Article 103 which provides that in the case of sitting legislators, the question of disqualification under Article 102(1) will be decided by the President. Perhaps a suitable amendment can be made in Article 102 to enable Parliament to restore the invalidated Section 8(4).

In fact, the judgment in Lily Thomas has not resulted in any perceptible qualitative change in the criminal proclivity of politicians. Politicians belonging to the powerful ruling dispensation at a particular time may be able to get a conviction stayed within a few hours, thus saving themselves from instant disqualification. But others will have to wait like Mr. Gandhi had to for four months and for the intervention of the Supreme Court just to get a stay on conviction in a defamation case which is non-cognisable and bailable. This and other cases show that Section 8(4) needs to be restored and protected constitutionally in order to protect the careers of India’s

legislators from abrupt convulsions caused by court orders which are given, in the words of the Supreme Court, “without any application of mind”.

P.D.T. Achary is former Secretary General, Lok Sabha

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SHOULD THE CJI BE PART OF THE COMMITTEE NOMINATING THE CEC?

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

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Polling officials collect EVMs in Rural Bengaluru on May 9, 2023, on the eve of the Karnataka Assembly elections. | Photo Credit: AFP

On August 10, the Union government introduced a Bill in the Rajya Sabha that proposed that the selection panel for appointing the Election Commission, comprising the Chief Election Commissioner (CEC) and other Election Commissioners (ECs), will consist of the Prime Minister as the chairperson, the Leader of the Opposition as a member, and a Union Cabinet Minister nominated by the Prime Minister as another member. In March, the Supreme Court had ruled that the selection panel should comprise the Prime Minister, the Leader of the Opposition, and the Chief Justice of India (CJI) until Parliament enacts a law on the manner of appointment. The Opposition has been arguing that the replacement of the CJI with a Cabinet Minister in the Bill indicates that the government is trying to make the poll body a puppet. Should the CJI be part of the committee nominating the CEC? **O.P. Rawat** and **Jagdeep Chhokar** discuss this issue in a conversation moderated by **Sreeparna Chakrabarty**. Edited excerpts:

According to the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023, a Cabinet Minister will be part of the selection panel instead of the CJI. This means that there will be two members from the ruling dispensation on the panel. Does this affect the neutrality of the panel?

O.P. Rawat: The issue before the Supreme Court was not who will be on the selection committee; it was why did you [the government] not enact a law as promised or as laid down in the Constitution. So, [the Court said], you make a law, [but until] then, our suggested panel will select the CEC and ECs. In the Constitution, Parliament is the supreme law-making body and the Supreme Court has the power to judicially review the constitutionality of every law. So, I don't think there is any issue in this.

Talking Politics with Nistula Hebbar | Why is the Law Ministry's Bill on appointment of Election Commissioners controversial?

Jagdeep Chhokar: I agree with Mr. Rawat that the Court had said that Parliament should make a law and that until such a law is made, the composition of the committee would be as given in the judgment. But I would also like to add that this was the direction of the Court and in every

judgment, the Court is also expected to explain the rationale for its decision. In the [March] judgment, the Court expended a lot of time and energy on why this law needs to be made. And the fundamental rationale was that the Election Commission is a crucial entity for the existence of democracy. As a matter of fact, the judgment says that the right to vote is a fundamental right, effectuated by the Election Commission through the conduct of elections. And therefore, to ensure that this right can be exercised properly, the Election Commission has to be independent of the executive. So, while the Bill, as proposed, follows the letter of the judgment, it does not at all follow the spirit of the judgment. This is a major issue with the Bill.

Is there is any substance to the perception that the Election Commission will now be more amenable to the executive's wishes?

O.P. Rawat: In another judgment in July 2017, when there was no law and the executive used to appoint the CEC and ECs, the Supreme Court observed that although Parliament has not enacted any law for the appointment of the CEC and ECs, the appointments of the CECs and ECs so far have been fair and politically neutral. It was from the same system that we had Sukumar Sen, who conducted the first election in independent India. Due to Partition, a large number of people had come from Pakistan and electoral rolls had to be prepared. It was a huge issue, for until then, the Government of India's voter list had just about four crore voters, but in the first voter list after Independence, there were 17 crore voters. Despite all those difficulties and with the literacy level being really low, Sen conducted a sterling election. The British had said that by giving universal suffrage, India will undo itself. He proved them wrong. T.N. Seshan was also a product of the same system.

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In case there is apprehension [of the Election Commission being more amenable to the executive's wishes] after the law is passed, the Supreme Court has the power to judicially review it. So, I don't think there is any problem.

Jagdeep Chhokar: While there have been sterling examples like Mr. Rawat himself, there have also been many instances where the conduct of the Election Commission has been questionable and far from satisfactory. There was an Election Commissioner, Ashok Lavasa, what happened to him? He was in line to become the CEC and had to resign or decided to resign. And this happened as a result of the system. So, the system of the executive appointing the ECs and that too purely from the bureaucracy, is not the healthiest. And the way this Bill has been prepared is contrary to the intention or rationale or justification of the Supreme Court's judgment in March. Only time will tell whether the independence of the Election Commission will be compromised or not. But in the last few years, the perception in the mind of at least some people is that the Election Commission is not doing what it ought to be doing.

So, does this Bill in any way override the Supreme Court ruling of March?

O.P. Rawat: Not at all, because the Court had asked why Parliament had not enacted a law. Now, this [Bill] will have to be debated in Parliament. Whether it is passed or not is another issue.

The Bill says that the salary of the CEC would be equivalent to that of the Cabinet Secretary. As of now, the salary is equivalent to that of a Supreme Court judge. Though the amount is the same, does this mean that the rank of the CEC is being downgraded?

O.P. Rawat: I don't think it is a downgrade in the matter of salary because the salaries are the

same for a Supreme Court judge and a Cabinet Secretary. But if you see this in the context of other constitutional bodies like the Union Public Service Commission (UPSC) and the Chief Information Commissioner (CIC), which have been downgraded, you feel that constitutional bodies are being continuously downgraded. A UPSC member is now equal to a Secretary to the Government. The CIC's tenure has been brought down from five years to three, and they are also equivalent to Secretaries. So, one feels that this will or this may give rise to some sort of dilution in their status and have a commensurate effect on performance.

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Jagdeep Chhokar: I agree. The money is not as critical as the status of a position. If the salary is the same, where is the need to say that it will now be equivalent to that of the Cabinet Secretary? I find it mysterious. If you give the same salary but peg the status at a different level, at least in perception, it is unnecessary and undesirable. Unless of course, this is being done with a certain objective, which I am not aware of.

The CEC is removable through the same procedure as a Supreme Court judge, but other ECs don't have the same security of tenure. They can be removed on the CEC's recommendation. Does this Bill have any provision on this?

Jagdeep Chhokar: Yes, which is good. It says that the other ECs will also have the same removal procedure as the CEC or the Supreme Court judge. This is one of the two positive provisions in this Bill.

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O.P. Rawat: I disagree. The Bill is not capable of amending the Constitution. Article 324, Clause 5 of the Constitution lays down that the terms of service of the CEC and ECs will be as enacted by Parliament provided that the removal of the CEC will be as the removal of the Supreme Court judges. But both the ECs can be removed on the recommendation of the CEC by the President of India. So that proviso cannot be amended by any law of Parliament. It will need an amendment of the Constitution by Parliament. So, I don't agree with that. The provision remains the same for the removal of the CEC, which will be by impeachment by Parliament, and the removal of both the ECs will remain on the recommendation of the CEC.

The present policy is of a multi-member ECI where an existing member is promoted as a CEC based on seniority. They get a full tenure only as a whole, but usually only for two years or so as CEC. Is there any case to advocate a full tenure for the CEC in this Bill?

Jagdeep Chhokar: I think the CEC must have a six-year tenure, whether or not he has spent two or three years as an EC. The CEC is at a different pedestal than the EC under the current scheme of things. I would even go to the extent of saying that this should be independent of the age of the CEC.

O.P. Rawat is former Chief Election Commissioner; Jagdeep Chhokar is founding member of the Association for Democratic Reforms

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OBSERVING THE CELEBRITIES IN PARLIAMENT

Relevant for: Indian Polity | Topic: Parliament - structure, functioning, conduct of business, powers & privileges and issues arising out of these

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In the Rajya Sabha, Jaya Bachchan has represented the film industry for long. But unlike many of her colleagues from tinsel town, she goes to Parliament regularly and participates in all the debates. File | Photo Credit: PTI

The Election Commission has conferred the status of “national icon” on former Indian cricketer Sachin Tendulkar. For the next three years, he is bound by a contract to spread awareness about the need for greater voter participation in the electoral process.

Though the intention is laudable, ironically it brings back memories of Tendulkar’s lacklustre stint in the Rajya Sabha. It particularly takes me back to the morning of March 15, 2013, in Delhi. It was my first week as a reporter of Parliament. The press gallery of the Upper House was mostly empty. Amidst the mundane announcements, Deputy Chairman P.J Kurien sought the “House’s permission to grant leave” to Tendulkar. Parliament rules stipulate that members’ leave applications are read out during a session and the House decides whether or not to grant permission. Just as the House was about to sing its customary “aye”, Samajwadi Party MP Naresh Agarwal rose unexpectedly to lob a bouncer at the absentee cricketer. “He hardly comes to the House. Why not give him permanent leave?” he joked and the entire House broke into laughter. Leave was granted and Tendulkar went on to complete his unremarkable term without “permanent leave”.

By no means is this an unusual story. But for me, a news reporter, it provided direct evidence of popular anecdotes about him. In fact, a hard-working celebrity parliamentarian is the equivalent of “a man biting a dog”. A galaxy of film stars and cricketers have entered Parliament with very little to show for it.

Actors and BJP members Hema Malini and Kirron Kher at Parliament House on June 9, 2014. | Photo Credit: PTI

The 2014 Lok Sabha, in particular, was packed with actors. Hema Malini sat on the Treasury benches among a row of women MPs. But unlike many others, Ms. Malini is a regular in Parliament. Behind her sat the ever-smiling Kirron Kher who would barely keep a straight face. A true actor, Ms. Kher would show a range of expressions, which would capture her feelings of the ongoing debate. In the back benches sat a stoic Paresh Rawal, a study in contrast. On the Opposition benches sat Bengali actor Moon Moon Sen. Malayalam actor Innocent too sat there, his eyes continuously scanning the floor of Parliament. And even when the House was fairly

peaceful, his eyes would sparkle with delight as though he was cracking a private joke. But it was the pandemonium that he revelled in. The moment his colleagues would begin agitating over a serious issue, he would tell them in Malayalam “*Chaadno* (Should I jump)?” pointing at the well of the House.

In the Rajya Sabha, Jaya Bachchan has represented the film industry for long. But unlike many of her colleagues from tinsel town, she goes to Parliament regularly and participates in all the debates. She is also the resident Santa Claus. In her capacious brown bag, she carries chocolates and mints and distributes them regularly to members of all parties.

Trinamool Congress MPs Mimi Chakraborty, right, and Nusrat Jahan. File | Photo Credit: The Hindu

In the 2019 Lok Sabha, two Trinamool Congress MPs, Nusrat Jahan and Mimi Chakraborty, increase the glamour quotient whenever they attend Parliament, which, barring the first session, has been rare. Similarly, Sunny Deol, a Lok Sabha MP, has only occasionally been seen. Both the Houses have had a fair share of cricketers. In the Rajya Sabha, Harbajhan Singh, an AAP MP from Punjab, dresses sharply, but struggles with parliamentary practices. His colleagues handhold him through the tough overs.

Journalists patrol the corridors in search of news stories. Occasionally this also means that we get to overhear interesting conversations. In July 2019, the Opposition and Treasury benches were arguing about the Triple Talaq Bill. Both sides were pulling out all the stops to ensure that they had the numbers. Full attendance was essential. I overheard a Union Minister chiding a national athlete who was a nominated member in the Upper House. He told her that she must be present for the voting. The athlete, who was not in a position to retort, walked off. While Tendulkar had the option of taking leave at will, she apparently did not.