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FLAIR TALK

Fast... Legal... All India Reporter

The Pandemic of Inequality

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Late Shri V. V. Chitaley
Founder

We draw immense inspiration from his life
and seek to expand his dreams for mutual growth.

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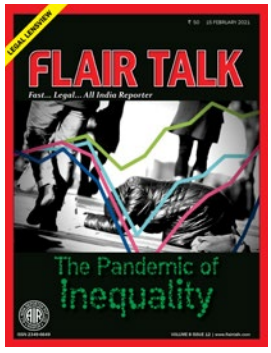
COVID-19, A Year On...

It has almost been a year that the world is wading through the global pandemic called COVID-19 and so also, a side effect of the same, aptly described as the pandemic of inequality. With the advent of this highly infectious and fatal disease, people were confined to their homes and people whose work duties could be fulfilled at home, stayed unaffected due to the upcoming trend of 'work-from-home'. But people who didn't have access to technologies or whose work could not be done from home, have suffered the most during the past one year. On the one hand, labourers were stranded helpless on closure of industries, on the other, traders were left high and dry, with closed shops and empty wallets, sometimes finding it difficult to meet the daily expenses. Students, even the ones who have access to internet and computers, suffered, as learning online is not even 'remotely' effective means to train the tender minds with the social skills they need for the grown-up world. But the stark reality is that the world is now going through a new phase of inequality. All international and national data analysis show that the rich got richer and poor got poorer during this pandemic and there is virtually nothing done by the Governments across the world to abate this travesty in these challenging times. The widening inequality which includes of economic, religious and State inequality, is hitting hard on the face of our society today. This month's "Cover Story" by Warish Masih discusses the inequalities that have been faced by the citizens of the world and some of the suggested measures that could make the world a better place to live in this hour of need.

In "Research", Pragya Rakshita and Pratikesh Shankar discuss the concept of confidentiality and party autonomy in arbitration. In "Law for the Lay", Chhaya Khosla explains the Witness Protection Scheme, 2018 in a lucid language. In "Case Study", Sanjeev Sirohi discusses the controversial 'skin-to-skin contact' judgment under POSCO Act of the Bombay High Court and its aftermath. In "Quote Unquote", Aamod Vairagkar presents views of legal fraternity and prominent personalities on the recently revised privacy policy of the immensely popular messaging service WhatsApp, which has created furore worldwide. In "Counsel's Chamber", Sandeep Jalan discusses the concept of 'Letter of Convenience'.

"From the Courts" brings you the latest judgments and updates from the Courts across India. In "Students' Corner", Kaustubh Mehta discusses the legal and moral problems behind the Central Government's ambitious Vista Project. Manisha Karia ponders upon ongoing trend of media trials in the light of Sushant Singh Rajput's suicide case in "Leap Frog".

Look forward for your feedback on this issue. Up your legal quotient and continue to thrive. See you next month!



"This pandemic has magnified every existing inequality in our society - like systemic racism, gender inequality and poverty."

Melinda Gates
Philanthropist and
former General Manager, Microsoft

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"Appointment of Judges of the Supreme Court and High Courts is made under Articles 124, 217 and 224 of the Constitution of India respectively, which do not provide for reservation for any caste or class of persons. The Government is committed to social diversity in the appointment of Judges in the Supreme Court and has also been requesting the Chief Justices of the High Courts that while sending proposals for appointment of Judges, due consideration be given to suitable candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities and Women to ensure social diversity in appointment of Judges in High Courts."

Ravi Shankar Prasad, Union Minister of Law and Justice

"The advocate must be inquisitive like a detective, tenacious like a farmer and precise like a surgeon. In the legal fraternity, we must walk the past prescribed by the Constitution of India. To leave the Constitutional path is to venture into lawlessness and to enter into the jungle raj. Our foremost duty is to strengthen the weak against the strong, to protect the small fish from the larger ones. We must provide a shield to the individual citizen against the mighty power of the State. We have to protect and promote the Rule of Law and Democracy."

Raghavendra Singh Chauhan, Chief Justice, Uttarakhand High Court

"History proves that all dictatorships, all authoritarian forms of government are transient. Only democratic systems are not transient. Whatever the shortcomings, mankind has not devised anything superior."

Vladimir Putin, Russian President

"The disease kept people away from their families. We could not perform rituals for those who died due to corona. In times of that crisis and atmosphere of despair, some were giving us hope. They were putting themselves at risk to save us - doctors, nurses, paramedics, ambulance drivers, sanitation workers, police and other frontline workers - they prioritised their duty to humanity. They stayed away from their families and children, they stayed away from home for days. Hundreds never returned home. They sacrificed their lives to save lives. So today, by vaccinating healthcare workers first, society is paying their debt."

Narendra Modi, Prime Minister of India

"History will rightly remember today's violence at the Capitol, incited by a sitting President who has continued to baselessly lie about the outcome of a lawful election, as a moment of great dishonour and shame for our nation. But we'd be kidding ourselves if we treated it as a total surprise."

Barack Obama, Former President of the United States

BCI Notifies New Legal Education Policy

The Bar Council of India, vide a notification dated 2nd January 2021, notified the Bar Council of India Legal Education (Post-Graduate, Doctoral, Executive, Vocational, Clinical and other Continuing Education), Rules, 2020, with a view to strengthen legal education at each level of undergraduate, post graduate, legal research, technology and court management, continuing legal education and professional and clinical skill development courses conducted off-line and on-line.

Under Chapter two, a very significant point has been highlighted under Rule 6 which states that one year Master degree to be abolished. A Master degree program in law of one year duration, introduced in India in 2013 by the University Grants Commission, shall remain operative and valid until the academic session, in which these Regulations are notified and implemented, but not thereafter at any university throughout the country. A Master degree in any specialized branch of law offered in the open system to any graduate, such as Business Law or Human Right, or International Trade Law without having LL.B/BA LL.B as the requisite entry-level qualification, shall not be designated as Master's Degree in Law (LL.M) but can be designated in any other manner attracting the immediate attention of anyone that such a degree holder may not be a law graduate. Master's degree in Business Law may be designated as (MBL); Master's in Governance and Public Policy as (MGPP), Master's in Human Rights as (MHR), Master's in Industrial Laws (MIL), etc., which cannot be considered equivalent to LL.M.

As per the notification, the Bar Council of India (either directly or through its Trust) may annually conduct a Post Graduate Common Entrance Test in Law (PGCETL) for admission in Master degree course in law in all universities and until the PGCETL is introduced the present system followed by respective Universities shall be followed. Further, the Bar Council of India, through the BCI Trust, shall introduce two professional efficiency enhancement continuing education courses only for Advocates who are enrolled with any State Bar Council.

It has also been notified that the BCI Trust may conduct para-legal (including land survey work, notarization, registration and all other judicial work of court and lawyers' chamber management) and technology and Court Management courses of suitable duration on-line and/or off-line to facilitate para-legal works and court-management to cover updated education and training.

The notification also prescribes criteria for equivalence of Post Graduate degree obtained from a foreign university. In order to qualify for test of equivalence of LL.M degree obtained from any foreign university, the Masters' degree in law course must have been taken only after obtaining the LL.B degree from any foreign or Indian university which is equivalent to the recognized LL.B degree in India. LL.M degree obtained from a foreign university, which has been pursued without an equivalent LL.B degree, shall not be equivalent to Indian LL.M degree such as (i) LL.B is a three/four year first undergraduate course in which case one year or two years of study in LL.M in the foreign university forms part of the LL.B program to consider the LL.B with or without a bridge course as equivalent to Indian LL.B, or (ii) LL.M is obtained without having any equivalent LL.B degree.

Supreme Court Stays New Farm Laws

The Bench of Supreme Court of India, comprising of Chief Justice of India, SA Bobde, along with Justices AS Bopanna and V Ramasubramanian, in *Rakesh Vaishanv v. Union of India, Writ Petition (Civil) No.1118 of 2020*, on 12th January 2021, stayed the implementation of the new agricultural reform laws that have seen continuous protests by farmers at New Delhi's highways since November 2020. The order was made in the proceedings of a batch of civil writ petitions challenging the constitutional validity of the three farm laws, as well as, the validity of the protests by the farmers against these laws. The three laws that have been stayed are the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, the Essential Commodities (Amendment) Act, 2020 and the Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020.

The Court noted that although the farmers have carried on peaceful protests until now, all rounds of negotiations with the Government of India have failed to produce a solution. There are many senior citizens and children at the protest sites who are exposed to serious health hazards due to the coronavirus and the harsh winter. There have also been some deaths due to illness and suicide.

In light of the situation on the ground and repeated failure of negotiation, the Court decided to stay the implementation of the laws and form a committee of agricultural experts to negotiate between the farmers' organizations and the

Government. It further said that staying implementation of the laws "may assuage the hurt feelings of the farmers and encourage them to come to the negotiating table with confidence and good faith."

With respect to apprehensions on the abolition of guaranteed Minimum Support Price (MSP), the Court noted that the existing MSP system will continue and that the Solicitor General has given his assurances of in-built safeguards within the new laws to protect the farmers' lands.

The Court also formed an expert committee, comprising of Bhupinder Singh Mann (the National President of Bhartiya Kisan Union and All India Kisan Coordination Committee), Dr Pramod Kumar Joshi (agricultural economist), Ashok Gulati (agricultural economist and former Chairman of the Commission for Agricultural Costs and Prices) and Anil Ghanwant (President of Shetkari Sanghatana). Representatives of all the farmers' bodies are directed to make their representations to the committee, irrespective of whether they favour or oppose the laws.

Although the Court's order notes that the farmers' bodies are amenable to proceedings before the committee, the Sankyukt Kisan Morcha has stated that it does not wish to participate in any committee proceedings, as they want a complete repeal of the laws instead of mere changes. They noted that previous talks with the Government over submitting before a committee had also failed.

Thus, they have said that although a formal decision on participation before the Court-appointed committee is yet to be made, the protests by the farmers will continue. The Morcha comprises nearly 40 protesting farmers' unions and their decision is expected to have a significant impact on the success of the Court-appointed committee.

Government Approves Central Sector Scheme for Industrial Development of J&K

The Cabinet Committee on Economic Affairs, chaired by Prime Minister Narendra Modi, in its meeting on 6th January 2021, considered and approved the proposal of Department for Promotion of Industry and Internal Trade for Central Sector Scheme for Industrial Development of Jammu & Kashmir. The scheme is approved with a total outlay of Rs.28,400 crore up to the year 2037. The Government of India has formulated New Industrial Development Scheme for Jammu & Kashmir (J&K IDS, 2021) as Central Sector Scheme for the development of Industries in the Union Territory (UT) of Jammu & Kashmir. The main purpose of the scheme is to generate employment which directly leads to the socio-economic development of the area. Considering the historic development of reorganization of Jammu & Kashmir with effect from 31st October 2019 into UT of Jammu & Kashmir under the J&K Reorganisation Act, 2019, the present scheme is being implemented with the vision that industry and service led development of J&K needs to be given a fresh thrust with emphasis on job creation, skill development and sustainable development, by attracting new investment and nurturing the existing ones.

The following incentives would be available under the scheme:

• Capital investment incentive at the rate of 30% in Zone A and 50% in Zone B on investment made in Plant & Machinery (in manufacturing) or construction of building and other durable physical assets (in service sector) is available. Units with an investment up to Rs.50 crores will be eligible to avail this incentive. Maximum limit of incentive is Rs.5 crores and Rs.7.5 crores in Zone A & Zone B respectively
• Capital interest subvention at the annual rate of 6% for maximum 7 years on loan amount up to Rs.500 crores for investment in plant and machinery (in manufacturing) or construction of building and all other durable physical assets (in service sector).
• GST Linked Incentive: 300% of the eligible value of actual investment made in plant and machinery (in manufacturing) or construction in building and all other durable physical assets (in service sector) for 10 years. The amount of incentive in a financial year will not exceed one-tenth of the total eligible amount of incentive.
• Working Capital Interest Incentive: All existing units at the annual rate of 5% for maximum 5 years. Maximum limit of incentive is Rs.1 crore.

Key Features of the Scheme:

• Scheme is made attractive for both smaller and larger units. Smaller units with an investment in plant and machinery up to Rs.50 crores will get a capital incentive up to Rs.7.5 crores and get capital interest subvention at the rate of 6% for maximum 7 years.
• The scheme aims to take industrial development to the block level in UT of J&K, which is first time in any Industrial Incentive Scheme of the Government of India and attempts for a more sustained and balanced industrial growth in the entire UT.
• Scheme has been simplified on the lines of ease of doing business by bringing one major incentive, GST Linked Incentive, that will ensure less compliance burden without compromising on transparency.

• Scheme envisages greater role of the UT of J&K in registration and implementation of the scheme while having proper checks and balances by having an independent audit agency before the claims are approved.
• It is not a reimbursement or refund of GST, but gross GST is used to measure eligibility for industrial incentive to offset the disadvantages that the UT of J&K face.
• Although earlier schemes offered a plethora of incentives, the overall financial outflow was much lesser than the new scheme.

Scheme is to bring about radical transformation in the existing industrial ecosystem of J&K with emphasis on job creation, skill development and sustainable development, by attracting new investment and nurturing the existing ones, thereby enabling J&K to compete nationally with other leading industrially developed States/UTs of the country. It is anticipated that the proposed scheme is likely to attract unprecedented investment and give direct and indirect employment to about 4.5 lakh persons. Additionally, because of the working capital interest subvention the scheme is likely to give indirect support to about 35,000 persons. The financial outlay of the proposed scheme is Rs.28,400 crores for the scheme period 2020-21 to 2036-37. So far, the amount disbursed under various special package schemes is Rs.1,123.84 crores.

Centre Notifies Unique Health Identifier Rules

The Union Ministry of Health and Family Welfare, vide a notification in the Official Gazzette dated 1st January 2021, has notified Unique Health Identifier Rules, 2021. The notification states that the Ministry intends to create Unique Health Identifier (UHID) for identification and authentication of beneficiaries in various health IT applications implemented by the Ministry.

According to National Digital Health Mission, every patient who wishes to have their health records available digitally, must start by creating a Health ID, which will be linked to a health data consent manager (such as NDHM) which will be used to seek the patient's consent and allow for seamless flow of health information from the Personal Health Records module.

The patient will have the option to link all the health records to this ID.

UHID is for facilitating integration of health data across various applications and create longitudinal Electronic Health Record (EHR) for citizens besides allowing de-duplication in various health services provided by Ministry. The notification also clarifies that the creation of UHID will be voluntary.

Purpose of these rule is for using Aadhaar authentication on voluntary basis, for establishing Unique Health Identifier. The Rules clarify that Aadhaar authentication service for creation of UHID is voluntary, and therefore no denial of health service provisioning in default shall be allowed.

The Competition Commission of India (CCI) argued before the Karnataka High Court, on 18th January 2021 that Amazon is violating India's Competition Act, 2002. The CCI alleges that Amazon struck deals with businesses to be the exclusive seller of goods, such as Apple and Samsung smartphones. Moreover, the CCI alleges that Amazon's pricing of certain goods was anticompetitive. Amazon's counsel, Gopal Subramanium, argued that Amazon was not the exclusive seller of certain products and that dealers on Amazon are willing to lower maximum retail prices during product launches. Moreover, Amazon contended that the CCI has not satisfied its obligation to bring forward a bona fide informant. Amazon notes that the trade group Confederation of All India Traders approached the CCI to initiate an investigation after unsuccessful legal attempts at limiting Amazon's operations in India in the past. The CCI operates by accepting complaints by private parties, such as Aiova, whose complaint initiated the current investigation. Amazon India's antitrust investigation is taking place as Amazon faces antitrust battles in the US and the EU.

Russian Opposition Leader Alexei Navalny Detained

The Moscow Regional Court, on 28th January 2021, rejected an appeal against detention by Alexei Navalny, a leader of the Russian opposition and well-known critic of President Vladimir Putin's government. Navalny had been detained by the authorities for 30 days on 17th January for parole violations. The arrest took place immediately upon his return to the country from Germany for the first time after being poisoned with a military-grade nerve agent in August last year.

Navalny came to international prominence by organizing anti-government demonstrations and running for office to advocate reforms against corruption in Russia and against President Vladimir Putin and his government. Navalny has been described as "the man Vladimir Putin fears most" by The Wall Street Journal. Putin avoids directly referring to Navalny by name. Navalny was a Russian Opposition Coordination Council member. He is the leader of the Russia of the Future party and the founder of the Anti-Corruption Foundation (FBK).

Navalny, who appeared in court through video-conferencing, told the presiding judge that charges against him are "absurd" and aimed at intimidating the opposition. "We'll never allow ... these people to seize and steal our country. Yes, brute force is on your side now. You can ... put me in handcuffs ... that will not continue forever."

Navalny's lawyers have raised concerns over the lack of transparency and rushed nature of his trial. He had also been denied access to his defence lawyers until the trial on 28th January, when the judge gave him five minutes to speak privately with his lawyer via video link. While Navalny has said that he expected the court to keep him in jail, his lawyers have said that they will appeal the ruling.

He could face years in jail for violating parole terms from a 2014 conviction for embezzlement and money laundering, one that has been rejected as "arbitrary and unfair" by the European Court of Human Rights (ECHR). He is also being investigated for fraud by the Investigative Committee of Russia, which he has dismissed as politically motivated.

In response to his detention, Navalny encouraged his supporters to protest via video, "What are these crooks sitting in their bunkers are most afraid of? You know this very well. People taking the streets. That is the political factor you can't ignore; that's the most important factor, the essence of politics. So come to the streets, not for me but yourself and your future. [...] I urge you not to be silent, to resist, to take to the streets. No one but ourselves will protect us, and there are so many of us that if we want to achieve something, we will achieve it."

Though many opposition supporters had been pre-emptively detained to prevent nationwide rallies, thousands are already protesting against the Putin leadership and police crackdown upon Navalny and his allies. US President Joe Biden has also raised concerns over Russia's conduct towards opposition members in his first phone call with Putin.

The day after his arrest, two UN Special Rapporteurs condemned the detention, while praising Navalny for his bravery. Agnès Callamard, the Special Rapporteur on extrajudicial, summary or arbitrary executions and Irene Khan, the Special Rapporteur on the right to freedom of opinion and expression, said that the Russian Federation should immediately release Navalny, adding that "[i]t is appalling that Mr Navalny was arrested for breaching parole terms, for a sentence he should not have received in the first place and despite the authorities being fully aware that he had been several months in Germany recovering from an attempt on his life." They also said that they "salute his courage and will continue to follow his case closely." The Rapporteurs went on to condemn the arrest of protestors and Navalny's supporters who were engaging in peaceful assembly.

Trump Impeached for the Second Time for Inciting Attack on US Capitol

Former President of the United States Donald Trump became the first federal official in United States history to have ever been impeached twice on 13th January 2021. Trump was impeached for "incitement of insurrection" in urging his supporters to march on the Capitol building. Four people died on 6th January, after supporters of Trump breached one of the most iconic American buildings, engulfing the nation's capital in chaos after Trump urged his supporters to fight against the ceremonial counting of the electoral votes that would confirm President-elect Joe Biden's win.

Hundreds of pro-Trump protesters

pushed through barriers set up along the perimeter of the Capitol, where they tussled with officers in full riot gear and about 90 minutes later, the demonstrators got into the building and locked the doors to the House and Senate. Smoke grenades were used on the Senate side of the Capitol, as police worked to clear the building of rioters. Windows on the west side of the Senate were broken and hundreds of officers amassed on the first floor of the building.

The stunning display of insurrection was the first time the US Capitol had been overrun since the British attacked and burned the building in August of 1814, during the War of 1812, according to Samuel Holliday, Director of Scholarship and Operations with the US Capitol Historical Society.

Trump finally called on his supporters to "go home" hours after the riot started, but spent a large amount of time in the one-minute video lamenting and lying about his election loss. In one stunning line, Trump told the mob to "go home", but added, "We love you. You are very special." Trump struck a sympathetic tone to the rioters he himself unleashed, saying, "I know your pain, I know you're hurt. We had an election that was stolen from us. It was a landslide election and everyone knows it. Especially the other side. But you have to go home now. We have to have peace."

However, later on in the evening Trump justified the mob's actions and praised them. "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" he said, in a tweet that was later deleted by Twitter. Others inside the President's orbit tweeted their calls for calm, as the mob repeatedly attempted to take over the building.

UN Treaty Prohibiting Nuclear Weapons Comes into Force

The first nuclear disarmament treaty in more than two decades, came into force on 22nd January 2021, following the 50th ratification of the Treaty on 24th October 2020, which triggered the 90-day period required before the Treaty entered into force. The UN had completed negotiations on the Treaty on the Prohibition of Nuclear Weapons at its New York headquarters in July 2017. The Treaty constitutes "a legally binding instrument to prohibit nuclear weapons, leading to their total elimination." Following negotiations, the Treaty was open to signatories beginning in September 2017.

The Treaty includes a comprehensive set of prohibitions on participating in any nuclear weapon activities. It includes undertakings not to develop, test, produce, acquire, possess, stockpile, use or threaten to use nuclear weapons. The Treaty also prohibits the deployment of nuclear weapons on national territory and prohibits the provision of assistance to any State in the conduct of prohibited activities. It further obliges States parties to provide adequate assistance to individuals affected by the use or testing of nuclear weapons.

In a statement, UN Secretary-General António Guterres hailed the achievement as "an important step towards a world free of nuclear weapons." "Nuclear weapons pose growing dangers and the world needs urgent action to ensure their elimination and prevent the catastrophic human and environmental consequences any use would cause," said the UN Chief.

So far, however, the US and the world's eight other nuclear powers - Russia, China, Britain, France, India, Pakistan, North Korea and Israel - have not signed the Treaty. The International Campaign to Abolish Nuclear Weapons (ICAN), which played a major role in the negotiations for the Treaty, set a more optimistic tone, stating, "Once the Treaty is in force, all States parties will need to implement all of their positive obligations under the Treaty and abide by its prohibitions. States that haven't joined the Treaty will feel its power too - we can expect companies to stop producing nuclear weapons and financial institutions to stop investing in nuclear weapon producing companies."

Supreme Court of Pakistan Frees Men Convicted of Kidnapping and Murdering Daniel Pearl

The Supreme Court of Pakistan, on 28th January 2021, ruled that four men convicted of kidnapping and murdering American journalist Daniel Pearl should go free, a move described by the White House as an "affront to terrorism victims everywhere." Pearl was working as the South Asia Bureau Chief of the Wall Street Journal in

2002, when he was kidnapped in the southern Pakistani city of Karachi, while reporting on Richard Reid, the British terrorist known as the "shoe bomber".

The high-profile abduction drew international attention amid growing concern over the threat posed by radical Islamic terrorism. Assailants later filmed Pearl's beheading and sent it to United States officials. It was among the first propaganda videos targeting hostages created by extremists and helped to inspire other terror groups to film horrific and egregious acts of violence. Four men were arrested in 2002, and convicted of the kidnap and murder of Pearl. One, British national Ahmed Omar Saeed Sheikh, was given the death penalty.

But in April 2019, a High Court in Sindh Province, where Karachi is located, re-examined the case after it was revealed that the investigators did not follow lawful interrogation procedures. Citing insufficient evidence, inconsistencies in police accounts and forced confessions, the Sindh High Court overturned all four men's murder convictions, concluding that "No evidence has been brought on record by the prosecutor to link any of the appellants to the murder of Pearl." Only Sheikh's conviction of abduction still stands, though the accompanying seven-year sentence means he is already eligible for release on time served.

The Court added that the men had "suffered irreparable harm and extreme prejudice" after spending 18 years behind bars and ordered all four to be set free. Pakistan's Supreme Court on 28th January, upheld that decision, ruling against appeals by both the Pearl family and Pakistani authorities.

Matt Murray, editor-in-chief of the Wall Street Journal, described the ruling as "infuriating and unjust," a sentiment echoed by the Biden administration and Pearl's family. White House Press Secretary Jen Psaki said that the US was "outraged" by the decision, which she called an "affront to terrorism victims everywhere, including in Pakistan."

US Secretary of State Antony Blinken said in a statement that the United States was prepared to prosecute Sheikh in the US. "We expect the Pakistani government to expeditiously review its legal options to ensure justice is served," he added.

Pearl's father, Judea Pearl, said that family members "were in shock and total disbelief," at the majority decision, which he described as "a crime against humanity, against journalism, against the core of our civilization. So, we are very shocked and hope some steps will be taken to correct for this injustice." He added that they are asking the US State Department and Department of Justice to "pursue vigorously a request for extraditing Omar [Saeed] Sheikh for this crime as well as other [crimes] he's committed against US citizens and we hope the Pakistani court and government will respond positively to such requests." Pearl's father described the acquittal as a "message of impunity for would-be terrorists and would-be abductors... around the world."

In a statement, acting US Attorney General Monty Wilkinson said that the US was "ready" to take custody of Sheikh to put him on trial in the US. "He must not be permitted to evade justice for his charged role in Daniel Pearl's abduction and murder," the statement said. The four men, who are still in detention following the Court's ruling, have been placed on the country's exit control list, barring them from leaving the country, according to Pakistan's interior ministry. Under global pressure, the Pakistani government has appealed the decision. The appeal seeks to overturn the acquittal and reinstate Sheikh's death penalty ruling.

The Supreme Court of Pakistan on 5th January 2021, ordered the government to rebuild a historical Hindu temple that was vandalized and destroyed a week before in Karak. During the hearing, Chief Justice Gulzar Ahmed directed the authorities to rebuild the Shri Paramhans Ji Maharaj Samadhi Temple and to charge expenses to the local Muslim leader, Mullah Sharif, whom authorities believe incited the riots. Reports reveal that members of the radical Jamiat Ulema-e-Islam party attacked the temple under the direction of a local cleric who opposed the building's renovation plans. Footage shows protesters taking pickaxes to the temple walls and setting it ablaze. Following the attacks, police arrested more than 100 suspects linked to the attacks and suspended dozens of police officers for failing to prevent the attack. Pakistan's Religious Affairs Minister Noorul Haq Qadri condemned the attack, calling it a "conspiracy against sectarian harmony". Prime Minister Imran Khan and Human Rights Minister Shireen Mazari have since promised to ensure Hindu minority group safety at all costs.

Compiled by HARPREET BEDI

The Pandemic of Inequality

By WARIS MASIH, Journalist & Social Activist, New Delhi waris_masih

The COVID-19 pandemic turned the lives of everyone across the globe upside down. Right from the disruption of the economy to a health crisis, the disease has not just created problems for the health of the individuals but also for the other very prominent areas of life. The mental health of millions, something which we rarely talk about, went through an unimaginable situation due to lockdown and restrictions. The pandemic removed the curtains which were very successful in hiding existing inequalities. While the privileged class could afford to shut their doors from the outside world, the economically deprived and disadvantaged people were left on their own. What we saw in India was a massive migration of millions of working-class men and women, who became homeless and penniless overnight and were left with no option but to take the journey on foot towards their hometown, as public transport services were halted. They walked hundreds of miles on foot, carrying their children and luggage. This particular incident shocked and made many Indians emotional. It was a reminder of the kind of insensitive world we live in and the lack of humanity in the society. The State had the twin responsibility, to protect its citizens from the disease and also to protect their social well-being. In *State of Punjab v. Mohinder Singh Chawla, AIR 1997 SC 1225*, it was held that the right to life guaranteed under Article 21 includes within its ambit the right to health and medical care. Additionally, in *Consumer Education and Research Centre v. Union of India, AIR 1995 SC 922*, the Supreme Court held that the right to human dignity would be well within the meaning of right to life and personal liberty. It further held that dignity has been recognized in Charter of Human Rights, in the Preamble and Articles 38 and 39 of the Indian Constitution. In this regard, while dealing with COVID-19 pandemic, the task which the Government was supposed to perform was to protect the health of the citizens while not damaging their dignity. But many actions of the Government have had a lasting impact on the society, especially its economic and social well-being which has led to lowering the dignity of a whole spectrum of individuals.

Its effects have been felt but in a very differential manner. There has been a crucial difference in how people placed differently in the society have faced the consequences of the pandemic. The richest people in the world had their wealth increased multiple times. In the US, billionaires have become richer to the tune of $565 billion in three months since March 2020, according to a report published by the Washington DC-based think tank, Institute for Policy Studies and Clearwater. No one has benefited as much as Jeff Bezos of Amazon, who has seen his wealth increase by a whopping $25 billion since January 2020 as homebound customers lean heavily on online shopping, grocery delivery and streaming. Jeff Bezos

added $13 billion to his net worth on July 2020, the largest single-day jump for an individual since the Bloomberg Billionaires Index was created in 2012. His fortune increased by $74 billion in 2020 to $189 billion, despite the US entering its worst economic downturn since the Great Depression. In India, Mukesh Ambani's net worth rose to $79.3 billion as on 10th August 2020, making him the world's fourth-richest person. Ambani's wealth rose by $22 billion in 2020. Ambani has slowly been shifting his focus to e-commerce, with tech giants seeking to buy a piece of India's fast-growing digital business. While his conglomerate Reliance Industries Ltd was slammed by a slump in demand for oil amid COVID-19, its share price has more than doubled from the low in March 2020, as its digital unit got billions in investments from companies including Facebook Inc. and Google. Share prices of major Indian pharma companies are on fire amidst the raging pandemic. Pharma tycoons like Dilip Shanghvi of Sun Pharma, Reddy family of Dr Reddy's Laboratories, PV Ramprasad Reddy of Aurobindo Pharma, Murali K Divi of Divi's Laboratories, YK Hamied of Cipla, etc. have doubled their net worth during the pandemic. The wealth of Sunil Mittal of Bharti Airtel and Gautam Adani of Adani Group has also grown considerably.

The difference between Indian and American scenarios is that while the political commentators and senators have been pressing for taxing the rich, the Indian Government just had the corporate tax decreased and has not expressed their intentions to withdraw it. India too, should make a similar choice and tax the rich appropriately. While most of the Indian people have been suffering because of job losses and a demand downturn, the fact that the rich have been getting richer all this while, is worrying and indigestible. The right to equality under Article 14 of the Constitution guarantees equality before the law and equal protection of

law. It does not only ensure equality before the law, but in all aspects of life. Economic life of an individual is the most central part of his well-being and its depreciation affects all other areas of his life. In *Sri Srinivasa Theatre v. Government of Tamil Nadu, AIR 1992 SC 1004*, the Supreme Court held that, the two expressions equality before law and equal protection of law do not mean the same thing even if there may be much in common between them. Equality before law is a wide concept which has many different meanings. One meaning that can be attached to it is that there shall be no privileged person or class and that none shall be above law. Another dimension is the obligation upon the State to bring about, through the machinery of law, a more equal society. The line of distinction between the equals and unequals should not be arbitrary but be based on relevant and justifiable reasons reflecting the actual differences in characteristics of the classes. In *Western UP Electric Power and Supply Co. Ltd v. State of Uttar Pradesh, AIR 1970 SC 21*, the Supreme Court held: "Art. 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment had no reasonable relation to the object sought to be achieved by the law." The inaction by the Government to bridge the gap between the poor and the super-rich, would result into creation of new classes. Considering that India is a welfare State, the Government is supposed to take active steps to not let such a situation develop, as it would lead to disastrous inequality between the people. If it happens, the society will undergo the most dreading phases and there will be enormous rifts between people and communities.

Global conversations around the COVID-19 pandemic circled around its impacts on hunger, poverty and inequality, making the world dive again into a time where it had started talking about various global goals like the Millennium Development Goals and Sustainable Development Goals (SDG). The impact of pandemic is more on those who are already poor, whether they are in developed or developing countries. Recently, António Guterres, Secretary-General

of the United Nations, while delivering the 2020 Nelson Mandela Annual Lecture, stated: "The COVID-19 pandemic has played an important role in highlighting growing inequalities. It exposed the myth that everyone is in the same boat. While we are all floating on the same sea, it's clear that some are in superyachts, while others are clinging to the drifting debris." He has beautifully explained the present scenario that has evolved as an after effect of pandemic.

Oxfam, a non-profit organisation that has its operations across the world, has estimated that there are 121 million more people who are on the verge of starvation today due to mass unemployment, disruption in food production and supplies. "As many as 12,000 people could die every day from COVID-linked hunger," declared Oxfam. "The frontline in the battle against the coronavirus is shifting from the rich world to the poor world," commented David Beasley, the executive director of the World Food Programme (WFP). Beasley said in a press conference that the global body was conducting its largest-ever humanitarian response to make food available to millions. Currently, the organisation assists 138 million people. A severe hunger crisis is playing out due to the pandemic, among those who were already surviving on meagre level or with external support.

The pandemic has multiplied inequality amongst working class people. Lockdown policies carried out by many governments to contain the spread of the virus have particularly hit the working poor in developing countries. For these workers, who depend on a daily wage and casual laborious work, the inability to reach their places of work has led to a major decrease in their earnings, with no safety net and high levels of insecurity about the future of their sustenance. Take for example, a street vendor selling vegetables in the streets of Delhi. As the pandemic hit India and the Government issued lockdown orders, the street vendor suddenly found herself without work.

In comparison, the professionals whose work depends on technology and who are able to work from home, the pandemic has had less effect on their income. The majority of workers in developing countries are employed in informal jobs, without the kind of support that workers in rich countries usually get from their governments, such as schemes to alleviate the economic stress. While many developing nations across the globe have increased the scale of social protection schemes as a response to the pandemic, this is absolutely not enough. And it has been observed that these measures never reach the majority of the poor and therefore have little to no impact. Among the suggestions made to the Indian Government to address such inequalities, Oxfam has suggested immediately revising minimum wages and enhancing these at regular intervals.

The pandemic has led to a sudden churn in technological change, helping certain businesses continue their operations digitally and allowing numerous individuals work from home who were earlier unable to. Those nations whose citizens have access to the internet and are comparatively more educated, will actually gain from the move to online technologies such as Zoom for virtual meetings. So, for workers in Singapore and Taiwan, the change to online technologies has been a boon. But countries that are still lagging in the digital race, including many in Sub-Saharan Africa, will fall further behind and this will lead to stress. As for India, it is not untrue that the shift to technology has led to emergence of many new digital based start-ups and mobile applications have registered growth, a class of people that has not been able to get hold of technology and is not literate has borne the brunt of this extraordinary thrust to work from home.

Among those suffering due to isolation

and stay at home orders, the school children have faced the most hurtful time. The pandemic has led to the closure of schools across the globe. In India alone, it has affected the education of as much as 290 million children. Already, there were six million children out of school. This number has the possibility of going up due to economic insecurity in their families due to COVID-19, resulting into many children leaving studies. This has especially affected the girl child. It is being seen by social activists on the field that more and more parents are pushing their children, especially the girl child, to get employed and work as a menial worker to raise funds for the family's maintenance and survival. The world, as per both the World Bank and the International Monetary Fund, has never viewed this level of contraction of the economy in the last eight decades or so like the present year and as may happen in a couple of years to come. According to a study by Brookings, more than 100 million people may have entered utmost poverty. The GDP of India has been estimated to decrease by more than 10% in the year 2020. This has resulted in job losses and increased unemployment. Several private companies have taken a decision to decrease compensation to their employees.

The recent impact of the pandemic is the lack of admission of new children in schools. ASER (Annual Status of Education Report), which is an annual survey that aims to provide trustworthy yearly estimates of children's schooling status and elementary learning levels for each State and rural district in India, has in a recent study stated that many young children have not joined school and there is a huge jump in out-of-school children in the 6-10 age group. This has gone up from 1.8% in 2018 to 5.3% in 2020 and among all children up to 16 years from 4% to 5.5%. One of the reasons may be that the admission formalities may still not be fulfilled due to COVID-19. But basically, it could be that parents have decided to keep their children at home for fear of the virus or the inability to afford their studies. Even in other developing countries of the world, the situation is quite similar. A study by IMF of Latin American countries shows that due to the closing of schools for five long months, more than 144 million children are doing learning via distance learning, which is clearly not sufficient. Economic insecurity of the family-loss of jobs and pay cuts has aggravated the impact and issues of children world over. Alternative methods of teaching evolved in a quick span of time by most schools have led to serious problems for students, especially those from families of low-income groups. The nature of the problems is similar across the globe. Both the ASER study and the IMF report display that the availability of smart phones for learning is inadequate. Further, with internet connectivity being poor, other modes such as TV, radio or sending of study material home have been utilized by institutions. According to the 86th Amendment Act 2002, right to education used to be derived under the Article 14 and 21 as a part of fundamental right guaranteed to all the citizens. The Supreme Court of India in *Mohini Jain v. State of Karnataka and others, AIR 1992 SC 1858* and *Unnikrishnan JP v. State of Andhra Pradesh, AIR 1993 SC 2178*, ruled that the right to education is a fundamental right that flows from the Right to life in Article 21 under Indian Constitution. The crisis that has unfolded for millions of school children has denied them the right to education guaranteed under Article 21A.

All these factors have led to a difficult situation and it is the need of the hour for the state to step in and correct the wrongs which have been committed against the citizens, who have been affected in the most disastrous way and their economic and social justice has been denied to them. It will not take much to grant them what is rightfully theirs. The Government needs to bring in economic schemes which enhance the social and economic well-being of the citizens. Right to equality as guaranteed under the Constitution must be granted to each citizen despite their position in the society.

Confidentiality and Party Autonomy in Arbitration

By PRAGYA RAKSHITA and PRATIKESH SHANKAR, National University of Study and Research in Law, Ranchi

Arbitration is one of the various alternate dispute resolution methods, along with negotiation, conciliation and mediation. It is a quasi-judicial proceeding, where the dispute is resolved by an Arbitral Tribunal, where procedural laws and technicalities are dispensable, so as to ensure expeditious resolution of matters. But, the principles of natural justice must be adhered to during the proceedings.

The Arbitration and Conciliation Act, 1996 (the Act) came into force on 22nd August 1996. It was enacted to consolidate, codify and amend the laws related to domestic as well as international commercial arbitration and enforcement of foreign awards. The Act also codified laws related to conciliation and connected matters. Two major amendments to the Act were passed in 2015 and 2019. The Act was originally divided into three Parts: Part I, dealing with domestic arbitration; Part II, dealing with international commercial arbitration; and Part III, dealing with conciliation. Part IA was inserted via the Arbitration and Conciliation (Amendment) Act, 2019, and it deals with the Arbitration Council of India.

Two of the features of the Act are party autonomy and confidentiality. In this article, these two aspects will be analysed. The main research questions here are that what are the reasons that lead to the inclusion of these concepts in the Act, the provisions in the Act that promote these ideas and the loopholes and shortcoming arising therein.

To reach at answers to these research questions, the backdrop against which the Act was passed and certain relevant documents will be analysed. The provisions of the Act and relevant case laws will also be looked into.

Meaning of Confidentiality and Party Autonomy

The Arbitration and Conciliation Act, 1996 does not define the terms Confidentiality and Party Autonomy. 9th Edition of Black's Law Dictionary defines "autonomy of the parties" as "the doctrine that people have the right to bind themselves legally; a judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by external control such as governmental interference. This is the principle that people are able to fashion their relations by private agreements, especially as opposed to the assigned roles of the feudal system."

The arbitration procedure is based on party autonomy, where both the parties decide the procedure as well

as the circumstances under which an arbitration is sought. Generally, it is made in the form of a contract which is formulated much before the dispute actually arises. The "rules of the game", such as applicable law, the seat of arbitration, the language of the proceedings may also include a provision to govern confidentiality issues.

9th Edition of Black's Law Dictionary defines "confidentiality" as "secrecy; the state of having the dissemination of certain information restricted."

It is often cited that confidentiality is one of the important perceived advantages of arbitration over litigation and there are times when parties opt for arbitration as it keeps the disputes private.

There are numerous advantages conferred by confidentiality in arbitration. For example, confidentiality reduces the possibility of damaging continuing business relations and avoids setting adverse judicial precedents. Additionally, the process offers parties the freedom to make arguments that they would be reluctant to make in a public forum. The private nature of arbitral proceedings offers disputants a forum where they can keep their disputes away from the intrusiveness of the media and the prying eyes of their competitors.

However, the idea that the confidentiality of arbitration affords the parties a more comprehensive shield to guard their information from disclosure than litigation must be qualified. An English Court in *John Forster Emmott v. Michael Wilson & Partners Ltd, [2008] EWCA Civ 184*, considered arbitration to be a private means of dispute resolution and considered an obligation of confidentiality to be implied in the arbitration agreement between the parties.

Confidentiality v. Privacy

Arbitration is a private process but not a confidential one. Parties to arbitration often erroneously believe that their disputes will remain confidential due to the private nature of the proceeding. The subtle differences between privacy and confidentiality have caused confusion and lead parties to mistakenly believe that their disputes are automatically confidential. The contrast between the duty of confidentiality as a right of non-disclosure and the procedural system of privacy.

Privacy in arbitration refers to the inability of a third party to attend and observe the arbitration hearing if the parties or even the arbitrator have not given their consent. The private nature of the arbitral process limits its transparency in that unauthorized third parties are not allowed to participate in or observe the proceeding.

On the other hand, confidentiality is more focused on information pertaining to the content of the process, the evidence adduced and the documents produced, the addresses to and of the tribunal, and the records of the hearings or the arbitral award rendered. There is no consensus on the extent to which the private nature of arbitration creates a duty of confidentiality.

Hence, privacy and confidentiality are distinguishable in that privacy deals with who may or may not be present at an arbitral hearing, while confidentiality deals with the obligations of the parties not to reveal any information or materials concerning the arbitration.

Need of Confidentiality and Autonomy

The need of confidentiality and party autonomy in arbitration proceedings can be deciphered from the purpose for which this alternate dispute resolution mechanism evolved. To find out the purpose, texts such as the preamble of the Act, the 246th Law Commission Report and others will be analysed in

this part of the project.

Statement of Objects and Reasons of the Act

The Statement of Objects and Reasons of the Act enlists a number of objects that are sought to be fulfilled by the codification of the Arbitration and Conciliation Act, 1996.

Every arbitration proceeding is individualized in the kind of dispute it deals with and/or the contractual or other relationship it arises from. So, to be able to serve the specific needs of each arbitration, it becomes necessary that the parties are granted sufficient autonomy to decide on the arbitral procedure to be followed that would be best suited for their particular arbitration.

The fourth objective reinforces the importance of party autonomy in arbitration as the scope or jurisdiction of the arbitral tribunal is ascertained by the parties themselves and one of the main objects of the Act is to uphold this autonomy of the parties by ensuring that the tribunal acts within the limits of its jurisdiction as imposed upon it by the parties in exercise of their autonomy.

Another objective of the Act was to minimize the role of Courts, which can be done by increasing party autonomy.

Finally, the concept of party autonomy is also reflected in the objects of the Act that provide for the settlement of the issues through processes like conciliation and mediation and such settlement agreements to be treated as final. This shows that the autonomy of the parties in deciding the terms of their settlement is to be respected.

Thus, it is clear from the analysis of the main objects of the Act that to achieve these objectives, granting party autonomy is an essential step.

246th Law Commission Report

One of the most major amendments to the Act was done in the year 2015, based on the 246th Law Commission Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014, so it's appropriate to analyse this Report.

While discussing the reason for the implementation of the Act in the Report, the words of Justice DA Desai in *Guru Nanak Foundation v. Rattan Singh, AIR 1981 SC 2075*, were pointed out, which were "Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940."

The Act, like its predecessor, was enacted so as to enable parties to resolve their disputes in a less formal and speedy manner by allowing them the autonomy to avoid procedural hassles. So, to give effect to the main purpose for which the Act was enacted, party autonomy becomes an essential factor.

In paragraph 20 of the Report, the need for a balance between judicial intervention and judicial restraint has been emphasized. It has been stressed that while party autonomy, by practicing judicial restraint, is important, the role of the Courts through judicial intervention can also not be ignored. Rather, the Courts must work in a partnership with the Tribunals.

In paragraph 57 of the Report, it is noted that there must be a balance maintained between procedural fairness and the binding nature of the arbitration agreement. The Commission, in its Report, opined that party autonomy cannot be exercised in complete disregard of the principles of impartiality and independence of the arbitral Tribunal, specifically at the time of the constitution of the Tribunal. For instance, the Commission

pointed out, that a party to a dispute cannot itself be allowed to be the arbitrator even if the parties have agreed to it. So, party autonomy cannot be stretched to the point of negating the principles of independence and impartiality.

Further, in paragraph 60, it is stated that real and genuine party autonomy must be respected.

Amendment Act, 2015

Analysis of the Statement of Objects and Reasons of the Amendment Act, 2015 is also important to understand the need for party autonomy in arbitration proceedings. It is clear that the Act attempts to minimize intervention of the Court, for achieving which end, party autonomy is of utmost importance. So, through this Amendment Act, 2015, the Parliament attempted to increase party autonomy in a balanced manner by providing that the parties may extend the prescribed time for completion of arbitration proceedings by six months, or they may agree to opt for completion of arbitration in a fast-track manner.

One amendment under this Amendment Act, 2015 that was controversial with respect to party autonomy was about the model fee Schedule on the basis of which High Courts were to frame rules for the purpose of determination of fees of arbitral tribunal. The dispute was that parties should be at liberty to determine the fees of the arbitrators. This issue was settled by the Supreme Court in favour of party autonomy in *NHAI v. Gayatri Jhansi Roadways Ltd, Civil Appeal No. 5383 of 2019* and *Gammon Engineers & Contractors v. NHAI, Civil Appeal No.5384 of 2019*.

So, it is clear from this Amendment Act, 2015 that party autonomy is important and must be upheld in such a manner that it is balanced with the administration of justice.

Justice BN Srikrishna High Level Committee Recommendations

The Amendment Act, 2019 was drafted on the basis of the recommendations made by this Committee and hence it is expedient to analyse its report. The Committee was constituted with a view to strengthening institution arbitration in India, for which it recommended certain amendments in the Act to minimize the need to approach the Courts for appointment of arbitrators. It also recommended the addition of a separate provision for confidentiality. According to its Report, "The ACA does not contain any provision expressly providing for confidentiality of arbitral proceedings. In the absence of such a provision, parties must fall back on any confidentiality clause in the arbitration agreement or the arbitral rules of the administering institution." The Committee hence recommended the insertion of a Section in the Act that expressly provides for confidentiality so as to strengthen the arbitration systems in India by ensuring a standard statutory provision of confidentiality applicable to all arbitration proceedings. The shows the importance placed on confidentiality.

Amendment Act, 2019

One of the main objectives of this Amendment Act, 2019 was "to provide that the arbitrator, the arbitral institutions and the parties shall maintain confidentiality of information relating to arbitral proceedings." So, it is apparent that confidentiality was considered as an important aspect of arbitration in India.

Provisions in the Act

There are multiple provisions in the Act that promote the idea of party autonomy and confidentiality. This part of the research paper discusses the Sections from the Act that codify the concepts of party autonomy and confidentiality in arbitration.

Section 4 of the Act contains that, "... any provision of this Part from which the parties may derogate...", which shows that there are derogatory provisions in the Act, so as to maintain party autonomy. Section 5 of the Act emphasizes that the role of the Court has to be limited to only those functions as are expressly provided for in the Act. Such a provision ensures that the parties enjoy a certain level of autonomy without the interference of the Court.

Sections 7 and 8 of the Act provide for arbitration agreement and reference to arbitration made on the basis of the existence, validity and scope of such arbitration agreement respectively [*Kalpana Kothari v. Sudha Yadav, AIR 2002 SC 404*]. Even while the matter is pending before a Court, the parties may agree to go for arbitration [*PA Gajapathi Raju v. PVG Raju, AIR 2000 SC 1886*]. The parties are also at liberty to decide their own format of such an arbitration agreement [*SN Prasad v. Monnet Finance, AIR 2011 SC 442*], as the only necessity is that it is written and the terms used in the agreement are mandatory in nature [*Wellington Associates v. Kirit Mehta, AIR 2000 SC 1879*]. These provisions grant the liberty to the parties to bypass the jurisdiction of the Court via a mutual agreement. The parties may exclude the jurisdiction of the Courts in first instance through a *Scott v. Avery* Clause, which creates arbitral award as a pre-condition for instituting a matter before a Court, that is also recognized in India [*Vulkan Insurance v. Maharaj Singh, AIR 1976 SC 287*].

Section 10 prescribes the number of arbitrators. According to this Section, the parties are free to decide upon the number of arbitrators, provided that such number should not be even. But the Courts have held that even if the parties choose an even number of arbitrators, such arbitration is valid, and the award will not be set aside simply by the reason of even number

of arbitrators as there was no dispute caused because of it [*Narayana Prasad Lohia v. Nikunj Kumar Lohia, AIR 2002 SC 1139*].

Under Section 11 of the Act, the parties are free to appoint the arbitrators based on any procedure as agreed upon by them. The Court does not intervene in such appointment, unless the parties fail to reach an agreement over the procedure to be employed for such appointment, or if they fail to execute the procedure agreed upon [*Konkan Railway Corp. Ltd v. Mehul Construction Co., AIR 2000 SC 2821*].

Sections 12 to 15 of the Act provide for grounds to challenge the appointment of an arbitrator, the procedure for such challenge, the ways in which his mandate may be terminated and the procedure for the appointment of the substitute arbitrator. These provisions grant autonomy to the parties as they are not forced to continue with an arbitrator that they are not comfortable with. Under Section 13, the parties are at liberty to agree upon a procedure for challenging the mandate of an arbitrator. Section 15 can even be considered as a residual provision, as it covers all the cases that are not covered under the specific conditions given in Sections 12 to 14 for the termination of the mandate of an arbitrator.

The provisions from Sections 19 to 26 of the Act are about the procedure to be followed during arbitration, which includes provisions regarding the place of arbitration, the language to be used, the date to be taken as the commencement of the proceedings, the question regarding oral or written hearings etc.

The parties are given a wide range of autonomy regarding these procedural rules, as the procedure may be regulated either solely by the statute, or by the agreement between the parties [*Rakesh Kumar v. State of Himachal Pradesh, 2002 (3) ArbLR 187 (HP)*].

Section 29 further stipulates that the parties may agree to authorize the presiding arbitrator to decide any disputes regarding any procedural rules.

Section 29B, which was inserted by the Amendment Act, 2015, allows the parties to agree to adopt the fast-track procedure, according to which the prescribed time limit is six months instead of twelve. So, the concept of party autonomy has been extended to the prescription of time limit within which arbitration proceedings are to be concluded.

Section 30 allows the parties to go for settlement by way of mediation, conciliation or other methods as well. Under Section 32 the parties may agree to terminate the proceedings of arbitration. Sections 31 and 33, which are regarding the arbitral award, also contain the phrase "unless otherwise agreed by the parties", which means that irrespective of the provisions in the Act, the parties have the autonomy to agree to the contrary.

Substitution of Section 31(8) and insertion of Section 31A via the Amendment Act, 2015 led to controversy regarding the autonomy of parties in deciding the fees of the arbitrators. But this controversy was resolved and party autonomy upheld by the Supreme Court [*NHAI v. Gayatri Jhansi Roadways Ltd, Civil Appeal No.5383 of 2019* and *Gammon Engineers & Contractors v. NHAI, Civil Appeal No.5384 of 2019*].

By way of the Amendment Act, 2019, Section 42A has been inserted into the Act. Section 42A ensures the confidentiality of all arbitral proceedings except that of the award, which may be disclosed as far as may be necessary for its execution. For giving full effect to the concept of confidentiality through this provision, the Section also includes a non-obstante clause.

Loopholes and Shortcomings

There are certain shortcomings in Section 42A, which are likely to pose certain problems in future which will require judicial intervention. Few of these problems are:

i) The exception to the confidentiality clause is only limited to disclosure for the purpose of enforcement of the award. It ignores all other circumstances under which such disclosure may be required, such as by legal duty; or to protect or enforce a legal right; or to enforce or challenge an award before a Court, as was recommended by the High-Level Committee.

ii) It takes away party autonomy, as Section 42A begins with a non-obstante clause with respect to any law and not unless otherwise agreed between the parties.

iii) Further, the provision only binds a specific list of entities by confidentiality and ignores other entities, such as witnesses (fact or expert), transcribers, Tribunal Secretary, hearing room facility service providers, third-party funder, etc., who may also breach such confidentiality.

iv) Moreover, the provision does not specify any consequences for such breach of confidentiality.

v) Another problem is regarding the harmonious construction of Section 42A with Section 43K, which allows the Arbitration Council of India to maintain an electronic depository. This could lead to a conflict and the High-Level Committee, anticipating this, suggested that only Courts may be allowed access to this depository.

Hence, it clear that the provision has many loopholes, which will be plugged by the Judiciary through its pronouncements in future. As far as the concept of party autonomy is

concerned, the major shortcoming is regarding how to maintain a balance between the autonomy of parties and the actual adjudication of justice.

Artificial Intelligence

With advancements in the field of artificial intelligence, its role is highly debated in arbitration. According to Justice MN Venkatachaliah, former CJI said in a Legal Leadership Conclave, on the subject of "Challenges and future of Arbitration and Mediation in India" that: "Arbitration and Mediation must become the new "mantras" for judicial salvation." On the other hand, Justice BN Srikrishna, as the head of the High-Level Committee, emphasized that the role of natural justice as it is still considered indispensable because of its human touch.

Whereas, Avinash Amble, an expert on Artificial Intelligence, while speaking on "Use of Artificial Intelligence in Conflict Resolution", stated that it's at least three decades before artificial intelligence can be used for dispute resolution, as it is incapable of equitable distribution to all, which an ADR forum intends to achieve. Though he did refer to a mock trial, wherein the artificial intelligence, when pitched against a parallel court, adjudged almost the same amount of punitive damages, even though both adopted different procedure and methodology.

Hence, the role of artificial intelligence in arbitration is a real possibility, even though a far one. This will raise even more questions regarding confidentiality and party autonomy. Are artificial intelligence arbitrators capable of appreciating the individualized nuances in each arbitration? Can the sanctity of confidentiality be maintained with the increased role of artificial intelligence, and that of the proficiency of hackers?

So, this will present even more loopholes and shortcomings in the law, maybe even to the extent of needing an altogether new statute.

Conclusion

Party autonomy and confidentiality, though very important aspects of arbitration, are not defined anywhere in the Act. Their meaning is rather derived from the dictionary and through judicial interpretations. Their importance and need have also been discussed in this article. Their need is understood by a thorough analysis of various documents, such as the Law Commission Reports and Committee Recommendations. Furthermore, the Statement of objects and purpose of the main Act itself and its Amendments were also analysed. Through these, it is clear that the ideas of party autonomy and confidentiality are important to further the objectives of the arbitration process. To give effect to the main principles and purposes behind arbitration, it becomes impertinent to adopt policies that enhance party autonomy and confidentiality.

There are various provisions in the Act that either directly or incidentally, strengthen these ideas of party autonomy and confidentiality. Despite the presence of these Sections, there are certain loopholes and shortcomings. With regard to party autonomy, the main question faced by the adjudicating authorities is about the balance that needs to be maintained between the autonomy of parties and the actual deliverance of justice, which might require some extent of judicial intervention and control. Furthermore, the provision regarding confidentiality, as included by the recent amendment of the Act encompasses multiple shortcomings, as have been enlisted above.

The role of Artificial Intelligence and the threats imposed by the same on the concepts of party autonomy and confidentiality have also been discussed in brief in this paper.

Thus, though the Act encompasses various important facets of party autonomy and confidentiality, it still has a long way to go before it can even claim perfection, which is probably impossible to achieve.

Witness Protection Scheme, 2018

By CHHAYA KHOSLA, Advocate, New Delhi

Witnesses play a vital role in facilitating the courts to arrive at correct findings on disputed questions of facts and to find out where the truth lies. They are the eyes and ears of the criminal justice system. When a witness to an offence is threatened, killed or harassed, it is not only the witness who is suffering, but also the fundamental right of a citizen to a free and a fair trial that is vindicated and hampered. This was the observation of the Supreme Court in the case of *Himanshu Singh Sabharwal v. State of Madhya Pradesh and others, AIR 2008 SC 1943*.

Today, the condition of witnesses in Indian legal system can be termed as 'pathetic'. Commonly, witnesses are bribed, threatened, abducted, even maimed or done away with. There are many threats faced by the witnesses at various stages of an investigation and then during the trial of a case. Apart from facing life threatening intimidation to itself and to its relatives, witness may have to face the trauma of attending the court regularly. For all these reasons, people do not want to step into the role of a witness and do not wish to come forth to testify in the courts of law.

As a result, the Indian criminal justice system is flooded with the problem of hostile witnesses, which is a result of the precarious condition of witnesses due to the present attitude of the whole criminal system towards them.

In this context, the Supreme Court has from time to time emphasized the imperative need for urgent legislative measures for providing protection to the witnesses so that the criminal trials do not get hampered by events like the witnesses turning hostile, or witnesses not coming forth to testify in Courts of Law.

In *Sakshi v. Union of India, Writ Petition (Criminal) No.33 of 1997*, the Supreme Court stressed that there is a dire need to come up with legislation for the protection of witnesses. The Court also issued certain guidelines on the procedure of taking of evidence from a child witness.

In *Neelam Katara v. Union of India, Writ Petition (Criminal) No.247 of 2002*, the Supreme Court observed that the edifice of administration of justice is based upon witnesses coming forward and deposing without fear or favour, without intimidation or allurements in court of law. If witnesses are deposing under fear or intimidation or for favour or allurement, the foundation of administration of justice not only gets weakened, but it may even get obliterated.

The Supreme Court in *Ramesh and others v. State of Haryana, Criminal Appeal No.2526 of 2014*, on analysis of various cases observed that, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

(i) Threat/intimidation;

(ii) Inducement by various means;

(iii) Use of muscle and money power by the accused;

(iv) Use of stock witnesses;

(v) Protracted trials;

(vi) Hassles faced by the witnesses during investigation and trial;

(vii) Non-existence of any clear-cut legislation to check hostility of witness.

Justice Malimath Committee Report on Reforms on Criminal Judicial System, 2003, remarks that, time has come for a comprehensive law being enacted for protection of the witnesses and members of his family.

In 2009, the legal provision of Section 195A of CrPC was brought into force which provides a relief to the witnesses in case of threatening etc. which reads as under:

"Section 195A- Procedure for witnesses in case of threatening, etc. - A witness or any other person may file a complaint in relation to an offence under Section 195A of the Indian Penal Code (45 of 1860)."

But the above provision is not sufficient

for providing adequate security and protection to the witnesses and their family members in heinous and terror crimes.

Therefore, in the matter of *Mahender Chawla and others v. Union of India and others, Writ Petition (Criminal) No.156 of 2016*, the Supreme Court had an occasion to comment on the criminal justice system and discussed in length about the witness protection system in India. In the said case, Ministry of Home Affairs, prepared the draft Witness Protection Scheme, 2018 and filed the same before the Supreme Court. Further, the Central Government gave an affidavit stating that the said Scheme is based on inputs received from 18 States/UTs, 5 State Legal Services Authorities. The said affidavit also stated that the said Scheme has been finalized in consultation with National Legal Services Authority (NALSA). While disposing the above petition, the Supreme Court approved the Witness Protection Scheme, 2018 and directed the Union of India as well as Union Territories to enforce the Witness Protection Scheme, 2018, in letter and spirit. The Supreme Court further directed that the said scheme shall be the law under Articles 141 and 142 of the Constitution till the enactment of suitable parliamentary and/or State Legislations on the subject.

Witness Protection Scheme, 2018

The objective of the Witness Protection Scheme, 2018 is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of justice. The Scheme is also aimed to identify the series of measures that may be adopted to safeguard witnesses and their family members from intimidate and threats against their lives, reputation and property. The Witness Protection Scheme, 2018 provides for adequate security and protection to the witnesses and their family members and these provisions will encourage and enable the witnesses to come forward and give evidence in heinous and terror crimes.

Categories of Witness as Per Threat Perception

Category 'A': Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

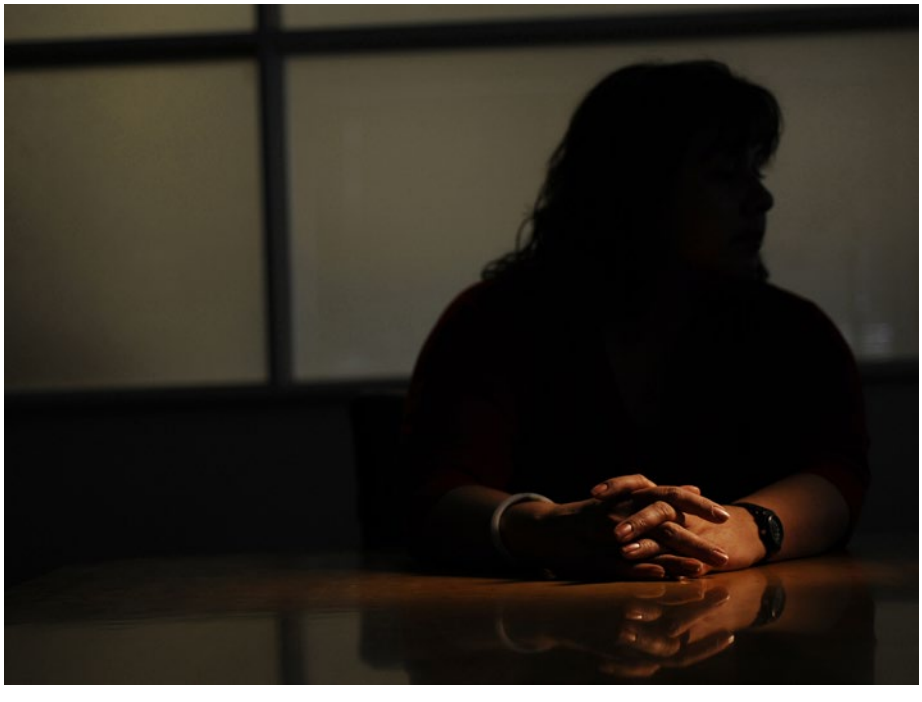
Category 'C': Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

State Witness Protection Fund

There shall be a Fund, namely, the Witness Protection Fund from which the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority and other related expenditure, shall be met. The said Fund shall be operated by the Department/Ministry of Home under State/UT Government. The Witness Protection Fund shall comprise the budgetary allocation made in the Annual Budget by the State Government; Receipt of amount of costs imposed/ordered to be deposited by the Courts/Tribunals in the Witness Protection Fund; Donations or contributions from Charitable Institutions or Organizations and individuals permitted by Central/ State Governments; Funds contributed under Corporate Social Responsibility.

Filing of Application Before Competent Authority

The application for seeking protection order under this scheme can be filed in the prescribed form before



the Competent Authority of the concerned District where the offence is committed, through its Member Secretary along with supporting documents, if any.

Procedure for Processing the Application

(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e) While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held in-camera by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT.

However, the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the concerned Police Sub-Division.

Types of Protection Measures

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration, not exceeding three months at a time. They may include:

(a) Ensuring that witness and accused do not come face to face during investigation or trial;

(b) Monitoring of mail and telephone calls;

(c) Arrangement with the telephone company to change the witness's telephone number or assign him/her an unlisted telephone number;

(d) Installation of security devices in the witness' home such as security doors, CCTV, alarms, fencing, etc.;

(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

(f) Emergency contact persons for the witness;

(g) Close protection, regular patrolling around the witness' house;

(h) Temporary change of residence to a relative's house or a nearby town;

(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;

(j) Holding of in-camera trials;

(k) Allowing a support person to remain present during recording of statement and deposition;

(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

(m) Ensuring expeditious recording of deposition during trial on day-to-day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

(o) Any other form of protection measures considered necessary.

Monitoring and Review

Once the protection order is passed, the Competent Authority would monitor its implementation and can review the same in terms of follow-up reports received in the matter. However, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly follow-up report submitted by the Witness Protection Cell.

Protection of Identity

During the course of investigation or trial of any offence, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority through its Member Secretary.

Upon receipt of the application, the Member Secretary of the Competent Authority shall call for the Threat Analysis Report. The Competent Authority shall examine the witness or his/her family members or any other person it deems fit to ascertain whether there is necessity to pass an identity protection order.

During the course of hearing of the application, the identity of the witness shall not be revealed to any other person, which is likely to lead to the witness identification. The Competent Authority can thereafter, dispose of the application as per material available on record.

Once, an order for protection of identity of witness is passed by the Competent Authority, it shall be the responsibility of Witness Protection Cell to ensure that identity of such witness/his or her family members including name, parentage, occupation, address, digital footprints are fully protected.

As long as identity of any witness is protected under an order of the Competent Authority, the Witness Protection Cell shall provide details of persons who can be contacted by the witness in case of emergency.

Change of Identity

In appropriate cases, where there is a request from the witness for change of identity and based on the Threat Analysis Report, a decision can be taken for conferring a new identity to the witness by the Competent Authority.

Conferring new identities includes new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The new identities should not deprive the witness from existing educational/professional/property rights.

Relocation of Witness

In appropriate cases, where there is a request from the witness for relocation and based on the Threat Analysis Report, a decision can be taken for relocation of the witness by the Competent Authority.

The Competent Authority may pass an order for witness relocation to a safer place within the State/UT or territory of the Indian Union keeping in view the safety, welfare and wellbeing of the witness. The expenses shall be borne by the Witness Protection Fund.

Witnesses to be Apprised of the Scheme

Every State shall give wide publicity to this Scheme. The IO and the Court shall inform witnesses about the existence of Witness Protection Scheme and its salient features.

The Witness Protection Scheme needs to be followed and implemented urgently so as to provide protection to the witnesses so that the criminal trials do not get hampered by the witnesses turning hostile or witnesses not coming forthwith to testify in Courts of Law.

#PrivacyMatters

Significance of WhatsApp's New Privacy Policy

By AAMOD VAIRAGKAR, Legal Analyst, AIR Law Academy & Research Centre, Nagpur

Since 5th January 2021, users on one of the most widely used messaging platforms in the country, WhatsApp, have been receiving in-app notifications about the company's updated Terms of Service and Privacy Policy. As per the notification, one will not be able to send or receive messages after 8th February, until the updated terms and conditions are accepted. WhatsApp's latest update left several users unsure about their privacy, especially in terms of what personal data may now be shared with the app's parent company Facebook. Other questions include possible compromise of financial transactions data, security around personal chats, and doubts about the app's end-to-end encryption guarantee. Many have even recommended moving to other platforms in a bid to keep their messages secure.

While WhatsApp has clarified the terms of the update on its blog and via Twitter - reiterating that the new terms will have no impact on private messaging or individual data - independent experts have put forward their own theories explaining its implication for a general, individual user.

Recently, the Supreme Court issued notices and sought responses from WhatsApp, Facebook and the Central Government in this matter concerning the instant messaging app's new privacy policy. Referring to Facebook and the messaging platform owned by it, a the Bench comprising of Chief Justice of India SA Bobde, along with Justices AS Bopanna and V Ramasubramanian said that they may be $2-3 trillion companies, but people value their privacy more than money and that it is the Court's duty to protect user privacy.

Senior Advocate Kapil Sibal, who appeared for WhatsApp, told the Court that the same WhatsApp policy would be applicable everywhere except in the European Union, which is governed by a special law.

Arghya Sengupta, Research Director at Vidhi Centre for Legal Policy says that, "Had the data protection law or regulation been in place, this issue would not have arisen in the first place. Sengupta further adds that, "Personal Data Protection Bill, which was introduced by the Parliament and which came out of the Srikrishna Committee Report, says that you can only use the information for purposes that are reasonably linked to the purpose for which the information was given. If that Section was there, then this new update in WhatsApp's privacy policy would have been illegal. This is exactly the reason as to why users in the European Union are safe from this change."

"What is practically happening is, users have signed up to WhatsApp because they want to communicate with their friends and family. So, they are giving personal data for this, while WhatsApp is using this data and sharing it with people to run their own businesses. That, actually, is the core of the issue - that the purpose that you are using the information for is not reasonably connected to the purpose for which the user is giving that information to you," Sengupta explained.

"There is only very limited protection which is available under the Information Technology Act," says Apar Gupta, Executive Director of Internet Freedom Foundation, a digital liberties organisation. "It remains ordinarily unenforceable and it does not provide any credible remedy. It stands in contrast to other jurisdictions, specifically European countries, where, in fact, fines have been imposed on Facebook for integrating WhatsApp data - which were one of the conditions under which Facebook was permitted to purchase and operate WhatsApp by the Competition Commissions of certain European countries," Gupta adds further.

"India's dearth of a data protection law also means that there is no relief that a user can get in case of a breach or misuse of data," as pointed out by Prasanth Sugathan, Legal Director of digital rights organisation, Software Freedom Law Centre (SFLC).

Tripti Jain, a lawyer, researcher at Internet Democracy Project says, "This

clarification/FAQ by WhatsApp aims to re-instil trust in people that they have lost because of the new privacy policy, however, it has proven to be counterproductive. In fact, what should be noticed is that the clarification briefs only about things WhatsApp cannot do. It fails to delineate what WhatsApp can do with personal data of individuals and how it does." Jain further adds, "When you share your location with someone on WhatsApp, it is sent as an encrypted message and hence is not shared. In that sense, this claim may be correct, however WhatsApp collects your location data at various instances; when the location service is turned on the phone, WhatsApp is taking your IP address and your location. For certain services it is also using your location even when the location feature is turned off. This part is missing from their explanation."

"Technically the statement may be correct but it's cleverly worded," says Aniruddh Nigam, Research Fellow at Vidhi Centre for Legal Policy. Nigam explains that their privacy policy still states that all the data under the "Information we collect" section may be shared with other Facebook companies, which includes other kinds of metadata like frequency and duration of activity, group names, battery level, location identifiers (which might technically be different from 'shared location') and the numerous other information listed therein. A lot more details have been added here from before, he says.

Nigam further adds, "While it is not reading actual messages per se but in its privacy policy WhatsApp has now confirmed that it collects a lot of metadata which is fairly invasive and would allow WhatsApp and the Facebook ecosystem apps to make precise inference about one's activities: such as it collects information about the time and frequency of interactions on WhatsApp. It's collecting the group names when you're a part of some groups."

"Facebook has only one business model surveillance fuelled Ad-sales, although this change in the policy keeps end to end encryption sacrosanct, that is, nobody can still read the content of the messages on WhatsApp including Facebook but from now on in the name of interoperability far more metadata will be shared between Facebook and WhatsApp," says technology lawyer Mishi Choudhary, Legal Director at SFLC New York.

Subimal Bhattacharjee, Member of the Editorial Board of the Cyber Journal of Chatham House says that, "Clearly, the government has to make the PDPB into law sooner than later so that such restrictive practices can never be introduced in the first place. After all, WhatsApp did make an exception for its users in the European Union. At the same time, for the Competition Commission of India, this is a classic case of an organisation using its near monopolistic power in the market to push through something that is not in the consumer interest. The fact remains that tech giants need more legal and regulatory watch, given the digital proliferation in the country. As Digital India expands and brings in more users from the current base of 70 crore and more take to social media for communications and business, they must be ensured a safer digital space, given that most wouldn't be aware of the reach of the data being generated."

Senior Advocate Shyam Divan pointed to WhatsApp's different privacy standards for users in India versus those in Europe. The standards must not be lowered for Indian users, he told the Court. There is a great amount of metadata that's shared and in the absence of a data protection law, there must be a direction to the Central Government to not allow the implementation of the revised privacy policy.

Bambi Bhalla, an Associate at Obhan and Associates says that, "Lack of a vigorous data protection system in place in India presently, especially given the digital proliferation in the country has been brought to light owing to popular social media platform WhatsApp, when it decided to update its terms of use and privacy policy. Briefly, the updated policy of WhatsApp states that the platform shall be sharing its user data, including personal data collected by it with other Facebook companies. Moreover, users will not have the option to opt-out of sharing such information if they wish to continue using the platform. Contrarily, WhatsApp has also introduced separate privacy-friendly policies in the EU region owing to the existence of the GDPR."

WhatsApp head, Will Cathart, stated that the policy update describes business communication and adds transparency. "It does not impact how people communicate privately with friends or family," Cathart tweeted. Further, Cathcart, took to Twitter to reiterate that the company is 'committed to providing private communication' protected by end-to-end encryption and 'that's not changing'.

At the end of day, it is important to note that WhatsApp is end-to-end encrypted meaning no third-party can intercept the message or decrypt it. Only the sender and receiver can see the plaintext of the messages, videos and images. However, the encryption is only on the WhatsApp app. It does not extend to the back-up files of the chats that are saved in a folder on the device or on the cloud devices. Moreover, screenshots of chats are saved in the phone's gallery. These are all outside of the encrypted WhatsApp platform.

WhatsApp is facing immense backlash in India over its upcoming privacy policy and on account of availability of many safer alternatives like Telegram, things are not looking so well for WhatsApp.

What is Convenience Note?

By SANDEEP JALAN, Advocate, Mumbai

As the name would indicate, a Convenience Note is a note that is tendered before a court in any judicial or quasi proceeding, which makes job of the presiding judge convenient in the dispensation of justice. The Supreme Court of India, in *Kaushal Verma v. State of Chhattisgarh, Criminal Appeal No.843 of 2020*, on 8th December 2020, had the occasion to whole heartedly praise the Standing Counsel for the State of Chhattisgarh for tendering synopsis of the case in 2 pages "Convenience Note", which gave snapshot of the entire case and assisted the Court in quickly appreciating the facts of the case; and passing appropriate order. The Court went on to direct the Registry that, "Note may be taken as the standard format by all the learned counsel appearing for various State Governments in this Court. The Registry may circulate copies of this order to all the learned Standing Counsel for the States."

A Convenience Note is a written note of argument, which the parties to the lis may tender to the court, post or prior to their oral argument, or in lieu of oral arguments.

The concept of Convenience Note is not something new, and is well recognized under Civil Procedure Code, 1908 (CPC) and Criminal Procedure Code, 1973 (CrPC), but the structure of the Note makes all the difference. The CPC, under Order 18 Rules 3-A, 3-B, 3-C, and 3-D; and CrPC, under Section 314, spell out provisions for written arguments. Nevertheless, the Written Note of Arguments may be tendered in any hearing of the application under suit or in criminal trial, or in any judicial or quasi-judicial proceeding, where the Court or the Tribunal or any Administrative Authority may be adjudicating upon some important rights of the parties before it.

Coming to the structure of the Convenience Note, it would all depend on the nature and the stage of the proceeding in which it would be tendered. But whatever be the format, two benchmarks may be kept in mind whilst drafting a Convenience Note: (i) It must be such, that aptly spells out the material facts of the case and arrange the facts in orderly fashion. (ii) It must be such, that aptly crystallizes the issues, or the principal issue involved in the lis and exactly pin-point/spotlight the legal and factual material, from the records of the proceedings, which answers the issues that have emerged. In the abstract sense, a Convenience Note must be such, which appeals to the sense of justice, that, relief must be granted or that the relief must not be granted. Let us formulate the structure of Convenience Note for various nature of legal proceedings.

To start with, let us look at probable headings of a Convenience Note in a civil suit trial, at the final stage of the proceedings. The headings may include and may start with - Tabular List of Dates and Events, followed by submissions (i) The Nature of Suit: Whether it is a suit for injunction or for specific performance of contract or suit for price for goods sold and delivered, etc; (ii) Parties to the Suit: Spelling out very brief introduction of the parties in the suit and their relationship, inter se; (iii) Description of the Suit Property: If the suit seeking substantial relief as to declaration or injunction or possession of any immovable property; (iv) Jurisdiction of the Court: Briefly spelling out as how the court has, or does not have, the jurisdiction to entertain the present suit; (v) Limitation: Spelling out as how the suit is filed or not within limitation period; (vi) Reliefs Claimed: Summarizing the principal and consequential reliefs claimed; (vii) Plaintiff's Case: Summarizing the whole case of the Plaintiff, narrating crucial facts; (viii) Stand of Defendant in Written Statement: Summarizing the defence of Defendant; (ix) Main Issues Framed; (x) Evidence Led by Plaintiffs/Defendants: Eliciting documentary evidence led in support of the case and further eliciting crucial statement made in Affidavit of Evidence remaining unchallenged

in cross examination; or eliciting how the documents led in evidence are inadmissible or are not proved in accordance to law, or eliciting the admissions made by Plaintiff/ Defendant or their witnesses in cross examination or other admissions made; (xi) Compliance/Non-Compliance to Applicable Legal Provisions and Judgments Relied Upon; (xii) General Submissions on the Whole Case: Dealing with specific defences/plea of the Defendant or dealing with specific contentions/plea of the Plaintiff; (xiii) Main Points to be Urged: Recapping of main points, legal and factual, whilst urging the Court to specifically deal with these points whilst recording the finding on any fact; (xiv) Final Submission: Stating that, having regard to the facts asserted, being proved/not proved/legally unsustainable and the legal position, the reliefs claimed for, must be granted/must not be granted. The above template/headings may be used in any other civil proceeding, including before any Statutory Tribunals, of course by making necessary and requisite changes.

Coming to the probable headings of a Convenience Note in a civil suit, at the interim stage claiming interim reliefs. Taking hint from above, the headings may include and may start with - Tabular List of Dates and Events, followed by Submissions (i) The Nature of Suit; (ii) Parties to the Suit; (iii) Description of the Suit property; (iv) Jurisdiction of the Court; (v) Cause of Action or the Alleged Cause of Action; (vi) Interim Reliefs Prayed For; (vii) Case of the Plaintiff; (viii) Stand of the Defendant; (ix) The Main Controversy to be Dwelled Upon by Court; (x) Prima Facie Case/No Cause of Action: Stating how the material facts asserted and documents placed on record by Plaintiff, have remained undisputed, or, how facts asserted are false and frivolous and documents led, are irrelevant or forged; (xi) Balance of Convenience and Irreparable Injury Test: Spelling out as how the Plaintiff/ Defendant would be disproportionately prejudiced if interim reliefs are granted or not granted; (xii) Compliance/ Non-Compliance to Applicable Legal Provisions and Judgments Relied Upon; (xii) General Submission on the Whole Case; (xiii) Main Points to be Urged; (xiv) Final Submission.

The headings in a writ petition at the admission stage may start with (i) Nature of Writ Petition, and the Main Relief Prayed For; (ii) Parties to the Writ; (iii) Case in Brief; (iv) Main Grounds on which Interference of the Writ Court is Prayed For: That is, whether the impugned act or order is patently illegal/without jurisdiction/ in violation of principles of natural justice, or any other serious illegality, going to the root of the matter; (v) No Prejudice to Respondents if Reliefs Prayed For, are Granted (as may be applicable); (vi) Prevail of Rule of Law and Element of Public Interest in Writs.

The headings in any appellate forum, challenging order of the subordinate court/forum, may start with (i) Nature of Appeal Preferred; (ii) Parties to the Appeal; (iii) Date of Impugned Order; (iv) Main Grounds of Challenge: Whether on want of jurisdiction, or on limitation, or on merits of the case, including patent illegality in applying law to the facts of the case; (v) Findings or Observations that are unsustainable in Law or on Facts on Record; (xii) Compliance/Non-Compliance to Applicable Legal Provisions and Judgments Relied Upon; (xii) General Submission on the Whole Case; (xiii) Main Points to be Urged; (xiv) Final Submission.

The headings in criminal prosecution under Section 138 of Negotiable Instruments Act may start with (i) Brief Introduction of Complainant and Each of the Accused; (ii) Jurisdiction of the Court; (iii) Limitation; (iv) Material Facts of the Case and the Evidences that Have Come on Record; (v) Statement of Accused Under Section 313 and Evidence by Accused (If any); (vi) Existence of Legally Enforceable Debt; (vii) Issuance of Subject Cheque; (viii) Dishonour of Cheque; (ix) Issuance and Receipt of Statutory Notice by Accused; (x) Non-Compliance with Notice; (xi) Misleading/Contradicting Defence/ Stand of Accused; (xii) Vicarious Liability of Accused; (xiii) Mandate of Section 139; (xiv) Judgments Relied Upon; (xv) General Submission on the Whole Case; (xiii) Main Points to be Urged; (xiv) Final Submission.

The headings in any application in civil suit or criminal prosecution, may include: (i) Nature of Application; (ii) Nature of Suit/Criminal Prosecution; (iii) Reliefs Prayed for in the Application; (iv) The Reasons and Grounds for Taking Out Application; (v) Stand of the Adversary; (vi) Compliance/Non-Compliance to Applicable Legal provisions and Judgments Relied Upon; (vii) General Submission on the Whole Case; (viii) Main Points to be Urged; (ix) Final Submission.

A Convenience Note may urge the court to specifically deal with certain (admitted or undisputed or proved) facts or the legal plea or the argument, advanced, as the entire outcome of the case may hinge on the findings of the court on those facts and pleas.
As indicated hereinabove, every paragraph in Convenience Note must be super imposed with headings/ marginal note, in the same fashion as "Sections" of the statutes are arranged, as, that will aid in quickly locating particular facts and legal submissions, the court may be searching for, at the time of passing order.

The Indian jurisprudence will be richer if judgments and orders are delivered in "marginal note" format. I could find at least one precedent, i.e. *Smt Radha Krishna Kandolkar v. Tukaram Pundalik Homkhandi, AIR 1991 Bom 119*.

Preserving Freedom of Speech, Respecting Privacy and Protecting Fair Trial

By MANISHA T KARIA, Advocate on Record, Supreme Court of India, New Delhi

The entire media coverage and debate on sudden demise of the popular actor Sushant Singh Rajput opened a serious debate on the role of the media in cases under investigation and pending trial before the courts. It also raised important question as to the right of the deceased to be treated with respect and dignity after death. Most of the reporting by the media with regards to the personal and private life of the accused/suspect and the family and friends of such person amount to violation of the right to privacy and damage to reputation of persons before and during any civil and criminal proceedings. This incident followed with numerous petitions before the several courts, have totally shocked the important pillar of democracy 'the free and fair media' and destroyed concept of 'fair trail and privacy'.

In Sushant's case, media reporting violated the right of alleged accused persons of fair trial and amounted to total inference in power of administration of justice. The Bombay High Court, while deciding batch of Public Interest Litigations, examined media reporting as regards to the death of Sushant and the materials gathered through "investigative journalism", before and after the CBI took up investigation in terms of the order of the Supreme Court. The petitions filed before Bombay High Court and the judgment and order dated 18th January 2021 unveil that "Republic TV while propagating the theory that the actor was 'killed' and expressing apprehension as to whether the probe by Mumbai Police could be trusted in view of serious lapses that it had committed, also sought for public opinion as to whether the actress should be arrested. In course of one such scathing attack against Mumbai Police, the channel by referring to an autopsy report of the ex-manager of the actor (who too died in mysterious circumstances) highlighted that her body was found unclothed. Apart from anything else, a clear lack of courtesy to a woman who has left this world is demonstrated thereby. On its part, Times Now displayed close-up pictures of the cadaver of the actor, one alleged to have been given by the actor's family, and raised suspicion in respect of a ligature mark by remarking that another image was morphed. While expressing views that Mumbai Police had not done its job properly necessitating the media to pursue the case of securing justice to the actor, the channel went to the extent of commenting that the activists' plea to restrain the media was a move to suppress coverage on the death of the actor. Serious concerns were raised by both the TV channels as to why an FIR was not registered or as to why no arrest was affected. Speakers invited by such channels ranging from ministers, members of the Parliament, lawyers, political analysts, forensic experts, social activists, spokespersons of political parties, etc., expressed views appearing on screen as to how Mumbai Police had bungled the inquiry/investigation into the unnatural death of the actor by failing to follow standard operating procedure, ignoring key evidence, hiding relevant forensic details, letting off conspirators and shielding the culprits. In fine, these TV channels continued their endeavour of informing the masses that Mumbai Police was suppressing the truth with a view to cover-up the entire incident. In the process, in an attempt to out-smart each other (for reasons which we need not discuss here), these two TV channels started a vicious campaign of masquerading as the crusaders of truth and justice and the saviours of the situation thereby exposing, what in their perception, Mumbai Police had suppressed, caring less for the rights of other stakeholders and throwing the commands of the CrPC and all sense of propriety to the winds. It amuses us not a little that Republic TV doffed its own hat, in appreciation of what its team had achieved, without realizing that it could be irking and invite adverse comments. While inquiry/investigation by Mumbai Police was strenuously asserted by these TV channels to be shoddy and questionable, the Supreme Court in its order dated August 19, 2020 recorded prima facie satisfaction of Mumbai Police not having indulged in any wrong doing. Despite such order, reports/discussions/debates/interviews on the death of the actor flowed thick and fast from these TV channels in brazen disregard of the rule of law, the edifice on which the country's Constitution rests. These TV channels took upon themselves the role of the investigator, the prosecutor as well as the Judge and delivered the verdict as if, during the pandemic, except they all organs of the State were in slumber. While we need not repeat here what Mumbai Police was accused of by these TV channels, judicial notice may be taken that the actress, although entitled to her rights to life and equal protection of the laws, protected by

Articles 21 and 14 of the Constitution, and the right guaranteed by Article 20(3)thereof to maintain silence, was painted as the villain of the piece, had the rug below the presumption of innocence removed, and received the media's verdict that she is guilty of orchestrating the actor's murder, much before filing of a police report under section 173(2), CrPC; and that in the situation as depicted, omission or neglect to arrest the actress amounted to a glaring act of impropriety by Mumbai Police. We have no hesitation to record that this sort of reporting by the media is immensely prejudicial to the interests of the accused and could dent the process of a future fair trial and derail due administration of criminal justice, once the matter reaches the appropriate court having jurisdiction."

The High Court categorically observed that such reporting could be seen as violation of the Programme Code. Even if the contents of the reports/ discussions/debates are considered to be mere insinuations and aspersions against Mumbai Police and the actress, they lack bonafides, are aimed at interfering with and/or obstructing administration of justice and have the propensity to shake the public confidence in the capability of the police machinery and the efficacy of the judiciary.

Such facts which came in public domain via media and court proceedings, raises a serious question as to whether such media trial can be said to be legal and permissible expression of the right under Article 19(1)(a) of the Constitution. It appears that lack of statutory body for electronic media has aggravated the situation, reckless media coverage targeting sensationalism has made the situation worse.

There are examples like the Jessica Lal case and the Nitish Katara case, in which media's intervention helped nab the guilty. However "investigative journalism" in Sushant's case has caused obstruction to serious issues which lead the Press Council of India to issue guidelines on reporting on suicide cases and the NBA also has issued advisory in reporting suicide cases.

The broadcasting media industry in India is self-regulated by two private bodies i.e., NBA; and NBF. The Supreme Court has approved the recommendations of the Nariman Committee which recommended an approach of self-regulation and rejected State intervention. Bombay High Court observed that the electronic media should also be guided by the contents of the guidelines of the PCI on reporting of death cases by suicide for two reasons: first, the said guidelines have a statutory flavour and similar such binding guidelines on reporting cases of death by suicide are non-existent for the electronic media; and secondly, the absence of such guidelines could, and as we have been shown in the present case, lead to the dignity of the dead being breached with impunity. The death of the actor was followed by such crude, indecent and distasteful news reporting by a few of the TV channels that we do not consider it worthy of being referred to here and be a part of this judgment. Nonetheless, instead of the Court laying down guidelines on reporting of death cases by suicide, it would be wise and prudent on our part to give direction for adherence to the guidelines of the PCI in this behalf by the electronic media while it reports cases of death by suicide, which would secure the ends of justice. Further the Bombay High Court observed that CTVN Act and the CTVN Rules, it is clearly seen that a robust statutory framework has been laid down there under read with the Up-linking and Down-linking guidelines. However, considering the facts on record, it is quite clear to us that the implementation of these provisions is far from satisfactory.

It is quite clear from the Sushant's media trial and above Bombay High Court judgment that, electronic media is not well-regulated because there are only two known private associations self-regulating its members and the maximum punishment for flouting their code of ethics is a fine of Rs.1,00,000, which is peanuts for most channels. There is obvious abuse of freedom of speech and expression by the media. Hence, the machineries need to ensure investigation of any crime should be carried on in the right way without being biased and unfair by any media reports based on "investigative journalism". The freedom of the press and media cannot be unlimited or unfettered. It is conditional and restricted under Article 19(2) by reasonable restrictions.

After this incident, all stakeholders need to keep in mind that the media coverage must not be under any influence of business or political agenda. Journalism is a profession and not a business, hence should follow high standards and professional ethics. It is moral as well as social obligation on media personnel to be responsible and ethical in reporting. These days sensationalism in news is making public lose its faith in the system. To maximise viewers/readers/ followers, the high values and ethics of journalism are left behind. The media has to play important role of public interest and it is right and duty of media to expose the truth only. The freedom of press indirectly stifled by certain government decisions which are not really contributing to a free press and unfortunately radio and television media is not only State owned but blatantly State controlled. The credibility of media is based on the unbiased and objective reporting, and responsibility for the same needs to be fixed so as to ensure that administration of justice is not undermined.

Pressing Breasts Without Disrobing Not "Sexual Assault" As Per POCSO Act but Offence Under Section 354 IPC: Bombay HC

By SANJEEV SIROHI, Advocate, Meerut

If there is one judgment of Bombay High Court which is attracting maximum attention and a lot of strong reactions from even the Apex Court, it is *Satish v. The State of Maharashtra, Criminal Appeal No.161 of 2020*, delivered on 19th January 2021, in which the Nagpur Bench of the Bombay High Court has held that groping a child's breasts without 'skin-to-skin contact' would amount to molestation under the Indian Penal Code but not the graver offence of 'sexual assault' under the Protection of Children from Sexual Offences (POCSO) Act. Additional Judge, Justice Pushpa Ganediwala made the aforesaid observation while modifying the order of a Sessions Court that had held a 39-year-old man guilty of sexual assault for groping a 12-year-old girl and removing her salwar. The Single Judge of High Court sentenced the man under Section 354 IPC (outraging a woman's modesty) to one year imprisonment for the minor offence.

The controversial part of the Judgement is contained in paragraph 18, where Justice Ganediwala observes, "Evidently, it is not the case of the prosecution that the appellant removed her top and pressed her breast... The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of 'sexual assault'. It would certainly fall within the definition of the offence under Section 354 of the Indian Penal Code." The Judge further observed in paragraph 26, "... Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration." In conclusion, the appellant was acquitted from charges under Section 8 of the POCSO Act and convicted under Section 354 of IPC and was sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.500.

It cannot be lightly dismissed that the Apex Court has stayed this ruling after Attorney General KK Venugopal pointed out that the Judgment was likely to set a dangerous precedent. Venugopal submitted that, "It will mean that if a cloth is touched no case under Section 8 of the POCSO Act is made out. This Court must take notice of the judgment." Justice Pushpa Ganediwala had ruled that the act of holding the hands of a minor "prosecutrix" or unzipping trousers in front of her, an act witnessed by PW-1 (prosecution witness1), in the opinion of the Court did not fit with the definition of aggravated sexual assault.

Further, the petition filed by Advocate Manju Jetley, on behalf of the Youth Bar Association of India, said that the High Court had also named the minor victim in its judgment which violated Section 228B of the IPC. The National Commission of Child Rights (NCPCR) and the National Commission for Women (NCW) took a serious note of the 19th January ruling. NCW expressed a desire to challenge the judgment before the Supreme Court and NCPCR wrote to the Maharashtra Chief Secretary to seek a review of the ruling. It added that, "It has been observed by the Commission (NCPCR) that the prosecution has failed in representing the case of the victim properly. If the prosecution had made the submissions as per spirit of the POCSO Act, the accused would not have been acquitted of the serious offence against the

minor." The letter further said, "the remark 'skin-to-skin... with sexual intention, without penetration' also needs to be reviewed and the State should take note of this, as it seems to be derogatory to the minor victim."

It is worth noting that Section 7 of the POCSO Act defines sexual assault of a child as "whoever, with sexual intent touches the vagina, penis, anus or breast of such person..." What is most problematic in this judgment is that Justice Pushpa Ganediwala, who delivered this judgment, stated that, as per the definition of sexual assault, a 'physical contact with sexual intent without penetration' is an essential ingredient of the offence with 'physical contact' requiring 'skin-to-skin contact' and not just any contact. Strictly speaking, if this is agreed to, it would be interpreted as that if an offender uses a condom while penetrating the child, this would not amount to an offence since there was no direct contact. How can this be justified ever? Also, it cannot be overlooked that the serious offence under POCSO Act, which carries a minimum of three years imprisonment which may extend to five years along with fine was reduced to Section 354 of IPC, which carries a considerably lower punishment of only one year of minimum imprisonment. In addition, this case was delayed for nearly four years.

We cannot afford to ignore that Flavia Agnes, who is an eminent woman, who has done extensive research in cases of child sexual abuse and is co-founder of Majlis Legal Centre, while differing from those who commented that Justice Pushpa Ganediwala lacks exposure to the letter and spirit of the POCSO Act, pointed out in her enlightening editorial titled "Weakening The Law" in The Indian Express dated 1st February 2021 that, "Lawyers and activists engaged with the RAHAT project of Majlis Legal Centre have closely observed the manner in which she conducted the trials in cases of child sexual abuse even before the enactment of the POCSO Act, when she was the trial judge for sexual offences against women and children in the Bombay City, Civil and Sessions Court. In our first case, which involved the sexual abuse of a four-year-old and where the police had delayed filing an FIR, she had convicted the accused, a watchman, for seven years. A high-profile criminal lawyer, Majeed Memon, appeared for the accused supported by the trustees of the school. On the other hand, our support person was a fresh graduate with no exposure to criminal courts. But it was the Judge's sensitivity that helped in a fair trial. In another case which concerned the father raping his daughter, where the FIR was filed after 18 months, she had argued that when the police refused to register a complaint, how can the illiterate mother be blamed for delay in filing. She convicted and sentenced the accused to 10 years of rigorous imprisonment. The most challenging case she presided over is the sexual abuse by multiple men at Kalyani Mahila Bal Seva Sanstha in Navi Mumbai. We had marvelled at the manner in which she conducted the trial. There were around 10 accused and some survivors had to be examined in sign language. In May 2013, six accused were convicted, including the founder-director, of the rape of five mentally-challenged female inmates, three of whom were minors. One of the victims died after she was gang raped. Hence, prime accused and director of orphanage was also convicted of murder. So, what happened in this case. Why such a mindboggling judgment that has been condemned by all concerned stakeholders - one which can become a precedent to be followed by subordinate judiciary? The harm that has been caused to the minor in this particular case as well as all future cases, cannot be easily overlooked. This judgment needs to be set aside and the comments expunged to repose the faith of all survivors of sexual violence in the judicial system."

So, we have to concede that Justice Ganediwala has a good track record and it is only in this judgment that she has erred for which she certainly deserved to be reprimanded but her entire career should not be put in jeopardy. It also cannot be ignored that mandatory sentences are counterproductive to the aim of reducing crime or acting as a deterrent.

But regarding this judgment's strong criticism, we also cannot overlook what is mentioned in the editorial of Hindustan Times dated 26th January 2021 that, "The ruling is disturbing. It is a literal interpretation of the law and overlooks the fact that POCSO does not mention clothing as a factor in the crime of molesting a child. This is a matter of violating the bodily integrity of the victim. The interpretation also does not recognize the long-term psychological damage that child sexual abuse victims suffer. This reading of the law will dilute cases of child abuse and make it difficult to ensure justice. The National Commission of Women has pointed out that the order will have a cascading impact on women safety and trivialized the legal architecture in place, and has decided, rightly so, to challenge the order. The issue should also force a relook at the wording of the Act and other laws, which deal with child abuse. There can be no room for ambiguity in child abuse cases and any loophole which allows for this must be plugged at once."

All said and done, one has to always concede that there has to be zero tolerance on sexual offences especially in child abuse cases. All the loopholes must be first quickly identified and then deliberated, discussed and debated upon and then reformed adequately to meet the present circumstances where the cases of violence and sexual offences against children are increasing very rapidly. No doubt, there can be no leniency at all for sexual offences against children.

Judgements & Developments from Courts across India

SC Clears Central Vista Project, New Parliament Building with Riders

The Bench of Supreme Court of India, comprising of Justices AM Khanwilkar, Dinesh Maheshwari and Sanjiv Khanna, in *Rajeev Suri v. Delhi Development Authority and others*, *Transferred Case (Civil) No.229 of 2020,* on 5th January 2021, allowed the Government to go ahead with the 'central vista project', which aims to redevelop the Parliament area and government offices around it. The Court's permission, however, comes with several riders. The Court while granting a green signal to the redevelopment project upheld the notification of a change in land use as well as the recommendations made by the Environment Ministry. Justice Sanjiv Khanna dissented from the majority view.

A number of petitions challenged the construction of Central Vista Project in the Lutyen's zone, alleging certain violations, including change in land use and environmental compliances. In the backdrop of concerns raised about the environmental impact of the construction in the central vista area, the Court directed the project proponent to install smog tower and use anti-smog guns at all construction sites.

The Court expressed its inability to adjudicate upon a policy decision in absence of law to the contrary, "We are compelled to wonder if we, in the absence of a legal mandate, can dictate the Government to desist from spending money on one project and instead use it for something else, or if we can ask the Government to run their offices only from areas decided by this Court, or if we can question the wisdom of the Government in focusing on a particular direction of development. We are equally compelled to wonder if we can jump to put a full stop on execution of policy matters in the first instance without a demonstration of irreparable loss or urgent necessity, or if we can guide the Government on moral or ethical matters without any legal basis. In light of the settled law, we should be loath to venture into these areas."

While Justice Sanjiv Khanna agreed with Justice Khanwilkar and Justice Dinesh Maheshwari on granting permission to the project, but differed on the view to permit a change of land use. Justice Khanna cited lack of prior approval of the Heritage Conservation Committee (HCC) and no disclosure for public participation, as his reasons to oppose a change in land use. In his dissenting judgement, he said, "Where power is given to do a certain thing in a certain way, then the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. When the statute prescribes a particular act must be done by following a particular procedure, the act must be done in that manner or not at all."

Earlier, the Court on 7th December 2020, had allowed the foundation stone laying ceremony for the new Parliament building on 10th December but directed that no construction should take place. The Bench had observed that the Central Government may lay down the foundation stone for the Central Vista project but no construction, demolition or felling of trees shall take place for the same.

Buyers Not Bound by One-Sided and Unreasonable Clauses in Apartment Buyer's Agreement: SC

The Bench of Supreme Court of India, comprising of Justices Dr DY Chandrachud, Indu Malhotra and Indira Banerjee, in *Ireo Grace Realtech (P) Ltd v. Abhishek Khanna, Civil Appeal No.5785 of 2019*, on 11th January 2021, held, "Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement." In the present appeal, the Developer had challenged the decision of National Consumer Disputes Redressal Commission (NCDRC), wherein refund of the amounts deposited by the apartment buyers was directed on account of inordinate delay in completing the construction and obtaining the Occupation Certificate.

After perusing the clauses mentioned in the Apartment Buyer's Agreement, the Court came to a conclusion that the terms of said clauses were wholly

one-sided, which were entirely loaded in favour of the Developer and against the allottee at every step. For the said issue, the Court held that the terms of the Apartment Buyer's Agreement are oppressive and wholly one-sided and would constitute an unfair trade practice under the Consumer Protection Act, 1986. Incorporation of one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act.

On the question, whether primacy has to be given to RERA over the Consumer Protection Act, the Court referred to its recent decision in *Imperia Structures Ltd v. Anil Patni, Civil Appeal No. 3581-3590 of 2020*, wherein it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available".

SC: Right to Property is Still a Constitutional Right

The Bench of Supreme Court of India, comprising of Justices Sanjay Kishan Kaul, Dinesh Maheshwari and Hrishikesh Roy, in *Bajranga v. State of Madhya Pradesh, Civil Appeal No.6209 of 2010*, on 19th January 2021, held, "Right to property is still a constitutional right under Article 300A of the Constitution of India though not a fundamental right."

The predecessor of the appellant was a bhumiswami of agricultural dry land measuring 64.438 acres situated in Village Bagadua, MP, which was in excess of the 54 acres ceiling limit prescribed as per Section 7(b) of MP Ceiling on Agricultural Holdings Act, 1960. Therefore, the competent authority had initiated the process to acquire the surplus land under Section 248 of the MP Land Revenue Code, 1959. The appellant being aggrieved, filed a suit for declaration of title and permanent injunction before the Trial Court. The appellant contended that the proceedings were illegal as he was actually left with only 54 acres of land which was within the prescribed ceiling limit in view of the fact that the land measuring 17 bighas and 7 biswa had been decreed in favour of one Jenobai, who was in possession by cultivation for about 20 years. The Trial Court had held that the appellant was the original bhumiswami and the suit with Jenobai was collusive, as she was the mother-in-law of the appellant and the endeavour was to prevent the surplus land from being acquired by the State.

The First Appellate Court set aside the judgment of the Trial Court on the ground that the competent authority had failed to comply with the statutory provisions under Sections 11(3) and 11(4) of the said Act. However, the said judgment was set aside by the High Court noticing that no information was stated to have been provided to the competent authority giving particulars of the suit of Jenobai. The competent authority was held not to be at fault in the alleged breach of Sections 11(3) and 11(4) of the Act, 1960 as the information germane for the same had not been disclosed.

According to Section 11(3) of the Act, 1960 the draft statement had to be published and served on the holder and "all other persons interested in the land to which it relates." Once a disclosure was there that Jenobai had filed a suit, there had to be mandatorily a notice to her, as otherwise any decision would be behind her back and would, thus, violate the principles of natural justice. The Bench observed the proviso to Section 11(4), which clarified that, in case the competent authority finds that any question has arisen regarding the title of a particular holder, which is already pending for decision before the competent court, the competent authority shall await the decision of the court. Hence, the Court held that proceedings should have been kept in abeyance to await the verdict in the suit and notice should have been issued to Jenobai.

The Bench expressed, "Right to property is still a constitutional right under Article 300A of the Constitution of India though not a fundamental right. The deprivation of the right can only be in accordance with the procedure established by law."

The Court further held, "The law in this case was the said Act. Thus, the provisions of the said Act had to be complied with to deprive a person of the land being surplus. It was further stated that, once a disclosure was made, the matter had to be dealt with under sub-Section (4) of Section 11 of the said Act and in view of the pending suit proceedings between the appellant and Jenobai, the proviso came into play which required the respondent authorities to await the decision of the court. Sub-Section 5 and thereafter sub-Section 6 would kick in only after the mandate of sub-Section 4 was fulfilled."

Considering the abovementioned, the Bench held that when there was no surplus land there could be no question of any proceedings for take-over of the surplus land under the said Act. Hence, the impugned order was set and the order of the first appellate court was restored.

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AIR Café Answers Across: 1.Collateral 3.Respondent 4.Possession 5.Mitigation 7.Devisee 8.Settlement | **Down:** : 2.Aforesaid 6.Theft

Central Vista Project

A Sordid Metaphor

By KAUSTUBH MEHTA, Vivekananda Institute of Professional Studies, New Delhi

The Government of India's decision to revamp the most central architectural structure precipitated into filing of a petition before the Supreme Court to exercise judicial review. The power of judicial review in India, unlike the purely Westminster system of governance - which confers unbridled authority and places the Parliament in an unassailable position - is pervasive. Constitutional courts in India have been entrusted with the responsibility to examine acts of the Legislature or Executive, which are at odds with the constitutional principles. The Central Vista redevelopment project, to construct a new Parliament building, Prime Minister's residence and other offices of the Secretariat, would entail an overhaul of the existing ninety-three-year-old structure costing the exchequer as much as twenty thousand crores. The project received an exuberantly emphatic response from the legal, environmental and architectural community, who denounced the ostensible purpose being averred by the Government. The timing of the project was also called into question as in the middle of a raging pandemic, when the economy of the country was in abject straits, the Government finalised the proposal.

In the light of this, the apex court was called upon to interrogate the vires of the Government decision on the touchstone of the Constitution and all other tenets which jurists swear by. A three judges Bench of the Supreme Court comprising of Justices AM Khanwilkar, Sanjiv Khanna and Dinesh Maheshwari heard the arguments at length in the month of November 2020 and pronounced its verdict in the first week of January 2021.

The arguments of the petitioners were against the modification of land and the haphazard manner in which the project was cleared by various authorities. The Delhi Development Authority Act, 1957, contains specific provisions which empower the Government to change land use and also to make changes in the zonal development plan. Therefore, the Court affirmed that the Government would be well within its power to alter or modify the existing land use in so far as the alteration sought to be carried out remains within the broad provisions and scheme of the DDA Act. The standpoint of public hearings, as argued by the petitioners, was not complied by the Government, to which the Court was of the opinion that it is not absolutely necessary for the Government to conduct public hearings while taking action under Section 11A of the Act. The majority opinion held that the principles of natural justice, from which flows the right to be heard, popularly known as audi alteram partem, would be dispensable in the present case. The dissenting opinion authored by Justice Sanjiv Khanna, however, held that the change being envisioned by the Government is not a minor one and therefore, it would not bode well if the objectors are not heard by the authority with due diligence. The judgment also held that the Court is devoid of the mandate to wade into waters of policy, which is an exclusive domain of the Executive, as it can hold discussions and requisition expert advice. The Court stated, "Under the constitutional scheme, the Government/Executive is vested with the resources to undertake necessary research, studies, dialogue and expert consultation and accordingly, a pure policy decision is not interfered with in an ordinary manner." This stance of the Court does not hold water. It marks a stinging departure from the well-established adjudicatory process which is replete with previous instances of Court being guided by Committees.

The petitioners made a fervent plea that the Central Vista Committee (CVC) did not apply its mind while granting approval to the proposal and it was reduced to a mere formality. The Government, in response to this, contended that as CVC is not a statutory body, the normative rules of administrative procedure would not apply. The petitioners argued that CVC is discharging a public function and therefore it should be bound by rules and procedures. However, the Court rejected this tranche of petitioners' arguments and held that the Committee was formed to function internally and so it should not be bound by the said procedures. When questioned about the exclusion of the

new Parliament building from the Central Vista earlier, the Court held the planning, design and construction to be the sole prerogative of the Executive Government and withdrew from the task of interloping in this Executive manoeuvring.

The two most seminal issues of law and justiciability that were agitated by the petitioners, and which also constitute the heart of the controversy, is the rule of law and the right to public participation.

Rule of Law Emasculated

Rule of Law is an ancient concept which hypothesises that in order for a society to sustain itself in a civilised manner, the law must govern the rule. In practical terms, what it means is that there must be supremacy of law and equality before the law. It is irresistibly inferred from this proposition that the "law" in the expression "Rule of Law" would mean the Constitution and the law of the land, but that is not the case. What rule of law means, in its true essence, is that the State is enjoined to not only adhere to the extant and documented provisions of law and Constitution, but also to the most basic principles of equality and liberty that each individual inherently possesses.

While dissecting the instant case of Central Vista through the prism of Rule of Law, a constitutional confrontation between established principles and Executive will is inevitable. The Court has conceded that the founding fathers of our Constitution conceptualised a legal system that would be subservient to the Rule of Law, but it has, nevertheless, unheeded it. All positive attributes of the Rule of Law like access to justice and transparency, inter alia, in governance, have been delightfully acknowledged but despite that, the Court successfully defended the Central Vista Project as an exception. In order to keep the Government action within the confines of law, the Court trimmed the permeability of the Rule of Law. The Court did that by stating, "It is for this very reason the statement - 'Rule of Law' must encompass a dynamic concept albeit rooted in four corners of the Constitution." The Supreme Court is the apex interpreter of the Constitution and by settling the Rule of Law within the purview of the Constitution, the Court assumed monopoly over deciding its contours. The Supreme Court, in *ADM, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207*, through Justice HR Khanna, observed, "Rule of Law is the antithesis of arbitrariness. Rule of Law is now the accepted norm of all civilized societies. Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order." In *Bachan Singh v. State of Punjab, AIR 1980 SC 898*, the Supreme Court laid down three basic assumptions in respect of rule of law: "Law making must be essentially in the hands of a democratically elected legislature; even in the hands of the democratically elected legislature, there should not be unfettered legislative power; and that there must be independent judiciary to protect the citizens against excesses of executive and legislative power."

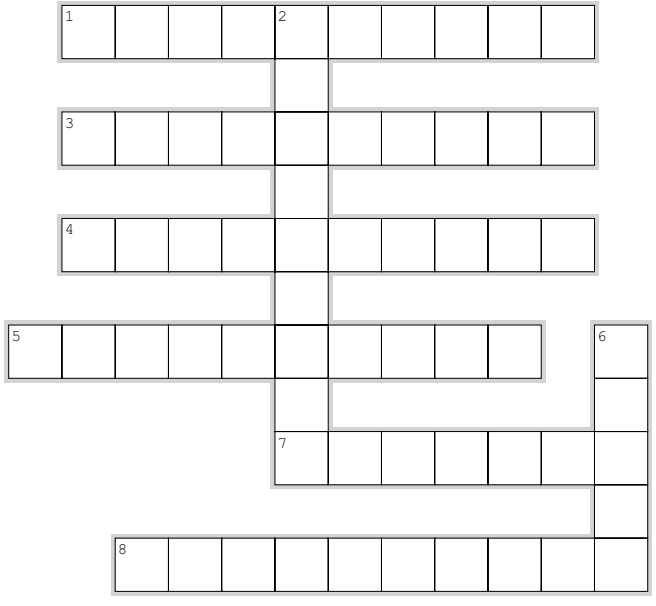
Right to Public Participation Massacred

Another very important and nuanced right that is crucial to the healthy existence of Democracy, is the right to public participation. It is popularly believed that as soon as the public exercises suffrage which culminates in investiture of the mantle of the governance, the public participation in the day-to-day affairs gets extinguished until the Government is under review in the subsequent elections. Whereas, the aspect that the usual course of business should not be disturbed by undue interference by public, it is indisputable that the decisions of the Government that would have far reaching ramifications must always be accompanied with a concomitant public participation, even if such an exercise encumbers the whole process. Principle 10 of the United Nations (UN) Rio Declaration on Environment and Development (Rio Declaration) describes the three pillars that are considered to form a 'right to participation': "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

International Agreements and Conventions, like the above-mentioned stipulation, also dictate that the nations collectively follow the route of public participation.

The redevelopment of the Central Vista, which is the most intrinsic and hallowed feature of our Republic and gives us our sense of belonging, should have gone through a full-fledged process of public participation, not just in letter but also in spirit. The dagger that the project will strike upon the environment, aesthetics and the grandeur of New Delhi will be an irreversible act on the nation's tangible soul. The model of governance which our Constitution subscribes to, casts an obligation to ensure that the flag of Democracy remains fluttering up in the sky. The usurpation of the autonomous public purview by the Government is a sordid metaphor of Democracy being laid to rest, just as the old Parliament building.

Crossword



(Answers on Page 35)

Across

1. Extra security for a debt; if there is a main security for a debt, such as a house being security for a mortgage, any extra security supplied
3. The person an action is being taken against
4. Having something under your control even though you may not own it
5. Putting facts to a judge, after someone has been found guilty, to justify a lower sentence
7. The person who is left freehold property or land in a Will
8. When property is bestowed, usually by a Will or a deed, on a trust for the benefit of people decided by the settlor

Down

2. Describing something which has been said or referred to before in the document
6. Taking someone else's property dishonestly, with the intention of never returning it

Maxims

in situ

Meaning 'in position'. Often used in the context of decisions or rulings about a property or thing "left in place" after the case as it was before.

lex scripta

Meaning 'written law'. Law that specifically codifies something, as opposed to common law or customary law.

Lexicon

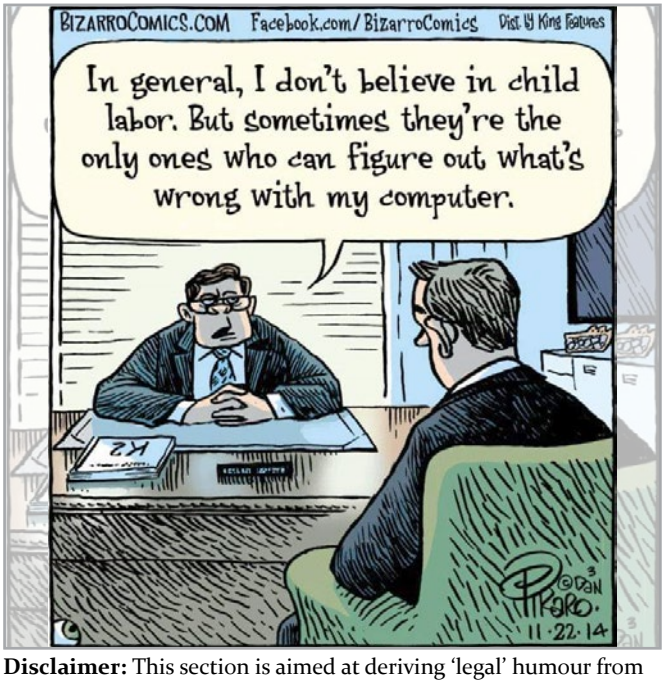
Probable Cause Hearing

A hearing held before a judge in criminal cases to determine if enough evidence exists to prosecute.

Rule to Show Cause

Summons compelling a person to appear in court on a specific date to answer to a request that certain orders be modified or vacated.

Wittyness



Disclaimer: This section is aimed at deriving 'legal' humour from day to day situations and is not meant to insult, offend or defame anyone.

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