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ALL HANDS ON DECK: THE HINDU EDITORIAL ON THE ELEVATION OF T.S. SINGHDEO AS CHHATTISGARH DEPUTY CHIEF MINISTER

Relevant for: Indian Polity | Topic: Functions & Responsibilities of the States, the Governor, the Chief Minister and State COM

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The elevation of T.S. Singhdeo as Deputy Chief Minister in the Congress government in Chhattisgarh is partly a reward for his loyalty to the party, and partly a message to Chief Minister Bhupesh Baghel who has risen as a regional strongman. Mr. Baghel spearheaded the Congress party's comeback in the 2018 Assembly elections in the State after a hiatus of 15 years. With his ear to the ground, Mr. Baghel instinctively senses the political mood of the State, and under him the Congress party has devised a unique mobilisation model. The party won 68 of the 90 Assembly seats in the State in 2018, and in government, continued to consolidate its support base. A combination of welfare schemes, an innovative evocation of Chhattisgarh's subnational identity, and social engineering that drew Other Backward Class communities closer to it, placed the Congress in an advantageous position against the Bharatiya Janata Party (BJP). The State government also rolled out a slew of schemes that pandered to Hindu sentiments as a counter to the BJP's Hindutva politics. All this boosted the Congress, but also strengthened the Chief Minister in such a way that others in the party began to feel the discomforting weight of his expanding power.

Strong regional leaderships create a typical dilemma for national parties such as the Congress and the BJP. On the one hand they anchor the party while on the other the stronger they are, the more deviant they could turn from the national agenda of the party. Strong leaders are often reluctant to subject themselves to processes, within the party or through institutions. Balancing this essential need of strong leadership with the imperatives of party decorum is not an easy task. Mr. Baghel has created a model for combating the BJP in the heartland, which the Congress could seek to replicate in other comparable regions. But the Congress can ill-afford to let success devour it. The history of the party in the State is instructive. Under the late Ajit Jogi, the first Chief Minister of the State, the party wilted as it alienated communities and its own leaders. Mr. Baghel's leadership was a critical factor in the revival of the party, but so were the contributions of several others, known and unknown. For it to retain power in the State, the Congress will have to hold all of them together. Mr. Singhdeo's elevation is, hence, a first step in the right direction. There is more to be done, including a renewed outreach to tribal communities. But at least the Congress seems ready to project a united front in Chhattisgarh.

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THE GOVERNOR’S MOVE IS DANGEROUS, UNCONSTITUTIONAL

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‘The position of the Governor in India’s Constitutional setup has been clarified by the Supreme Court of India in a number of cases’ | Photo Credit: R. RAGU

The Governor of Tamil Nadu, R.N. Ravi, has dismissed V. Senthilbalaji, a Minister in the Council of Ministers of Tamil Nadu — as in the communication issued by the Raj Bhavan on June 29, 2023. (The Governor later backtracked on his decision late in the night, keeping the “dismissal” order in abeyance.) The operative part of the press release issued by the Raj Bhavan is that “there are reasonable apprehensions that continuation of Thiru V. Senthilbalaji in the Council of Ministers will adversely impact the due process of law, including fair investigation that may eventually lead to breakdown of the Constitutional machinery in the State”. Hence, the dismissal of the Minister.

Editorial | **Constitutional misadventure**

This unprecedented and deliberately provocative act of dismissing a Minister of a government which enjoys an absolute majority in the State legislature, without the recommendation of the Chief Minister of the State, is going to set a dangerous precedent and has the potential to destabilise State governments putting the federal system in jeopardy. If Governors are allowed to exercise the power of dismissal of individual Ministers without the knowledge and recommendation of the Chief Minister, the whole constitutional system will collapse.

What needs to be examined first is whether Governors have the power to dismiss an individual Minister without the advice of the Chief Minister. Under Article 164 of the Constitution, the Chief Minister is appointed by the Governor without any advice from anyone. But he appoints the individual Ministers only on the advice of the Chief Minister. The Article implies that the Governor cannot appoint an individual Minister according to his discretion. So, logically, the Governor can dismiss a Minister only on the advice of the Chief Minister.

The reason is simple. The Chief Minister alone has the discretion to choose his Ministers. He decides who the Ministers of his Council will be. He also decides who will not remain as a Minister in his Council. This is a political decision of the Chief Minister, who is ultimately answerable to the people. The Constitution has not transferred the discretion of the Chief Minister to the Governor.

This point would become absolutely clear on looking at the Government of India Act, 1935. Section 51(1) of this Act says, “the Governor’s Ministers shall be chosen and summoned by him, shall be sworn as members of the council and shall hold office during his pleasure”. This Section makes it clear that the Ministers shall be chosen by the Governor. So, they hold office during his pleasure. Further, sub-section 5 of Section 51 says, “The functions of the Governor under this section with respect to the choosing and summoning and the dismissal of Ministers and with respect to the determination of their salaries, shall be exercised by him in his discretion”.

Two things are clear from Section 51(1) and Section 51(5) of the Government of India Act, 1935. One, the Ministers are chosen by the Governor. Two, they are dismissed by him at his discretion. Thus, the Governor during the colonial rule had absolute discretion to choose a Minister and dismiss him. The hire and fire approach.

Now, the Tamil Nadu Governor’s action conveys the impression that he thinks that the Governors under the Constitution of India have the same discretionary powers as the Governors appointed by His Majesty by the commission under the Royal Sign Manual. Perhaps the words, “the Ministers shall hold office during the pleasure of the Governor” in Article 164 might have given him such an impression. But, independent India has a constitutional system under which a Governor is a mere constitutional head and he can act only on the aid and advice of the Council of Ministers headed by the Chief Minister.

B.R. Ambedkar had stated unambiguously in the Constituent Assembly that there is no executive function which a Governor can perform independently under the Constitution. So, choosing a Minister and dismissing him are no longer within his discretion. It is the Chief Minister who chooses the Minister. It is the Chief Minister who recommends the removal of a Minister.

It is true that the pleasure doctrine has been brought into the Constitution of India from the Government of India Act, 1935. But these words simply refer to the formal act of issuing the order of dismissal which is to be done by the Governor, but only on the advice of the Chief Minister. It is because it is the Governor who appoints the Ministers. Therefore, it has to be the Governor who should dismiss them.

The pleasure of the Governor under the Constitution of India insofar as it relates to the Ministers is not the same as that of the colonial Governor. It should be noted here that much of the Act of 1935 has been reproduced in the Constitution. Section 51 of the Government of India Act, 1935 confers on the Governor the discretion to choose as well as dismiss the Ministers. But when Article 164 of the Constitution was drafted, the words “chosen”, “dismissal” and “discretion” were omitted. It was a significant omission which makes it abundantly clear that the Constitution did not confer any discretion on the Governor to either choose or dismiss an individual Minister.

The position of the Governor in India’s Constitutional setup has been clarified by the Supreme Court of India in a number of cases. In Shamsher Singh and Anr vs State Of Punjab (1974), a seven- judge Constitution Bench declared the Law on the Powers of a Governor in the Republic in the following words: “we declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations....”

Similarly, in Nabam Rebia vs Deputy Speaker, a Constitution Bench of five judges reaffirmed the law laid down in Shamsher Singh and further held that the discretionary powers of the Governor are limited to the postulates of Article 163(1). The Court also set aside the decisions in the Mahabir Prasad Sharma and Pratapsing Raojirao Rane cases, where it was held that the Governor can exercise power under Article 164 in an unfettered manner.

In sum, the dismissal of a Minister of the Tamil Nadu Government by the Governor of the State without the advice of the Chief Minister is constitutionally wrong. Newspaper reports suggest that the Governor later held back his order of dismissal for legal consultation. But the issue of dismissal of a Minister without the advice of the Chief Minister is one which clearly destabilises the constitutional system.

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

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LOFTY CLAIMS ABOUT LOCAL GOVERNANCE

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Telangana Minister K.T. Rama Rao in New Delhi. File | Photo Credit: PTI

On June 16, Telangana Minister for Municipal Administration and Urban Development K.T. Rama Rao launched the ward administration system for the Greater Hyderabad Municipal Corporation (GHMC), ostensibly to improve local governance and ensure better coordination among various departments in civic matters.

The system entails the establishment of GHMC offices at the ward level, so that people can approach ward offices instead of zonal offices for the reddressal of grievances. Each ward office, headed by an officer of the rank of assistant municipal commissioner, will have employees from various wings of the GHMC.

Mr. Ramo Rao justified the system in view of the population explosion in the city. Each ward has a population that is equal to that of a municipality outside the GHMC, but lacks in administrative systems that municipalities are endowed with, he said.

The GHMC area is divided into six zones and 30 circles geographically, for administrative convenience. The number of circles was increased following the recommendations of the Prasad Rao Committee, constituted in 2011, for rationalisation of staff. Based on the Committee's recommendations, the government of undivided Andhra Pradesh also issued orders in 2013, sanctioning 2,607 additional posts under various departments. But in less than a year, before the posts could be filled up, the State was divided, and Telangana was formed. Nearly a decade has passed since the formation of the new State, but the sanctioned posts for the GHMC are yet to be filled up. Every department is severely short-staffed. For instance, for the estimated population of one crore, there are only 18,000 sanitation workers employed.

In 2018, the GHMC's Standing Committee unanimously approved a proposal to increase the number of zones to 10 and circles to 50 for quick, efficient and transparent delivery of services. It forwarded the proposal to the government. The change would mean 1,610 additional posts, apart from the earlier 2,607 posts which remained unfilled. The State government accorded in-principle approval for increasing the number of zones to 12 and circles to 48, but kept mum about the sanction of funds for this. The proposal has not taken any concrete shape, however.

The present council of the GHMC was formed in 2021, after elections were conducted in 2020. The Bharat Rashtra Samithi tasted its first major electoral setback during these elections. Almost

a third of the members elected were from the Bharatiya Janata Party, which was unprecedented. On formation of the council, the GHMC was constitutionally obligated to form ward committees. Two and a half years since the present council was formed, the ward committees have still not been formed.

The ward committees were to have local residents and NGOs, senior citizens, representatives of the underprivileged sections, women, persons with disabilities, slum residents, and other groups as members. Ward committee meetings were to be attended by all line department officers, and issues pertaining to the division were to be flagged. Recommendations from the committees were to go to the council and be discussed at the general body meeting for resolution, which reflects local self-governance.

At a recent press conference after the launch of the ward offices, Minister Talasani Srinivas Yadav said that the government was wondering whether to scrap or retain the ward committees provision in the GHMC Act. Though he may have said this without thinking of the constitutional status of ward committees, his statement reflects the extent of the State government's interference in the conduct of the GHMC's affairs.

There was a time when coordination among all the line departments was achieved through city coordination meetings held every month. No such meetings are organised now. Weekly/fortnightly grievance redressal forums such as 'Prajavani' and 'Face to Face', which provided a platform for citizens to directly air their grievances to the Mayor or Commissioner of the GHMC, are a thing of the past. Twitter has replaced all these forums.

Even the announcement of the ward offices came without approval from the GHMC council. Under such circumstances, lofty claims about local governance and coordination through ward offices can be seen only as another election stunt, and not as a well-intentioned policy decision.

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THE TASK OF RECONSTRUCTING INDIA'S DEMOCRATIC UNIVERSE

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

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'The choice we make at the hustings will determine whether or not India's electoral democracy can vindicate its liberal promise' | Photo Credit: Getty Images/iStockphoto

The season of elections is upon us. The Opposition's search for a winning electoral strategy to challenge the dominance of the Bharatiya Janata Party must contend with the inherent contradictions of a fractured polity that has birthed the disarrayed political parties but which must now come together in a unity of larger purpose. The state of the nation, riven by endless schisms, dehumanising insensitivity to the human condition, and an accentuated assault on constitutional fundamentals presents an exceptional situation meriting an extraordinary response. An objective scrutiny of the state of 'Naya Bharat and Shreshta Bharat' lays bare as never before, the nation's depressing social and political realities.

The heart-rending destitution, exploitation and unfreedom of the multitude mirrors the reality of a not-so-shining India, despite a rising economy that has only widened the economic and social disparities in the absence of distributive equities. The agonising reality of a nation in distress is visible in the fate of 35.5% of the country's undernourished and stunted children, in the stony eyes of forsaken widows, mothers grieving for the loss of their children to addiction and hopelessness, unable to bear the grief of their innocent daughters having lost their smile forever to the ravages of lust and violence, and the unbearable grief of a father compelled to see his children starve to death.

The numbing incidents of a Dalit who had his thumb chopped off because his nephew dared to lift a ball while watching a game of cricket, of a husband and a teenager on having to carry the body of a wife and mother, respectively, for want of affordable transport are a damning indictment of a 'rising India'.... The loss of millions of lives on account of preventable diseases, crores of elderly citizens robbed of their dignity in the twilight of their lives, innocent love denied fulfilment because of hate and prejudice, cold blooded murders and endless acts of torture in custody, the coercive incarceration of dissenters and dissidents, and the flaunted arrogance of power, present a painful truth of a morally impoverished politics denuded of its essential purpose of brightening 'crumbled lives' and addressing the 'deep caverns of injustice'.

A moving extract from the English poet and essayist Anna Lætitia Barbauld's poem, 'To the Poor', is a window into the common burden of injustice and deprivation that points to a deep

wound in the soul of the nation. “Child of distress, who meet’st the bitter scorn,... who feel’st oppression’s iron in thy soul, whose bread is anguish, and whose water tears” .

Redemption from the ‘purgatory of suffering’ in which millions of fellow citizens continue to suffer, demands politics helmed by leadership sensitive to the moral injunctions of a dignitarian order founded in justice and freedom. The challenge for those who seek to lead is to “not just find a fork on the historical road, but help to create it”, such as would enable national bonding in shared empathy, transcending all divides. Since leadership does not come to the meek nor to the servile who confuse surrender of conscience for loyalty to a higher purpose, the compelling imperative of our times is leadership that articulates the collective moral conscience of the nation and is sustained by it. And political choices driven by personal loyalties must contend with Thomas Mowbray’s powerful censure of those who demand the loyalty of citizens above the dictates of their conscience. “... My life thou shalt command, but not my shame: The one my duty owes; but my fair name, Despite of death, that lives upon my grave,....”

Comment | **India, democracy and the promised republic**

The outcomes of the ensuing State Assembly polls and the Lok Sabha election in 2024 will test our collective resolve to energise the nation’s political order and refashion a pluralist democracy around an exalting constitutional imagination. We are indeed collectively charged with a duty to reconstruct our democratic universe around ‘the meaning of first things’ and to remind ourselves that inaction in the face of wrong leaves the soul divided against itself. Clearly, resistance against the muscular propensities of an emerging leviathan state warrants a passionate participation of citizens, particularly of the intelligentsia, who must remind themselves of the limitations of interpreting the world without changing it. Nor can we forget an abiding truth of history that a pervasive sense of injustice carries within itself the seeds of disruptive retribution and that the progressive advance of human civilisation is embellished by the triumph of right over wrong.

In a political season pregnant with possibilities, our aspirations for the country are felicitously articulated in the book, The Line of Mercy, as a place “where laughter rings, where lush creepers of stories decorate lives, where the caverns of justice run true and deep, where the fire of illumination and wisdom burns warm, where love is not a fatal poison, where redemption and mercy do not hide their wings”. Realising this vision requires an act of will, fortitude and judgment. The choice we make at the hustings, deservedly in favour of dignity, justice, inclusion, fraternity, sensitivity to popular perceptions and accountability of power will determine whether or not India’s electoral democracy can vindicate its liberal promise.

Ashwani Kumar is Senior Advocate, Supreme Court of India and a former Union Minister for Law and Justice. The views expressed are personal

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A CASE OF UNCHECKED POWER TO RESTRICT ONLINE FREE SPEECH

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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‘Misinformation and fake news are not grounds under which free speech can be restricted under Article 19(2) and Section 69A’ | Photo Credit: Getty Images/iStockphoto

On June 30, 2023, the Karnataka High Court dismissed Twitter’s challenge to the issuance of blocking orders by the Ministry of Electronics and Information Technology (MeitY) in connection with the taking down of Twitter accounts and specific tweets. The High Court admonished Twitter for not complying with the orders and imposed an astounding cost of 50 lakh on the United States-based social media company.

The judgment undermines the right to free speech and expression and also paves the way for the state to exercise unchecked power while taking down content without following established procedure. Moreover, it exhibits a new trend to hinder digital rights and the exercise of free speech on the grounds of the dissemination of false speech.

Section 69A of the Information Technology Act, 2000, empowers the state to issue blocking orders in cases of emergency on the grounds such as “sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States, public order or for preventing incitement to the commission of any cognizable offence relating to the above”. The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules) lays down the procedure for any blocking order issued under Section 69A.

This provision’s constitutionality was challenged in *Shreya Singhal vs Union of India*, where the Supreme Court of India upheld the validity of Section 69A and the Blocking Rules after observing that sufficient procedural safeguards were embedded, such as provision of recording a reasoned order, and providing notice to the intermediary and the originator whose content was sought to be blocked.

However, the Karnataka High Court has held that observations in *Shreya Singhal* cannot be construed to mean providing notice to the users of the content, and that even if reasons are recorded in writing, they may not be conveyed to the user. This runs contrary to judicial precedent. In the absence of procedural safeguards, the restrictions that are to be imposed on free speech can be implemented without any oversight or without giving any recourse to the

affected entity to challenge them.

This translates into unfettered power being exercised by the state in taking down content, a point which was agitated before the Supreme Court in *Shreya Singhal* and was only laid to rest after the safeguards were emphasised.

Further, while the High Court has acknowledged that blocking orders affect the rights of users, it held that the state could exercise its discretion to hear users and that issuance of notice under Rule 8 was not mandatory. It observed that users of Twitter were not “downtrodden” or did not “suffer from some handicap” that prevented them from accessing the appropriate remedies available to them. Additionally, the High Court held that claims of users whose tweets or accounts were blocked could not be espoused by Twitter and that none of the affected users had approached the High Court.

First, the latter observation is false as the human rights activist and author, Aakar Patel, whose Twitter account had been blocked, had filed an application to intervene in the case. However, his application was refused by the High Court. Second, the view of the High Court that users need to be identified for notice to be given and that Twitter must provide this information is divorced from reality when it comes to application of the Blocking Rules. MeitY routinely cites the confidentiality requirement under Rule 16 of the Blocking Rules to deny blocking orders to originators of content. Obtaining blocking orders becomes a Sisyphean task, even when requested through the Right to Information process, and even if the originator identifies themselves. This is further evidenced by how the blocking orders in this case were provided to the High Court in sealed covers.

Reasonable restrictions on the fundamental right to freedom of speech can only be instituted on the basis of eight specifically enumerated grounds under Article 19(2) of the Constitution. The Supreme Court had clarified in Shreya Singhal that blocking under Section 69A and the Blocking Rules must conform to those grounds only.

However, the High Court’s reproduction of certain portions of blocking orders in its judgment reveals that one of the reasons was that the content could lead to the spread of “fake news” and “misinformation”, which had the potential to disturb “public order” and threaten the “security of [the] State”.

Misinformation and fake news are not grounds under which free speech can be restricted under Article 19(2) and Section 69A. The Supreme Court has repeatedly held that for speech to be prejudicial to maintenance of public order, there must be a direct link between the speech and the potential threat to public order. However, the High Court is convinced that these blocking orders are “well-reasoned”, even though no nexus can be established with public order and the security of the state.

This reliance on dissemination of false information to obstruct digital rights and free speech has been witnessing a rise over the past few years. Disproportionate Internet shutdown orders, such as the ones currently operating in Manipur, are routinely issued to curb this spread of false speech and misinformation. This trend to restrict fundamental rights with the “fake news” rhetoric is reminiscent of the oft-cited rhetoric of the state invoking national security to justify laws that are excessive and arbitrary.

Moreover, the High Court rejected Twitter’s contention that Section 69A only permits the blocking of specific tweets. Wholesale blocking of Twitter accounts amounts to prior restraint on the freedom of speech and expression, i.e., limiting future speech and expression. In Brij Bhushan And Another vs The State Of Delhi, the Supreme Court held that pre-censorship on

freedom of speech is unconstitutional. Such a digital prior-restraint, that too so disproportionate in nature, has the potential of inducing a chilling effect on the freedom of speech of online platform users.

The Karnataka High Court's judgment subverts the procedural safeguards that must be employed while restricting the freedom of speech, and erodes the principles of natural justice which dictate for the affected party to be allowed to present their case to the best of their abilities. Along with the recently amended IT Rules on fact-checking, the judgment has the dangerous potential of reposing untrammelled power in the State to remove any content that it deems to be unfavourable.

Radhika Roy and Gayatri Malhotra are Associate Litigation Counsel with the Internet Freedom Foundation.

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judiciary (system of justice) / human rights / Twitter / laws / Karnataka / justice and rights

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THWARTING TWITTER: ON THE KARNATAKA HIGH COURT RULING

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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It is unfortunate that the petition by Twitter, Inc. challenging the validity of the spate of blocking orders passed by the Union government was rejected by the Karnataka High Court. While success in litigation involving the government's power to restrict speech and expression on grounds permitted in Article 19(2) of the Constitution was always expected to be difficult, it is disconcerting that the court refused to countenance all arguments based on the absence of notice to users and the apparent lack of proportionality involved in large-scale suspension of accounts and posts that contained political content, especially dissenting views against the government's farm laws and the farmers' protests they sparked. There was some expectation that judicial review will temper the authorities' zeal to go in for account-level blocking rather than ordering the removal of specific tweets, links or URLs that it deemed injurious to public order or national security. What is quite disappointing is that the court both ruled that Twitter cannot espouse the cause of its users who have voiced no grievance and discouraged an intervenor from among those who suffered account-level suspension. It ruled that a foreign entity such as Twitter could not invoke the constitutional guarantee of free speech and expression on behalf of users. In the ultimate rebuff to the platform, the court imposed costs of 50 lakh for indulging in much-delayed "speculative litigation" despite not complying with the blocking orders for a long period and then doing so only under protest.

There is little doubt that social media content can degenerate into incitement, hate speech and hostile propaganda against the state or its instrumentalities. Laws exist in most countries to order intermediaries such as social media platforms and Internet service providers to remove any offending content, but it is a common principle that established democracies should frame policies and regulations rooted in fairness and natural justice, and not impose undue curbs on freedom of speech and expression. Section 69A of the IT Act, which sets out the power to issue blocking orders, was upheld by the Supreme Court in Shreya Singhal (2015) mainly on the ground that it came with adequate procedural safeguards. Twitter argued that lack of notice to the originators of content and the account users was in breach of that verdict. The court has ruled that issuing notice to users was not mandatory, especially when they may not be identifiable. Conclusions such as this, and the wide berth given to authorities to opt for account-level blocking may require reconsideration. A definitive verdict from the Supreme Court may be needed to clarify both the rights and obligations of large media companies in relation to user-generated content.

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RELIEF, AGAIN: THE HINDU EDITORIAL ON THE TEESTA SETALVAD CASE

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

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July 06, 2023 12:10 am | Updated 12:23 am IST

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For the second time in the same case, the Supreme Court has intervened to grant a welcome respite to activist Teesta Setalvad, who is being prosecuted on charges relating to her role in helping victims of the Gujarat riots pursue justice. The Court has extended till July 19 its interim stay on a Gujarat High Court decision denying her regular bail and directing her to surrender immediately. At first blush, it may appear that the Court was unusually accommodative when it formed a Bench to hear her plea against the High Court order on the same day, and a larger Bench after the one with two judges differed on granting her interim protection from arrest. However, the circumstances are equally unusual and indicate an attempt to keep her in prison for as long as possible. The present case arose from observations by a Bench of the Court virtually canvassing for her arrest and prosecution for “keeping the pot boiling” — a reference to Ms. Setalvad helping victims such as Zakia Jafri to seek justice for killings during the 2002 pogrom. The police lost no time in registering an FIR against her and former IPS officers R.B. Sreekumar and Sanjiv Bhatt, accusing them of fabricating evidence and tutoring witnesses to make statements that showed an alleged plot to implicate key functionaries of the Gujarat government, including the then Chief Minister Narendra Modi.

In September last year, the Court had given her interim bail, following an unusual postponement of her bail hearing in the High Court from August 3 to September 19, 2022. She had by then spent over two months in prison, and was questioned in custody. With the charge sheet having been filed, and the accused having spent considerable time in custody, it was a good case for grant of bail on merits. The Court had asked the High Court to decide on her regular bail application independently. The High Court cited the “gravity of the offence” and the material against her to deny her bail and reject a request to suspend the order for some time. It went so far as to observe that giving her bail would widen communal polarisation. One of the Supreme Court judges found it strange that someone who has been out of prison for nine months was denied even a few days’ time to surrender. As the Supreme Court has said in the past, protection of personal liberty should be ensured at least for a limited duration so that citizens may pursue their legal remedies. The prosecution’s zeal should not alone determine who is free and who is in jail.

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DUE PROCESS CLAUSE OR BASIC STRUCTURE DOCTRINE?

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

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July 08, 2023 12:40 am | Updated 12:40 am IST

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‘The basic structure doctrine is a judicial concoction enunciated by the Supreme Court of India and is often celebrated as a firm guarantee of the citizen’s rights’ | Photo Credit: Getty Images/iStockphoto

The Indian Constitution is a proverbial ship of Theseus to some extent. The mythical ship of Theseus, the Greek hero, was preserved for long, but each old plank was replaced with new timber. This triggered a thought experiment that raises the question whether an object that has had all of its components replaced remains fundamentally the same object. Likewise, the Indian shipwrights of the Constitutional Argo drew up an original blueprint with feeble safety devices for the natural rights of the citizenry. Fortunately, in due course, the Supreme Court of India provided two lifebuoys for the natural rights of the citizenry — namely, the due process clause and the basic structure doctrine. But in the parchment of the Constitution, these two doctrines are still conspicuously absent. This makes the Constitution a deceptive scripture. Another conundrum is identifying, out of the two devices, the surer guarantee for the hard-earned natural rights of the Indian plebeian.

The due process clause is deeply rooted in the natural law school of jurisprudence. Natural law is norms that are higher than state-made laws, and the dictate of human reason. Natural law, as higher law, renders state-made laws invalid when the state-made laws are contrary to natural law. The term ‘law’ in the due process clause stands for natural law. The due process clause is an American construct. The Fifth Amendment in the American Constitution (1791) asserts that “No person shall be deprived of life, liberty, or property, without due process of law”. Due process has two aspects — substantive due process and procedural due process. The due process clause secures people a range of rights that ideally ought not to be taken away by law.

When the Constituent Assembly of India deliberated over the fundamental rights, leading members of the Assembly agreed on the idea that the due process clause must be incorporated into the Constitution. The draft clause 11 contained the due process clause, which read: “No person shall be deprived of his life, liberty, or property without due process of law.” Govind Ballabh Pant was the prominent opposer of the due process clause as he believed that the clause would be a hurdle in the implementation of social reform laws such as the abolition of the zamindari system. C. Rajagopalachari moved a compromise amendment on the due process clause by delinking ‘property’ from it but retaining due process protection for life and liberty. Accordingly, the due process clause was passed by the Assembly on April 30, 1947, which read:

“No person shall be deprived of their life or liberty, without due process of law.”

B.N. Rau, the constitutional adviser of the Constituent Assembly, was entrusted with compiling a draft Constitution reflective of the Assembly’s prior decisions and deliberations. Rau clipped the due process clause by prefixing ‘personal’ before ‘liberty’, emulating the Irish Constitution. Even though it is said that Justice Felix Frankfurter of the United States Supreme Court advised Rau to jettison the due process clause altogether, Rau did not concede to that advice. Later, the drafting committee dropped the due process clause from the draft and replaced it with ‘except according to procedure established by law’ (a term borrowed from the Japanese Constitution of 1946). The Constituent Assembly witnessed heated debates over the due process clause — the most noted among them was the K.M. Munshi-Alladi Krishnaswami Ayyar debate. The Assembly finally voted against the due process clause and it was a moment of grim irony as just over a year-and-a-half ago, the Assembly had endorsed the due process guarantee.

The basic structure doctrine is a judicial concoction enunciated by the Supreme Court of India in the Kesavananda Bharati case (1973). It is often celebrated as a firm guarantee of the citizen’s rights. But a close vivisection would expose its infirmity. The amendability of fundamental rights was the major controversy in Kesavananda Bharati. Nani Palkhivala argued that fundamental rights are included in the basic structure of the Constitution, and hence unamendable. This proposition was accepted by the Sikri-led six ‘citizen-judges’. But Justice H.R. Khanna crucially rejected this view. He held that the Constitution (29th Amendment) Act, 1972 which curtailed the fundamental right to property was perfectly valid. The upshot of Kesavananda Bharati was that the question of whether fundamental rights are part of the basic structure has been left unanswered. Hence, the Basic Structure Doctrine is much ado about nothing as far as fundamental rights are concerned.

Veteran lawyer T.R. Andhyarujina in his book, Kesavananda Bharati Case: The untold story of struggle for Supremacy by the Supreme Court and Parliament said: “It is a doubtful conclusion that in Kesavananda Bharati the Supreme Court held the ratio of ‘Parliament has no power to amend the basic structure of the Constitution” Only the view by the majority — an unprecedented statement prepared by Chief Justice S.M. Sikri — held that Article 368 does not enable Parliament to alter the basic structure of the Constitution. Whether the view by the majority is a legitimate part of the judgment is a moot question.

In Maneka Gandhi vs Union of India (1978) which marked a paradigm shift in Indian constitutional law, Justice P.N. Bhagwati opined that words and phrases in Article 21 are open-textured and encompass due process guarantees. “New understanding of Article 21 was that ‘personal liberty’ was a vast repository of rights and when this fundamental right was affected by any law, courts would seriously interrogate and probe the purpose, rationale, and legitimacy of the law”, writes Rohan J. Alva in his Liberty After Freedom: A History of Article 21, Due Process and the Constitution of India.

Abhinav Chandrachud points out in The Oxford Handbook of the Indian Constitution, “B.N. Rau and Alladi Krishnaswami Ayyar were worried that the due process clause would be used by Indian courts to invalidate social welfare legislation, like price control laws. However, the Court has not used ‘due process’ to invalidate social welfare legislation. In fact, often, the Court has used due process doctrines to protect the interests of vulnerable sections of society such as pavement dwellers and prisoners.”

Unlike the basic structure doctrine, the due process clause was duly discussed and endorsed by the Constituent Assembly, even though it was subsequently dropped. The due process clause has a splendid place in the constitutional history of the world. It is the due process clause, not the basic structure doctrine, that offers a surer guarantee for the citizen’s natural rights.

Unfortunately, the citizen's natural rights are in the line of fire in India due to pieces of legislation such as the Unlawful Activities (Prevention) Act. Hence, the due process clause must be firmly embedded in the constitutional architecture of India, and incorporated into the constitutional text.

Faisal C.K. is Deputy Law Secretary to the Government of Kerala. The views expressed are personal

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DANGEROUSLY FANCIFUL: THE HINDU EDITORIAL ON THE JUDICIARY, RAHUL GANDHI'S CONVICTION AND THE DEFAMATION CASE

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

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July 10, 2023 12:24 am | Updated 12:24 am IST

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The Gujarat High Court order declining to stay the conviction of Congress leader Rahul Gandhi in a defamation case is quite unreasonable and borders on the fanciful. Justice Hemant M. Prachchhak becomes the third judicial authority in Gujarat to rule that Mr. Gandhi, in using the words "Why do all these thieves have Modi as a surname?" in an election campaign speech in 2019, had committed defamation against a large number of people and that it was a "serious offence". The purported seriousness of the offence has been cited to justify the award of a two-year jail term, the maximum punishment for defamation. While the remark is unlikely to have troubled or caused any reputational harm to any reasonable person, the trial magistrate, a civil court hearing an appeal against conviction, and now, the High Court, have unanimously concluded that the offence is grave, amounting to moral turpitude. The High Court has agreed with the first appellate court that Mr. Gandhi does not deserve the benefit of stay of conviction, an order that would help overcome his disqualification from the Lok Sabha. It has enthusiastically endorsed the conclusion that the offence is grave because it was committed by a Member of Parliament and leader of a party that had ruled the country for decades and that it was a speech that contained a false statement made with intent to affect the outcome of an election.

The court has controversially ruled that the statement has defamed a determinable group of people, referring to those with the surname 'Modi'. It has thus rejected the key argument that 13 crore people with the surname could not have been aggrieved by that sentence. How the court concluded that a large number of people were aggrieved is not clear when no one except the complainant has claimed harm to reputation. It is disconcerting that court after court has endorsed a punishment tailored specifically to disqualify a Member of Parliament. The High Court has also ignored the argument that a legislator cannot be pushed out of the House and barred from electoral contest for an offence that was neither serious nor involved moral turpitude. Instead, it has made a fanciful claim that the law's object is to maintain purity in politics and cited the pendency of other cases against Mr. Gandhi to decline to stay the conviction. It has even referred to a complaint by V.D. Savarkar's grandson against Mr. Gandhi, as though a political remark could add another layer of gravity to the offence. The extent to which a judicial order can go to make a defamation case sound like a horrific crime against society at large is quite astounding.

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ALARM BELLS: ON THE VIOLENCE IN THE WEST BENGAL PANCHAYAT ELECTIONS

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

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July 11, 2023 12:10 am | Updated 12:10 am IST

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The extent of violence in the West Bengal panchayat elections, though numbing, was not totally unexpected. In all, 36 people lost their lives in the violence that spread across several districts of the State for almost a month in the run-up to the elections; 18 people died on the day of elections, on July 8. Opposition parties had expressed their apprehension that the elections would be marred by violence if proper steps were not taken. Despite several interventions by the Calcutta High Court, which directed the deployment of central forces at all polling booths, the West Bengal State Election Commission failed on several counts. What proved costly was the State Election Commission's decision to conduct the huge exercise of three-tier rural elections across 61,636 polling booths on a single day, its reluctance to seek central forces, and the subsequent delay in requisitioning forces when directed by the High Court. The central forces arrived late and were deployed in a haphazard manner.

Infighting in the ruling Trinamool Congress has also been a major contributor to the violence. Besides this, in places where the Opposition could put up some resistance, there was bitter fighting between the Trinamool Congress on the one side, and the Congress, the Communist Party of India (Marxist) and the Bharatiya Janata Party on the other. The Trinamool Congress's dominance on the ground, which remained unquestioned for a decade, is now facing resistance in several places. More than half of those killed in the violence during the elections were supporters of the ruling party. In the panchayat polls in 2018, the Trinamool Congress had won about 34% seats without any contest; this time round, it was about 12%. The control of panchayats helps in political dominance at the local level, and controlling the rural economy. Also, the cadres, who provide the muscle, have a direct stake in the outcome. Elections in West Bengal are rarely peaceful and with two lakh candidates in the fray, the local functionaries did not want to concede any ground. While the State Election Commission was found wanting, the political leadership will also have to take a lot of the blame for allowing the elections to local bodies turn into a matter of life and death. There are also some structural reasons that make grassroots politics so competitive and violent in West Bengal. With high unemployment and scarce activity in the formal sector resulting in extreme competition for political posts, in turn leading to extraction and corruption, the State is caught in a debilitating cycle. The violence and the chaos on Saturday should act as a wake-up call for the State's political class.

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CITIZEN ACTION FOR CLEAN POLITICIANS, CLEANER POLITICS

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

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July 12, 2023 12:08 am | Updated 01:59 am IST

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‘ India has a system where there are a very significant number of elected representatives with a serious criminal record’ | Photo Credit: Getty Images/iStockphoto

What does a comprehensive look at the background of all the 4,001 sitting Members of the Legislative Assemblies across India tell us about the state of Indian politics? Can India’s aspirations to be a globally respected economic and cultural power be fulfilled with the kind of politics it has?

All candidates now follow stipulations following a Supreme Court of India judgment, filing self-sworn affidavits which record the details of criminal cases they have, if any. Of the 4,001 sitting MLAs, 1,777 of them, or 44%, have a criminal case. The current Lok Sabha also has 43% Members of Parliament (MP) with criminal cases. In 2004, the percentage was around 22%, and has now doubled. Many people feel that the cases are either trivial ones or politically motivated. The point that these are not frivolous first information reports needs to be emphasised. These are cases registered after a due process of investigation, filing of charge sheets, a preliminary hearing of the case and being formally charged in a court of law. Even if we say that the cases are foisted by rival political parties, it shows that political parties are selectively using the law and the system needs to change. The law and order system was put in place by political parties and they need to change it. However, facts show that most cases were filed when the party to which the MLA or MPs belonged to was in power. So, the cases are not all politically motivated.

If we dig deeper and look at serious criminal cases — which on conviction would lead to a jail sentence of five years or more — there are 1,136 or 28% of such MLAs today. There are 47 MLAs with murder cases, 181 with attempt to murder cases, another 114 with cases related to crimes against women, and 14 with rape cases. States/Union Territories with the highest number of serious criminal cases are Delhi 53%, Bihar 59%, Maharashtra, Jharkhand and Telangana 39% each, and Uttar Pradesh 38%.

No political party is free of this malaise. If one focuses only on those parties with at least 40 such MLAs, the Bharatiya Janata Party (BJP) leads with 479 MLAs with criminal cases, and 337 with serious criminal cases. The next largest party, the Indian National Congress (INC), has 334 MLAs with criminal cases, and 194 with serious criminal cases.

The other parties including the Dravida Munnetra Kazhagam (DMK), Trinamool Congress, Aam Aadmi Party, YSR Congress, Samajwadi Party, Bharat Rashtra Samithi (formerly the Telangana Rashtra Samithi), Rashtriya Janata Dal, Communist Party of India (Marxist) and Biju Janata Dal have a lower number of such MLAs but with a higher percentage of offences — between 42% to 76% for criminal cases, and 32% to 43% for serious criminal cases. The other parties such as the Nationalist Congress Party, Shiv Sena, Janata Dal (United) or JD(U), Jharkhand Mukti Morcha and All India Anna Dravida Munnetra Kazhagam have far fewer seats, and so the number of their MLAs with criminal cases is also much lower.

In the 2019 Lok Sabha, the BJP had 116 MPs with a criminal record, the INC 29, DMK 10, Trinamool Congress 9, and JD(U) 13. When it came to serious criminal cases, the BJP has 87 MPs, INC 19, DMK 6, Trinamool Congress 4, and JD(U) 8. Even Union Ministers are tainted. In the case of their first swearing in during 2019, there were 22 Ministers out of 56 with criminal cases and a total of 61 cases against these 22 Ministers, all from the ruling party. The chances of those with a criminal record winning was over 15%. In comparison, it was 4.7% for those with a clean record. This shows that people with a criminal record are more likely to get elected. No other country has so many people with known criminal records in its Parliament or State Assemblies.

Gender representation is low with only 9% of elected women MLAs. Most MLAs are college graduates or more (66%). The average assets of MLAs was 13.63 crore, and of those with a criminal case, at 16.36 crore. Winning depends on the wealth of a candidate, with 30% of those with assets of 5 crore or more being elected, while only 8% of those with assets of 2 crore or less were elected.

In contrast, 75% of Indian citizens reported wealth of 8 lakh or less, and a total of 98% reported wealth of 80 lakh or less.

The spend on elections now is at an all-time high. Clothes, mobiles, cooking equipment, liquor and cash are distributed to entice voters, thus violating the law. Estimates show that the expenditure in the Lok Sabha elections is more than that in the United States presidential elections. It is well known that candidates spend crores of rupees and violate the spending limit of 40 lakh for MLAs and 70 lakh for MPs (enhanced to 90 lakh in 2022), which is the limit the Election Commission of India (ECI) has set in consultation with political parties. Public money is spent to promise freebies such as free water, electricity, travel, and food to name a few.

The number of MLAs and MPs with criminal records has risen only because their party leaders continue to distribute more tickets to such candidates. In the so-called advanced countries, there is no such system of distributing tickets. Candidates are selected either by a first-round primary, as in the U.S., or by a more open and democratic process, as in many European countries.

In summary, India has a system where there are a very significant number of elected representatives with a serious criminal record. Such people are more likely to win than others. Electoral laws are flouted while spending money. So far, the ECI has taken very little action on this. Political leaders continue to distribute tickets to such people. Winning is the means by which to recover the money spent and accumulate it for the next election. Media management, especially through social media, passes off as good governance.

We will see more of this in the next Lok Sabha election in 2024. Every party fears that it will lose if it undertakes reforms. Media management can impact public perception for some time. Eventually, more and more Indians will get to know the truth. Perhaps that is the moment when change will happen. That is when the potential of the country will be realised. Citizen action can speed up this process.

Trilochan Sastry is Professor, Indian Institute of Management Bangalore and Founder Chairman, Association for Democratic Reforms

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UNDERMINING AUTONOMY: THE HINDU EDITORIAL ON JUDICIAL ENDORSEMENT OF A TENURE EXTENSION SYSTEM

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

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July 13, 2023 12:20 am | Updated 12:29 am IST

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The Supreme Court's verdict upholding statutory amendments made in 2021 to allow multiple extensions of service to heads of investigative agencies is a setback to the cause of protecting their institutional independence. While the part of the judgment quashing the two one-year extensions given to the Director of Enforcement, S.K. Mishra, may be welcomed, the rest of it is a free pass to the government to undermine the autonomy of these agencies. The Court has asked Mr. Mishra to step down on July 31. In 2021, it had directed the government not to grant any extension to him beyond November that year. It has now ruled that even though Parliament can remove the basis for any judgment through legislation, it cannot nullify a court direction. Mr. Mishra was appointed for a two-year term in 2018, but in 2020, the original appointment was retrospectively amended to make it a three-year tenure. He was given two annual extensions in 2021 and 2022, despite crossing the age of superannuation. The government ignored the Court's earlier observation that such extension should be given to those who have attained superannuation only in "rare and exceptional cases". However, the larger import of the latest judgment is that it endorses the changes enabling annual extensions to the CBI and ED Directors until they complete five years in that office.

The heads of the CBI and ED have an assured term of two years regardless of superannuation, and the introduction of a power to extend it to five years means an officer may get up to three annual extensions. As the petitioners who challenged the extension given to Mr. Mishra, as well as the Court-appointed amicus curiae, argued, piecemeal extensions undermine the independence of the office, and encourage a carrot-and-stick policy to make Directors toe the government's line. The Court has rejected, without much justification, their contention that the 2021 changes to the Central Vigilance Commission Act, the Delhi Special Police Establishment Act and the Fundamental Rules go against the spirit of earlier judgments that mandated fixed tenures to the CBI and ED heads only to insulate them from extraneous pressures. The finding that the amendments do not violate any fundamental rights is quite surprising, as allowing the government to have Directors who can pick and choose what cases to investigate based on political instructions certainly offends the rights of citizens to equal treatment and impartial investigation. At a time when there is a cloud of suspicion over the misuse of government agencies against political opponents, the Court's endorsement of a tenure extension system designed to undermine their independence is not conducive to the rule of law.

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FROM AN AGENCY TO A PLANNING BODY

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

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July 13, 2023 12:15 am | Updated 01:28 am IST

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The Garhbeta-I Block office in West Bengal's Paschim Medinipur. Photo: Photo: bdogarhbeta1.com

The Trinamool Congress has scored a massive victory in the panchayat elections in West Bengal. It is 45 years since the first election for modern panchayats was held in West Bengal, and 30 years since Parliament passed the 73rd and 74th Constitution amendments recognising panchayats and municipalities as constitutionally mandated local self-governments for rural and urban areas, respectively.

Over four and a half decades, decentralisation has enabled the implementation of land reforms and development programmes, helped rejuvenate agricultural growth, and improve rural infrastructure and other development works. It has also helped generate social and political awareness among the people and groom new leadership across social, economic and cultural barriers. Thus, decentralisation has strengthened the roots of democracy.

However, the momentum of the process, set in the first decade, has hardly been maintained over the years. The initial enthusiasm has been sacrificed at the altar of party rivalry and power grabbing. A panchayat has now been turned into a ground-level apparatus for implementing government programmes, and carry forward departmentalism with little creativity and grassroots innovation. According to Article 243G of the Constitution, apart from implementing subjects under the Eleventh Schedule, panchayats have the power to prepare their own plans for economic development and social justice that match with people's needs and priorities. They can do so by mobilising local resources through an inclusive, transparent, and participatory process. The focus is on local resources, local analysis of problems and solutions, and a collective vision. But there is hardly any effort to accomplish this task.

Panchayat planning in West Bengal thus requires a paradigm shift. Panchayats need to become planning bodies which are committed to local resource development, broaden the democratic decision-making space, and ensure decentralised development.

The rural landscape is changing. Wetlands are under stress. The level of groundwater is falling rapidly, and wells in many parts of the States are drying up well before the onset of summer. To accommodate the growing population, agricultural fields are increasingly being given for settlements. Gentrification is taking place even in rural areas. Local ecosystem services have dwindled, resulting in elevated vulnerability and risk. This is going to be further exacerbated by

climate change.

The presently available aggregate data mostly based on conjecture at the village level are not adequate for the preparation of panchayat development plans. A cadastral map of natural and man-made resources comprising land, land use, water, settlements, community assets of health, education etc., and infrastructure by involving local people is necessary. Given the advancement of modern mapping technology and satellite acquired data product, village-level resource mapping can be easily done. The importance of micro-level data for decision-making has been realised across the world. In the last decade, the U.S. Environmental Protection Agency compiled a nationwide geographic data (Smart Location Database) on a neighbourhood scale. It contains more than 90 variables under 10 topics.

Based on local-level data, it is important to work out development reports for all the gram panchayats in West Bengal. These may cover local geography, history, and cultural background; natural and human resource base including health and education, use of resources, changing trends, and problems of resource use; existing government programmes; development plans proposed at the village/panchayat level; and a vision for the future. Such an exercise requires the services of people from all walks of life. Technical support groups at the panchayat level involving professionals, teachers, and other personnels, both in-service and retired, and NGOs may help in a big way. This will set the process of grooming civil society at the grass-roots level, which is urgently needed for ensuring checks and balance in the highly politicised society of West Bengal. They can also help in social auditing at the lowest level. This will create a democratic space for debate and deliberations and promote decentralisation.

Srikumar Chattopadhyay, geographer, is with the Gulati Institute of Finance and Taxation, Thiruvananthapuram

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AN UNACCEPTABLE VERDICT IN THE CONSTITUTIONAL SENSE

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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‘In the guise of constitutional adjudication, the court only tried to reiterate the traditional beliefs on marriage and morals’ | Photo Credit: Getty Images

A judgment by the Allahabad High Court recently, declining the prayer by an inter-faith couple in a live-in relationship for protection from police harassment has caught national attention. The judgment in Kiran Rawat vs State of UP negates the very idea of constitutional morality in personal relations, which the Supreme Court of India has repeatedly affirmed. The High Court in its judgment implied that the live-in relationship is a “social problem”.

The case of the petitioners, a Muslim man and a Hindu woman, was short and simple: They are around 30 years of age, living together and their relation is based on mutual love and affection. They alleged that the local police have been torturing them while living in a rented house, and sought protection from police harassment, allegedly done on the basis of a complaint made by a family member.

The judgment by the High Court is unacceptable in the constitutional sense. First, the court is ostensibly carried away by the notions of conventional social morality rather than the constitutional principles on individual autonomy and personal liberty. Second, in the process, the court also discarded several Supreme Court judgments, even after citing them, by giving untenable reasons. Third, the High Court travelled much beyond the brief and relied on personal laws on marriage which were irrelevant.

The Allahabad judgment said that Supreme Court verdicts on live-in relationships such as D. Velusamy (2010), Indra Sarma (2013) and Dhanu Lal (2015) were not intended “to promote such relationships” and that the law traditionally has been “biased in favour of marriage”. Thereby, the High Court essentially rejected the precedential value of the top court verdicts. The High Court also made an unnecessary reference to Section 125 of the Criminal Procedure Code (Cr.PC) which talks about maintenance to wives (and not “other women”). The High Court also said that extramarital and premarital sex are not recognised under the Muslim law. Even the “sexual, lustful, affectionate acts such as kissing, touching, staring etc.” prior to the marriage, are ‘Haram’ in Islam, says the judgment.

Though there were many deficits in the petition, the High Court could not have assumed that

marriage is a condition precedent for constitutional protection and the exercise of fundamental rights. In effect, it acted as a theological court, as if the very idea of individual liberty and autonomy are alien to the writ jurisdiction. The verdict shows a clear inclination towards social orthodoxy and religious revivalism. In the guise of constitutional adjudication, the court only tried to reiterate the traditional beliefs on marriage and morals.

The Supreme Court verdicts on fundamental rights are not mere adjudication of the inter-party disputes, as fallaciously conceived by the High Court. The law laid down by the Supreme Court is binding on all the courts in the country, as in Article 141 of the Constitution. In the process of constitutional adjudication, the top court is not ‘encouraging’ or discouraging any social practice or human conduct.

For example, in Joseph Shine vs Union of India (2018), the Court decriminalised adultery as defined under Section 497 of the Indian Penal Code (IPC). This was done since the state’s police power cannot be used for punishing individual moral aberrations. In the words of Deborah L. Rhode, “Fidelity is a value, but not one that the state should police” (Adultery: Infidelity and the Law, Harvard University Press). In Navtej Singh Johar (2018),while substantially striking down Section 377 of the IPC dealing with same sex relations, the Supreme Court made a constitutional adjudication rather than mere moral judgment. The libertarian value of these judgments lies in their capacity in limiting the state’s power in the realm of personal choices.

The Supreme Court judgments, cited in the Allahabad verdict, also upheld personal liberty and laid down the law in that regard. In Lata Singh (2006), the Court directed police authorities throughout the country to see to it that any adult undergoing inter caste or inter religious marriage is not harassed by anyone. In S. Khushboo vs Kanniammal & Anr. (2010), the Supreme Court held: “While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting”. It was only a restatement of law.

But the Allahabad High Court said that the observations of the Supreme Court in these judgments were made in the context of the facts of the respective cases. Facts of every case will vary from one another and there cannot be precedents on facts. But that does not mean that the High Court can disregard the proposition of law laid down by the Supreme Court on questions of fundamental rights.

The petitioners in the Allahabad case only asserted their right not to be tortured by the police and did not pray for a moral evaluation of their decision to live together. They relied on the law laid down by the top court. The High Court ought to have sought further particulars if required and endorsed the couple’s fundamental right, without conducting an unwanted and irrelevant survey of the personal laws on marriage. The judgment is a classic case of judicial indiscipline which the Supreme Court will, hopefully, set right as early as possible. To imply that the moral lessons of personal laws will supersede the constitutional tenets is a serious adjudicatory mishap.

Kaleeswaram Raj is a lawyer at the Supreme Court of India

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ARCHITECTURE BEYOND THE NEW PARLIAMENT

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

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July 17, 2023 12:15 am | Updated 01:29 am IST

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The new Parliament building. File | Photo Credit: PTI

Architecture deserved to be at the centre of the recent inauguration of the Parliament building. In many ways, the event was about the value of design and the ability of Indian architects to build enduring structures on time. The new Parliament building calls for public attention to the growing reputation, enhanced competence, and potential of the architecture profession in India. Even the contestations around the project are about the public consequences of the profession.

However, architecture cannot serve and flourish further only if it is utilised in occasional public buildings or in more monumental projects. As the profession's history shows, architecture can extensively attend to the people's growing needs. Harnessing this potential will depend substantially on state investment in design.

Over the last 100 years, the endeavour of a small group of trained architects with a few educational institutions has grown significantly. This is a result of serving public interests as much as private ones. Pre-independence, the challenge and urgency was to distinguish and define architectural services from other close professional claimants. Architects such as G.B. Mhatre in Mumbai and L.M. Chitale in Chennai demonstrated what the young profession could offer by building commendable structures from petrol stations, stadiums, and banks. Nation-building and extensive state support in independent India demanded the construction of many projects: new towns, industrial centres, housing and infrastructure. Architecture then efficiently filled everyday needs while simultaneously enabling the nation to function. Away from the overrated architectural axis of Delhi, Mumbai, and Ahmedabad, architects such as Chatterjee and Polk in Kolkata, J. C. Alexander in Thiruvananthapuram, and Chandavarakar and Thacker in Bengaluru made a case for good design to regional clients and state. Post-Emergency witnessed the urge to return to roots, producing gold and dross. If Uttam Jain's University buildings in Jodhpur were inspiring, Charles Correa's Jaipur museum was disappointing. The profession overgrew this problematic phase.

If the mainstream practice embraced concrete and cities, many architects, supported by able community leaders, explored alternative paths. They showed the relevance of using local materials, working with communities, housing the poor, and pursuing environmentally conscious practices. Cooperative refugee housing in Faridabad, rural institutions by architects trained under Laurie Baker, craft-based building rejuvenation by Parul Zaveri and Nimish Patel, and low-cost techniques mainstreamed by Revathi Kamath heralded sustainable practices.

Over the last two decades, a variety of practices has emerged, with about 70% spearheaded by young talents. Firms are geographically better spread, and architects are beginning to serve smaller towns. Buildings are speculative, critical, and, at the same time, pragmatic. A small but stunning brick vault school library in Kopargaon, near Shirdi; shelters built with care for elephants in Jaipur; the empathetic Ashwinikumar crematorium in Surat; village sports amenities in Adisaptagram in West Bengal, and other meaningful works are showing how good design in public service can enliven a place and enrich communities. Unfettered, many young Indian architects continue designing socially relevant buildings.

These accomplishments have raised expectations. However, how much more they can serve depends on bridging the gaps within the profession and, equally importantly, how well the profession's potential is harnessed in the public realm.

At the professional end, vanity projects abound. Servicing the unreasonable demands of the markets and the profession's complicity in it raises doubts about the architects' interests. Gender disparity within the profession questions the lack of sensitivity. Widening gaps between low academic standards and increasing professional and industry expectations raise concerns about the skills.

Architecture does not require radical inventions to correct and enhance its capabilities. In an essay in *The New Yorker*, surgeon-writer Atul Gawande points out that failures occur in professions that face uncertainties and complexities; however, what distinguishes a great profession from a mediocre one is not which one fails less but how quickly the profession rescues itself. A greater commitment is needed to design meaningful buildings, reinforce ethical orientation, make practice more inclusive, and upgrade competencies to build environmentally sensitive buildings and meet the challenges of technological disruption.

While these are within the profession's reach, what remains external to it is capitalising on the potential, particularly in public projects. Design's role in enhancing the quality of life and contribution to the economy is best realised in collective projects. Through its Design 2025 Masterplan, Singapore envisions using design as a key tool to strengthen the economy. Closer home, it is encouraging to see the Kerala government trying to create a 'design-based ecosystem' to build and preserve public assets.

While such ambitious plans could be a long-term goal, in the short term, the state could invest in the design and use of quality professional services by improving its procurement processes, creating credible selection methods, and lowering entry barriers for young talent to grow.

A. Srivathsan is a professor at CEPT University.Views are personal

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IN J&K, LAND IS AGAIN THE CENTRE OF DEBATE

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

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July 18, 2023 12:15 am | Updated 12:15 am IST

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Land and its ownership have been at the centre of a debate in Jammu and Kashmir (J&K) since August 5, 2019, when the Centre revoked the special status granted to the erstwhile State under Article 370 of the Constitution. The special status contained protective provisions for land, housing, and jobs for State Subjects (locals).

Over the last few weeks, the debate has become more intense with the Lieutenant Governor's administration introducing a slew of schemes for homeless and landless people, and migrant workers. Regional parties have expressed concern that these schemes will open doors for outsiders to settle in J&K.

A week ago, Lieutenant Governor Manoj Sinha announced a scheme to grant five marlas (252 square feet) of land to the landless population under the Pradhan Mantri Awas Yojana-Gramin (PMAY-G). Around 2,711 households have been designated as "landless" in the first phase. Besides this, the Union Ministry of Rural Development has set a target to grant 1.99 lakh houses to the homeless population in J&K by 2024.

Weeks earlier, Mr. Sinha had announced the Affordable Rental Housing Complexes (ARHC) scheme, which provides rental housing for Economically Weaker Sections (EWS) and Low-Income Groups (LIGs). The scheme covers urban migrants including labourers, street vendors and rickshaw pullers working in the Union Territory. Laying the eligibility criteria for this scheme, the J&K Housing Board said it would accept applications "from any citizen of India who migrated to Jammu from any part of India temporarily or permanently, for employment, education, long-term tourist visit, etc." It is likely that migrant workers and their children would become eligible for domicile in J&K with this scheme. They can apply for land and jobs if they have lived in the UT for 15 years or have studied for seven years or appeared in the Class X or Class XII examination, as per the new domicile laws passed after 2019.

Regional parties are also concerned about constant amendments to laws. J&K has recorded the highest number of amendments to land laws and re-allocations in the past four years. The administration amended the rules of the J&K Industrial Policy 2021-30, the J&K Industrial Land Allotment Policy 2021-30, and the J&K Private Industrial Estate Development Policy 2021-30 to make make available 30,000 kanals (3,749.9 acres) for industries to woo outside investment. In 2021, amendments were made to land laws passed after 2019 to further liberalise the conversion of agricultural land for industrial purposes.

Even political parties which operate from the Jammu division, where the Bharatiya Janata Party (BJP) has significant support, have been critical of the latest moves. Various parties have pledged to oppose any move that seeks to provide land to outsiders. Peoples Democratic Party president Mehbooba Mufti quoted the Ministry of Housing and Urban Affairs which said that 19,045 people were homeless in J&K in 2021. She said that there was a glaring mismatch between the official figure for the homeless and the target to grant 1.99 lakh houses to the homeless. She said that the administration's intent seemed to be to "settle outsiders" and "import slums" to J&K. Omar Abdullah from the National Conference and Sajad Lone from the Peoples Conference warned the administration against accommodating people beyond 2019 and sought clarification on the eligibility criteria.

According to the Lieutenant Governor's administration, those residing on forest land, Rakhs, farmland and the Dachigam National Park, where construction is not allowed, will be provided land in the first phase. However, the administration remained silent on whether there would be evictions. It has also considered designating as landless those people who are occupying custodian land — pockets of land left behind by those who migrated from J&K to Pakistan or Pakistan-occupied Kashmir in 1947. Mr. Sinha has defended the PMAY-G saying it would enable the landless poor to own land and raise their standards of living.

However, faced with a public outcry, the administration hastened to clarify that only 2,711 landless families which were part of the 2018-19 Permanent Wait List of Homeless Persons of J&K (before the Centre ended special status) would be provided land under the scheme. The controversy reflects the growing chasm between the J&K political class and the BJP-ruled Centre.

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Jammu and Kashmir

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IS THE DELIMITATION QUESTION SETTLED?

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to The Preamble, Union & its Territories and The Citizenship

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R.K. Trivedi, Chief Election Commissioner of Delhi, with representation proposals for amendments to the The Delimitation of Council Constituencies (Mysore) Order, 1951, in 1983 in Bangalore. | Photo Credit: T.A. HAFEEZ

Delimitation is the process of redrawing boundaries of Lok Sabha and State Assembly constituencies based on a recent Census to ensure that each seat has an almost equal number of voters. The last delimitation exercise took place in 1976. While the current boundaries were drawn on the basis of the 2001 Census, the number of Lok Sabha and State Assembly seats remained frozen on the basis of the 1971 Census. In 2002, the Constitution was amended to place a freeze on the exercise until the first Census conducted after the year 2026. Should delimitation be delayed any further? **O.P. Rawat** and **Udaya Shankar Mishra** discuss the question in a conversation moderated by **Varghese K. George**. Edited excerpts:

Lok Sabha constituencies were delimited pan-India based on the 1971 population last time. Why did we decide that we should wait until 2026 before the new population figures are taken into account?

O.P. Rawat: After the 1976 delimitation, which was based on 1971 population data, a decision was taken to freeze delimitation or redistribution of seats to different States, based on decennial population data, for 25 years. This was due to imbalances in population growth between the northern and southern States. In 2002, delimitation was done, but even after that, it was felt that this issue [of population] persists, and until after the first Census after 2026, there will be no delimitation. Projections show that northern States like Madhya Pradesh, Rajasthan, Uttar Pradesh and Bihar have decennial growth rates of 12% to 15%, whereas, in the southern States, the decennial growth rates range between 6% and 10%. From 2011 to 2021 there was no levelling. It is presumed that after 2026, this levelling will take place.

In 2002, there was no redistribution of Lok Sabha seats across State boundaries. The boundaries of Lok Sabha constituencies were redrawn, but the total number of seats in particular States did not go up or down. So, the current distribution of Lok Sabha seats is as per the delimitation of 1976?

O.P. Rawat: Yes. Also, the number of seats is specified by Parliament. And whenever there was a State reorganisation, it was specified in the States Reorganisation Act. For instance, when Uttarakhand was formed, it was specified that instead of 22 Assembly seats that it [the region]

had in Uttar Pradesh, Uttarakhand would have a 70-seat Assembly. I feel that whenever the next delimitation is taken up, Parliament will decide what the total number of Lok Sabha seats and different Legislative Assembly seats will be. Distribution among the States will be decided by the Delimitation Commission, which will be appointed under a Delimitation Commission Act. Parliament gives them directions for devising a formula for reallocation of seats.

So, even while the basic requirement is that representation will have to be proportionate to the population — one person, one vote, one value, Parliament has the leeway to fine-tune the principle in order to ensure that in some cases, relatively fewer people will continue to elect a Parliament member?

O.P. Rawat: Yes. For instance, in Tripura or Manipur, they gave two seats even though the population was not enough. Lakshadweep has one seat for just about 68,000 people. Such exceptional arrangements can always be made by Parliament. But we have universal suffrage — one person, one vote. That principle cannot be obliterated outright.

Some calculations suggest that if Lok Sabha seats were to be redistributed according to current distribution of the population, the northern States might have as many as 32 seats more, while the southern States might have up to 24 seats fewer. That scenario cannot be significantly altered by a parliamentary intervention, which might be able to deal with specific cases like isolated geographical areas or hilly areas or special categories of communities. Is that right?

O.P. Rawat: Parliament can specify that no State will lose the number of seats that it currently has.

Professor Mishra, how do you see the regional variations in population trends?

Udaya Shankar Mishra: This very question that we are trying to address in terms of delimitation had echoed when I was involved in the Finance Commission exercise of allocating population weightage on population. Earlier, Finance Commission decisions were based on the 1971 Census. But in the most recent exercise of the Finance Commission, it was moved to the 2011 Census figures. The regional variations in population count are definitely showing a demographic divergence. Even today we are violating the 'one person, one vote, one value' principle. Parliament has this leeway to say that nowhere can seats come down. Even if the number of seats increase overall, the ratio between parliamentary representation of the northern States and southern States might widen. So, Parliament must evolve a certain normative proportionality based on population, from which a deviation can always be considered. We are going to do the delimitation exercise, but can't we have a fixed proportionality in the first place? And then allow a deviation depending on specific circumstances? If the quantum increases and if we keep the proportionality constant, the game will definitely become unequal.

Also read | **Delimitation fallout needs no political forecasting**

If we think of a solution to this particular problem, we cannot be looking at count alone. There is judgment to be applied as to what count of proportionality should be maintained. There should definitely be a minimum of a normative of the count also. When it comes to representation, it is not the count, but the characteristic of representation which is more important. There are numbers that are larger and numbers that are smaller. Can we in the process be missing the voices of the marginal communities? For instance, the tribal people, the elderly? So, a standard proportionality norm has to be negotiated in such a manner that we do not miss out on the marginal voices when it comes to representation, in terms of allocation of seats. Representation is not merely by per capita representation, it involves a greater accommodation of diverse characteristics. And given India's diversity and the unusual concentrations of certain groups in

the population, this is important to take note of.

That is why we have a whole set of group rights that are part of India's organising principles. But the starting pointing is to divide the total population by the total number of constituencies we have, to form a representative government?

O.P. Rawat: Actually, going by the book, it is about headcount only. There can be specific arrangements to give representation to particular areas, for those groups to be visible. These arrangements would be political because this is a complicated matter. It will be decided by politics, Parliament. So, they will bargain to come up with some formula. But they will never try to bring in the colonial concept of different categories of voters.

Will that flexibility be wide enough to accommodate concerns that the southern States will be overwhelmed by the rising political weightage of northern States?

O.P. Rawat: I feel that we are being blinkered in this issue, whereas Parliament and the political process will see it in totality. What happens if some areas get more seats in Parliament? What is the fear? Those are important issues to settle. I find that whether it is the south or the north, voters are mature and display in the same polling booth two different preferences — one for the State and another for the Centre. We should have faith in people. They will definitely come out of it when the issue comes up.

Professor Mishra, what impact do you see migration having on electoral politics? For instance, migrants from Bihar and Uttar Pradesh have become significant political constituencies in Delhi and Mumbai.

Udaya Shankar Mishra: Patterns that we examine indicate that mobility has increased in the last decade or so. There are two to three very distinct flows of migration happening: from the east to the south; and from the north to the west. Migrants from the east are replacing the workforce in southern States. In political terms, migrants' agency is going to play a very significant role in outcomes. Already we see candidates raising issues and concerns of migrants, for instance in Kerala.

O.P. Rawat, a former IAS officer, served as the 22nd Chief Election Commissioner of India; Uday Shankar Mishra is professor at the International Institute for Population Sciences, Mumbai

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INDIA'S DATA PROTECTION LAW NEEDS REFINEMENT

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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July 21, 2023 12:08 am | Updated 01:36 am IST

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'India must guard against the risks of enacting a law that is toothless in effect' | Photo Credit: Getty Images

India is no Europe, and this seems especially true in the face of a task such as drafting and conceptualising a data protection law for over 1.4 billion Indians. The European Union's (EU) data protection law, i.e., the General Data Protection Regulation (GDPR), came into force in the middle of 2018 and achieved widespread popularity as arguably the most comprehensive data privacy law in the world. However, the GDPR has been saddled with challenges of implementation and risks being relegated to the status of a paper tiger. Although the EU's challenges may be due to its unique legal structure, India must guard against the risks of enacting a law that is toothless in effect.

This deliberation becomes increasingly relevant as the Indian government is likely to table India's fresh data protection law in the ongoing monsoon session of Parliament (July 20-August 11). Late last year, the government released the Digital Personal Data Protection (DPDP) Bill, 2022 for public consultation. This is its third recent attempt at drafting a data protection law. While the draft released for public comments was not as comprehensive as its previous versions, news reports suggest that the government may present a Bill that is largely similar. Considering this, critical gaps remain in the DPDP Bill that would affect its implementation and overall success.

In its scope and definition, the DPDP Bill only protects personal data, that is any data that has the potential to directly or indirectly identify an individual. In the modern data economy, entities use various types of data, including both personal and non-personal data to target, profile, predict, and monitor users (non-personal data is typically anonymous data that does not relate to a particular individual — for example, aggregate data on products which numerous users look at between 9 p.m. and 11 p.m. on Amazon). Often, this non-personal data when combined with other datasets can help identify individuals, and in this way become personal data, impacting user privacy.

For instance, anonymous datasets about individual Uber rides in New Delhi can be combined with prayer timings to identify members who belong to a certain community, which could include their home addresses. This process of re-identification of non-personal data poses significant risks to privacy. Such risks were accounted for in previous versions of India's draft data protection Bill, in 2018 and 2019, but do not find a place in the latest draft. By not recognising

these risks, the DPDP Bill is very limited in its scope and effect in providing meaningful privacy to Indians. A simple and effective solution — as in the earlier versions — would be to add a penal provision in the Bill that provides for financial penalties on data-processing entities for the re-identification of non-personal data into personal data.

Another gap is the inability of the proposed data protection board to initiate a proceeding of its own accord. Under the Bill, the board is the authority that is entrusted with enforcing the law. The board can only institute a proceeding for adjudication if someone affected makes a complaint to it, or the government or a court directs it to do so. The only exception to this rule is when the board can take action on its own to enforce certain duties listed by the Bill for users. This is for the adjudication of disputes between the law and users — for example, an obligation on users not to register a false or frivolous complaint with the board, and not between users and data-processing entities.

In the data economy, users have diminished control and limited knowledge of data transfers and exchanges. Due to the ever-evolving and complex nature of data processing, users will always be a step behind entities which make use of their data. For example, a food delivery app can take all my data and sell it to data brokers in violation of my contractual relationship with them. Individually, I may have little resources or incentive to approach the data protection board.

The board, on the other hand, may be in a better position to proceed against the food delivery app on its own — on behalf of all such affected users.

This is not a novel suggestion. The Competition Commission of India, which is responsible for the enforcement of India's antitrust law, has the power to initiate inquiries on its own (and utilises it frequently). Again, a simple way to do this would be to have a provision in the DPDP Bill that allows the data protection board to initiate complaints on its own.

These are not the only gaps in the DPDP Bill, but finding solutions to them would help address challenges in implementation in a significant way and make for a more future-proof legislation.

Shashank Mohan is Programme Manager at the Centre for Communication Governance, National Law University Delhi

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CLEAR-HEADED APPROACH: THE HINDU EDITORIAL ON THE JUDICIARY, THE POLICE AND THE GRANT OF BAIL

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

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July 22, 2023 12:10 am | Updated 12:21 am IST

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Courts should adopt a clear-headed and common sense approach while considering the grant of bail, and should eschew the tendency to keep someone in prison merely because the police oppose bail with great vehemence. In granting regular bail to activist Teesta Setalvad, the Supreme Court of India has effectively rebuffed the Gujarat police stand that the purported gravity of the offence she is accused of is enough to deny her bail. As the case depends mainly on documentary evidence, all of it forming part of the charge sheet filed in the case, the Court really saw no need for her to be in judicial custody. Further, Ms. Setalvad had been subjected to custodial interrogation during a seven-day police remand shortly after her arrest in June 2022, and she was not called in for any further questioning ever since she was given interim bail by the Supreme Court in September. In effect, the three-judge Bench headed by Justice B.R. Gavai saw no real need to imprison someone during trial solely because the police strongly argued that she had allegedly fabricated evidence and goaded victims of the 2002 pogrom in Gujarat to level false charges against political leaders in a bid to implicate them in the communal carnage.

The Court posed some pertinent questions to the Gujarat police. The case of forgery and fabrication of evidence was registered shortly after the Supreme Court, while rejecting a riot victim's plea, had observed that those who had sought to malign the State government and its functionaries should be put in the dock. Ms. Setalvad had been arrested within a day, and the Court had questions about what investigation it had conducted within such a short time to justify her arrest. Notably, the apex court Bench was of the view that the High Court order refusing bail to her contradicted itself, as it had initially observed that it cannot go into the existence of a prima facie case, but had gone on to consider statements of witnesses against her. The ruling is yet another reminder that an order of bail must be the norm after considering whether the accused is likely to flee justice or will be available for trial, and if, once freed, will be in a position to influence witnesses or tamper with evidence. While the gravity of the offence is a factor, it need not be the sole consideration. The trial in this case is set to begin soon in a Sessions Court in Ahmedabad. One hopes it will settle the question whether activists assisting victims ought to have been proceeded against on the charge of trying to implicate innocent political leaders.

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THE POLITICS OF THE UNIFORM CIVIL CODE

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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July 24, 2023 12:15 am | Updated 01:50 am IST

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Members of the women's wing of All India Muslim Personal Law Board meet female representatives of different parties regarding Uniform Civil Code at Sir Syed Ahmed Khan's Conference Hall, Madina Education Centre, in Hyderabad July 22, 2023. | Photo Credit: ANI

On June 27, in Bhopal, when Prime Minister Narendra Modi advocated that a Uniform Civil Code (UCC) be implemented, he was seeking to accomplish the last of the three core ideological agendas that the Bharatiya Janata Party (BJP) has campaigned for years. The abrogation of Article 370 of the Constitution and construction of the Ram Mandir in Ayodhya are the other two. But why is it the BJP so eager to have a UCC while its exclusionary majoritarian ideology considers inequality between the majority and minority population as legitimate? In Bhopal, Mr. Modi asked: How could it be possible to run a family (the nation) with disparate laws for its different members (communities)? B.R. Ambedkar asked similar questions: Why should Hindu religion have four castes? And why do some caste groups dominate and humiliate others, particularly Dalits? The fate of India's egalitarian pursuit would ultimately depend on the resolutions of these two inter- twined questions. But the Hindu Right seems to be overenthusiastic about the UCC, and shows no concern for Ambedkar's question on caste inequalities. Though the Constitution recommends a UCC, the fact is that a UCC has been seen as a communal agenda for a long time. Even well-known, secular public intellectuals have chosen to shy away from taking a clear stand in its favour.

India may be moving towards majoritarianism, but the arc of democracy is increasingly bending towards multiculturalism. Many Western liberal democracies, and not just India, are wrestling with the issue of gender equality, which is at the crux of a UCC. For instance, the French courts deal with such cases that often come from Muslim immigrants from Morocco and Algeria. Canada, Australia, and the U.S. often use religious-based alternative dispute resolutions. India could learn from such efforts.

Another key issue of UCC is Muslim personal law. The All India Muslim Personal Law Board (AIMPLB) came into existence in 1973 mainly to preserve Muslim personal law. But the history of personal law can be traced to as early as 1772, when the colonial state used religious doctrines to formulate personal laws. The Muslim Personal Law (Shariat) Application Act, 1937 and the Dissolution of Muslim Marriage Act, 1939 form the foundation of Muslim personal law. The triple talaq bill, passed in 2019, is one of the recent major changes to personal law.

Some suggest that internal reforms within the community are the way forward, but sadly, there

has not been much progress on this score till date. Muslim women activists have been knocking on the doors of community leaders for years for reforms, particularly codification of Muslim personal law. During Nehru's time, many Muslim countries such as Jordan, Syria, Tunisia, and Pakistan brought about reforms and codified their family laws. These changes were based on The Ottoman Law of Family Rights, 1917. Though Maulana Azad and Humayun Kabir were prominent Muslim leaders at the time in India, no efforts for internal reforms took place. In independent India, the Muslim community leadership has been majorly aligned with secular parties; the community has barely had any independent leadership. Even the Deoband leadership was aligned with the Congress for a long period of time. The indifference shown by secular parties, whether in power or out of it, towards contentious issues such as Ayodhya and UCC has created opportunities for the Hindu Right to set the agenda.

Progress on internal reforms remains insignificant. Many feminists and Muslim women groups who are exhorting for gender justice have been accusing the AIMPLB of being an all-male body ever since the days of the Shah Bano case. Under pressure, the AIMPLB had opened space for women members for whatever its worth. But there is hardly any progress on the codification of family law or on general reform of personal law.

For the average Indian political mind, UCC is only three glorious words with an exalted promise of equality of law. So, it does make sense when Opposition parties are asking the government to present a draft. At the same time, these parties have both the resources and the time to prepare their own draft, which could have brought about a qualitative difference to the present debate. It now appears that India is heading for a great clash between Muslim groups such as the AIMPLB and the Indian state on this issue. Groups such as AIMPLB may not be able to influence the Modi government the way they convinced the Rajiv Gandhi government about the Shah Bano case. If the community is mobilised to take to the streets, it will add a new layer to the politics of polarisation, which may give an advantage to the Hindu Right. On the Babri Masjid issue, such a clash took place both on the streets and in court. In the end, it all appeared to be in vain, and the community is living with a deep sense of loss and injustice.

Also read | Push for Uniform Civil Code turns spotlight on Supreme Court's query on religious freedom

On the relationship between gender justice and Islam, a lot depends on interpretations of the religion and religious texts. While liberal interpretations can be found in various works, such as those by the Moroccan feminist Fatima Mernissi, there are also regressive interpretations, which can be found in the statements of the Taliban, for instance. One only hopes that Muslim groups in India opt for liberal interpretations which ensure gender justice. Whatever be the outcome, a UCC under a majoritarian regime is likely to be an awkward result of the crisis of Indian secularism.

***Shaikh Mujibur Rehman teaches at Jamia Millia Central University, New Delhi. He is the author of* Shikwa-e- Hind: The Political Future of Indian Muslims**

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LOOKING FOR ALLIES IN ANDHRA PRADESH

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

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July 25, 2023 12:15 am | Updated 12:15 am IST

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Actor-turned-politician Pawan Kalyan with Union Home Minister Amit Shah, in New Delhi. | Photo Credit: PTI

On July 18, Pawan Kalyan, the president of the Jana Sena Party (JSP), was called to attend the National Democratic Alliance (NDA) meeting in New Delhi. After the meeting, the actor-turned politician met Prime Minister Narendra Modi alone. Later, he also met Home Minister Amit Shah and Bharatiya Janata Party (BJP) national president J.P. Nadda. His presence at these meetings reaffirmed the JSP's alliance with the BJP and its presence in the NDA. It may also push the YSR Congress Party (YSRCP) to rethink its political strategy in Andhra Pradesh.

Mr. Kalyan took the opportunity in New Delhi to criticise the ruling YSRCP and also speak to the national media. He suggested that the BJP open its arms to all those parties which intend to upset the YSRCP government. He has repeatedly dropped hints that the 2014 winning combination of the BJP, the JSP, and the Telugu Desam Party (TDP) should be back in force to ensure that Chief Minister Jagan Mohan Reddy is no longer in power.

Mr. Kalyan founded the JSP in 2014. He did not contest the 2014 general and Assembly elections, but provided outside support to the BJP-TDP alliance. The combination won, and Chandrababu Naidu of the TDP was back as Chief Minister for the third time. However, in 2018, the JSP grew disillusioned with the TDP and the NDA over issues of farm distress and the non-grant of 'special category status' for the State, promised during the bifurcation of Andhra Pradesh in 2014, and left the alliance. In 2019, the JSP fought the Assembly elections along with the Left parties and the Bahujan Samaj Party, but it performed miserably. Despite contesting all the 175 Assembly seats, it won only the Razole Assembly seat. The next year, it rejoined the NDA alliance. Since then, Mr. Kalyan has met Mr. Modi at least twice and Mr. Shah and Mr. Nadda several times.

Since his debacle in 2019, Mr. Kalyan's popularity as a politician may have grown. The huge response to his Varahi Yatra, launched to "expose" all the "misdeeds and corruption" of the government, and the debt burden on the State, is an indication. He intends to cover the entire State in the next few months.

The yatra by TDP leader Nara Lokesh has also been attracting crowds, including in Mr. Reddy's stronghold, Kadapa. After Mr. Naidu stormed out of the alliance with the NDA, it seemed unlikely that the TDP and the BJP would patch up in the near future. But of late, Mr. Naidu, who has

been called by Mr. Reddy an opportunist, has been warming up to both the BJP and the JSP. This has created speculation that the combination might work again.

While this sounds great on paper, there are also several challenges ahead. As Mr. Kalyan is from the Kapu community, the JSP is seen as a Kapu party. Kapus form close to 30% of the population in the State. So far, Andhra Pradesh has not fielded a Chief Minister from this community. Aware of this, Mr. Reddy has been encouraging Mudragada Padmanabham, another strong Kapu leader from the Godavari districts, a Kapu area, to re-enter politics. Recently, Mr. Padmanabham came out of his political hibernation, but did not announce his political affiliations.

However, if there is a demand for a Kapu Chief Minister, it may leave Mr. Naidu and the Kamma community unhappy. Despite forming less than 10% of the population, the Kammas are financially strong. In 2008, when Mr. Kalyan's elder brother and popular matinee star K. Chiranjeevi launched the Praja Rajyam Party (PRP), the Kapus backed it fully. But the merger of the PRP with the Congress upset the community. It is important to note that politics in Andhra Pradesh has always been dominated by the Reddy and Kamma communities.

Second, despite Mr. Kalyan's good relationship with the BJP leadership, there has been lack of synergy between the workers of the JSP and the BJP. This will need to be addressed.

The third challenge pertains to the face of the alliance. There could be issues on this front since both Mr. Naidu and Mr. Kalyan might push to be the face of the alliance. The BJP too may have its own preferences. Mr. Kalyan has categorically stated that the chief ministerial face will be decided post-elections. This, though, may prove to be a bad strategy in the run-up to the elections since Mr. Reddy's welfare schemes are popular across the State.

Finally, though Mr. Kalyan has a large following among the youth, his party lacks strong leaders. If he relies only on his image, this could backfire, as was the case in 2019.

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Andhra Pradesh / alliances and coalition

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NEVER-ENDING SAGA: ON THE LEGAL WRANGLING BETWEEN THE CENTRE AND THE GOVERNMENT OF THE NATIONAL CAPITAL TERRITORY

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 legal wrangling between the Centre and the Government of the National Capital Territory (NCT) of Delhi over the contours of their respective powers is a never-ending saga. In the latest round, the legality of the recent ordinance promulgated by the President of India to create a new scheme to regulate services in Delhi will be scrutinised by a Constitution Bench. It will be the third such five-member Bench to examine the respective powers of the two warring entities in the last few years. The crux of the issue is that the ordinance has sought to nullify a recent Constitution Bench verdict that ruled that the subject of ‘Services’, covered under Entry 41 (State List), will fall under the executive and legislative domains of the Delhi government, and not that of the Centre. The Court’s earlier reasoning was simple: Article 239AA, which governs the affairs of the NCT of Delhi, excluded only three subjects from the Delhi government’s purview — police, public order and land — and that it could exercise control over the remaining subjects. As ‘Services’ was not one of the excluded subjects, it upheld the Delhi government’s remit over appointments, postings and transfers. It ruled that any attempt to expand the Centre’s ambit by excluding the subject of services would go against the constitutional scheme of Delhi’s governance.

The three-judge Bench that referred the ordinance matter to a Constitution Bench has noted that the creation of a new ‘Authority’ to regulate ‘services’ effectively amends Article 239AA of the Constitution because it becomes a fourth subject in the list of excluded ones. However, this may not necessarily invalidate it. Clause 7 of Article 239AA allows Parliament to enact laws “for giving effect to, or supplementing” the Article. Further, it stipulates that such a law would not be deemed an amendment to the Constitution, even if it has such an effect. While the Court has conceded Parliament’s power to enact such a law, it has indicated that it can examine whether the exercise of such power is valid, especially when it has the effect of excluding ‘services’ completely from the elected Delhi regime’s ambit. The Court has also noted a contradiction: while it appears from one clause that the existing governance structure of Delhi cannot be altered, another clause seems to allow this. This, it says, requires a ruling. On the legal side, the larger Bench may be able to delineate the contours of Parliament’s power to make laws under Clause 7, and rule whether while exercising such a power, it can abrogate the governance principles of Delhi. However, the tussle involving politics and personalities is unlikely to end soon.

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CHILD, LAW, AND CONSENSUAL SEX

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

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July 26, 2023 12:15 am | Updated 01:54 am IST

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Illustration for The Hindu: Satheesh Vellinezhi

In the last one month, at least three different High Courts have either quashed First Information Reports (FIRs) and pending criminal proceedings or acquitted accused persons under the Protection of Children from Sexual Offences (POCSO) Act, 2012. One High Court released the accused on bail on the grounds that the accused and victim had consensual sex.

On July 12, the Delhi High Court released a 25-year-old accused on bail on the premise that the 15-year-old girl had eloped with him on her own and did not support the prosecution's story of sexual assault. On July 10, the Bombay High Court quashed the conviction of a 25-year-old man under POCSO on the grounds that he had consensual sex with the 17-year-old girl. The girl had terminated her pregnancy after the arrest of the accused. On July 7, the Madras High Court not only quashed an FIR registered under POCSO and consequential criminal proceedings, but also directed the Director General of Police to produce the reports of all such pending cases before the Court. On June 27, the Madhya Pradesh High Court quashed an FIR registered under POCSO and all criminal proceedings on the basis that the sexual relationship was consensual. The judgment did not mention the age of the accused (who used to be her coach). The Court recommended that the Indian government consider reducing the age of consent of the prosecutrix from 18 to 16 years. The relevant sections of the Indian Penal Code (IPC) were also applied in these cases.

A 'child' under POCSO is defined as any person below the age of 18 years. Acts of penetrative sexual assault committed on children are criminal offences under POCSO. The purpose of defining 'child' under POCSO, and of the provision under Section 375 of the IPC (sexual intercourse, whether with or without her consent, is rape if she is under 18 years of age), is to safeguard children against penetrative sexual assault irrespective of their consent, which could even be unequivocal and voluntary. Otherwise, the third part of Section 90 of the IPC, which provides that consent is not consent "unless the contrary appears from the context, if it is given by a person who is under 12 years", was sufficient to interpret consent for a child of any age.

An analogy can be drawn with the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, where, if certain prohibited acts are committed with the knowledge of the caste of the victim, intention does not have to be proved separately. The provision was made specifically to safeguard vulnerable groups. Similarly, if children are to be treated as a separate and vulnerable category, consent should be of no avail if the accused had knowledge of the

victim being a child.

However, in the cases cited above, the High Courts neither honoured the age of consent nor took any cognisance of the mandatory legal presumption in favour of the prosecutrices. Even the difference between the age of the prosecutrix and the age of the accused, which ranged up to 10 years, was not taken into account. Though there are recommendations from various sources to reduce the age of consent from 18 to 16 years, the case where the victim was 15 years was also not paid heed to.

Editorial | **Considering consent: On POCSO Act and the age of consent**

If all 'consensual sex' cases are to be quashed by the judiciary, what will be the bottom-line age of consent and who will set that boundary? Can the objective of POCSO be softened and allowed to boil down to Section 90 of the IPC (which is general in nature) where consent of a child who is even less than 12 years of age be admitted? Can such interpretations be said to be in the 'best interests of the child'? In two of the above four cases, minor girls had become pregnant and terminated their pregnancy. Did the courts examine whether these girls really understood the consequences of early pregnancies?

The High Courts have not declared any provision of the IPC or POCSO unconstitutional. Therefore, quashing the cases of consensual sex may not lead to any less work for the police; they will still have to register FIRs whenever a child goes missing or a cognisable offence is reported either by parents or any other third party and proceed with their investigation.

One of the reasons, inter alia, for the reluctance of courts to convict accused persons in consensual sex cases could be the harsh minimum imprisonment, which is 10 years and 20 years for penetrative sexual assault and aggravated penetrative sexual assault, respectively. Instead of proving to be a deterrent, this appears to be benefiting the accused. The Bureau of Police Research and Development could analyse the cases of consensual sex (as has been directed by the Madras High Court), age-wise, across States and help the Central government in taking a decision of reducing the age of consent based on that study. One solution could be to reduce the age of consent with some leverage allowed to the judiciary to interpret consent in cases of the victim being of lower age based on the child's understanding of consequences. The caveat of the 'best interest of the child' would be necessary.

While reducing the age of consent is within the jurisdiction of Parliament, the Supreme Court must step in to quickly resolve the gap between the laid down law (as understood by the investigating agencies) and the different interpretations by the High Courts. This acquires importance in light of the Supreme Court judgment in *Independent Thought v. Union of India* (2017) wherein it held that even sexual intercourse with a minor wife is rape.

R.K. Vij is a retired Indian Police Service officer. Views are personal

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children / sex

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UNITING THE HOUSE: THE HINDU EDITORIAL ON THE GOVERNMENT, THE OPPOSITION AND THE MANIPUR ISSUE

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

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July 27, 2023 12:20 am | Updated 12:20 am IST

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Both the Opposition led by the Congress and the ruling Bharatiya Janata Party (BJP) say they want a parliamentary debate on Manipur, but they are unable to agree on a mechanism to do it. The abhorrent violence, including repeated incidents of sexual violence against tribal women in the State, should have brought the government and the Opposition together; instead, they are unable to even debate the issue. The Opposition has insisted that any discussion must begin with a statement by Prime Minister Narendra Modi, who would not commit to that. Home Minister Amit Shah said the government was willing to discuss the issue and sought the cooperation of the Opposition, which saw the outreach as an attempt to shield Mr. Modi. The Opposition has now moved a no-confidence motion against the government as a way of forcing Mr. Modi to speak on the issue. Considering how he has responded until now, that might be a bit too optimistic. The discussion on the no-confidence motion in the Lok Sabha is likely to be a continuation of the obfuscation of the issue by the BJP and the persistent demand by the Opposition. Meanwhile, in the Rajya Sabha, the Opposition continues to demand a discussion followed by a statement by the Prime Minister.

The demand for a comprehensive statement by the Prime Minister is legitimate, but the Opposition must understand that it serves no purpose if the outcome is no discussion. It must seize whatever opportunity it gets for a discussion in Parliament, and take the protest to public places outside. The BJP's response to the horror in Manipur has been to equate it with crimes in Congress-ruled States, which is difficult to sustain. For moral and strategic reasons, the turmoil in Manipur is a threat to the country's security, integrity, and social harmony; it is a threat that calls for national unity. It is a sad moment in Indian democracy that its politics remains partisan even in the face of such human suffering, ethnic violence and the breakdown of law and order in a sensitive border State. Congress President Mallikarjun Kharge has written to Mr. Shah saying that the government cannot be seeking the Opposition's cooperation while the Prime Minister is likening it to extremist outfits. Labelling critics as anti-national or unpatriotic may be politically convenient, but this predictable response in the BJP toolkit is turning out to be an impediment to national unity. It is time Mr. Modi called for healing in Manipur, reassured the scared victims of the State and set an example by holding the perpetrators accountable. And there is no better place than Parliament to make it all clear to the country and the world.

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Prime Minister Narendra Modi / parliament / Bharatiya Janata Party / Indian National Congress / Manipur / unrest, conflicts and war / politics / sexual assault & rape / Rajya Sabha / Lok Sabha

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NEEDLESS ACCOMMODATION: THE HINDU EDITORIAL ON THE JUDICIARY AND THE TERM OF THE ENFORCEMENT DIRECTORATE HEAD

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

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July 29, 2023 12:20 am | Updated 08:35 am IST

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It comes no more as a shock or surprise if the Supreme Court is seen as deferring excessively to the government's wishes. The order allowing Sanjay Kumar Mishra, head of the Enforcement Directorate (ED), to continue till September 15 at the Centre's request is needlessly accommodative. It was only on July 11 that the Court declared illegal the extensions given to Mr. Mishra in 2021 and 2022. At the same time, he was permitted to continue till July 31 to ensure a smooth transition. Yet, without any submission that the process to select his successor has been set in motion, the Court has invoked an undefined "larger national interest" to allow him to go on up to September 15. It was a self-serving application in the first place. The ostensible reason that the government finds his services indispensable is that he is helming the country's efforts to demonstrate its framework to counter money laundering and the financing of terrorism during a country review before the Financial Action Task Force (FATF). The multi-lateral body adopts a mutual evaluation system and India's ongoing review will go on until June 2024, when the final evaluation report may be considered at a likely plenary discussion on its compliance status. The government sought an extension of his services until October 15, presumably because the country's agencies and institutions may be ready by then for an on-site visit by an FATF delegation.

As the agency that administers the law against money laundering, the ED may have a key role in preparing the country's presentation, but it is difficult to believe that the process depends on one individual. Even if it were so, nothing prevented the government from utilising Mr. Mishra's services for FATF purposes alone, while leaving the directorate's routine activities under his successor. In any case, various agencies and authorities are involved in framing the country's policies on money laundering and terrorism financing. It is unfortunate that the Court did not countenance arguments that highlighted these points. It did raise questions as to how one person could be indispensable, but ultimately chose to allow him to continue for some more time. One can understand the argument that the country's image depends on a positive FATF evaluation, but the claim that not giving Mr. Mishra an extension might result in a "negative image" is quite incomprehensible. India's credentials will be evaluated on its laws, systems and compliance with global standards and not on who prepared the report. The Court's permissiveness detracts from its resolve to hold the government to account for actions that it had itself declared illegal.

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judiciary (system of justice) / investigation / terrorism (crime) / government / money laundering

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