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Ensouth

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N South

Advocates

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At a Glance

Managing Partner's message

"April is the cruelest month", said T.S.Eliot, "mixing memory and desire". With general elections looming over India, he could have been talking about Indian politicians!

As for us, Ensouth stays within its focus areas, discussing law and policy.

First, on the judicial side, in **Why the Dance Bar Ban has to go**, we explore the legal challenges facing Bombay's Dance Bars and discuss why the State Government's persecutions of this business model is unsustainable.

Next, in a critique of policy, in **Who's afraid of Sovereign Snoopers**, we examine the Home Ministry's notification allowing ten security agencies to snoop on citizens.

Finally, while still on our policy focus, we find ourselves unable to agree with the ideological assumptions underlying India's continuing reservation obsession and we say as much in **Inherent fault-lines in the new reservation policy.**

Happy Reading

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Why the dance bar ban had to go

Ranjeev C. Dubey

(First published CNBC TV18 on Feb 9th, 2019)

Fifteen years after the Maharashtra government decided it wanted its bar girls to dance no more, the recent decision of the Supreme Court in Indian Hotel and Restaurant Association v State of Maharashtra has delivered the reassuring message that liberal winds continue to blow through the fair corridors of the Supreme Court. Let's celebrate the eclipse of this retrograde piece of legislation.

Back in August 2005, in a fit of moral rectitude, the state banned the 'holding of a performance of dance, of any kind, in an eating house, permit room or beer bar'. It made an exception only of 'elite establishments' presumably on the ideological assumption that the rich were incorruptible! In the result, reportedly 75,000 girls working in some 700 establishments together with twice as many men lost their jobs.

Not all of them were destitute women exploited by rapacious men. Celebrated bar dancer Tarannum Khan, whose Versova bungalow was raided by the Income Tax department in September 2005 for tax evasion, is said to have earned on average ten lakhs for eight hours of work. Abdul Karim Telgi, the main accused in the fake stamp duty case, once rained Rs 93 lakh in crisp notes on Tarannum in a single night.

The case found its way to the Supreme Court. In 2013, the court agreed the ban was unconstitutional. The state government now reacted by creating a new law purporting to 'regulate' the industry featuring rules so stringent that not a single license was issued. Once again, the Supreme Court was asked to rescue this art from the clutches of the neo-con moralists.

Inside Indian Bars

To understand the court's decision, it may be important to understand what actually goes on at these bars. For a start, bar dancing differs from western erotic dancing in that clothes never come off and the best you can hope to see is a bit of back or belly and a lot of bare arms: that's considerably less than you would at a big fat Punjabi wedding. Bar dancers overwhelmingly wear normal everyday Indian clothes, revealing significantly less than your average belly dancer. Patrons cannot touch the girls without the bouncers swarming all over the offender. Unlike Bollywood movies, the girls almost never heave their bosoms or thrust their pelvis. In general, the girls just about sway lazily to Bollywood pop but should a patron choose to start chucking notes, the tempo of the dance rises with fleeting eye contact being the other main payoff! It is truly tame stuff, but there is this atmosphere of cigarette smoke and hooch laced with the vague

hint of impending sin which is both cheesy and charming. You have to be pretty fundamental to see this as unacceptable sin!

With provocation so sparse, what was the Supreme Court to do but make a detailed examination of these 'regulations'? Some presented no difficulty. The condition that a license could only be granted to an applicant who 'possess a good character' and 'antecedents' was trashed on the simple principle that a criterion to establish such credentials was impossible. The condition that a licence could not be granted to an establishment to 'which a license for Discotheque or Orchestra has been granted" was rejected as irrational. That alcohol could not be served where the girls were dancing was held to be unsustainable. That licenses could not be issued to any place within a kilometer of an educational or religious institution was held to be disproportionate. That CCTVs had to be fixed at the entrance to such premises was held to be a breach of privacy. The judgment is instructive and there is much to be learnt about how the court now thinks.

Not Everything Is Hunky Dory

That said, several features of the judgment may yet give reason to pause. Two particularly attract attention. The Supreme Court has held that a ban on patrons showering currency notes on the dancers is justified because of its "tendency to create a situation of indecency". Money can be given but it can't be thrown, which really means that some lascivious fingers are now going to fleetingly touch the willing hand of a dancing maiden!

The larger problem though is the continuing ban on "obscene dance", defined as one designed only to 'arouse the prurient interest of the audience' and 'which consists of a sexual act, lascivious movements, gestures for the purpose of sexual propositioning'. Since these are subjective tests to be judged by undercover beat cops fresh off the bus from the rural hinterlands, dance bars will doubtless remain vulnerable to arbitrary behavioural standards. In practice, this translates into its attending risk of extortion at the hands of the authorities.

There is a larger dimension to this worry. The court's failure to review the 'prurient interest' test is a significant departure from its recent push to make India a more open liberal modern society. An examination of the experience of a range of democracies in the 20th century reveals that the judiciary, in general, has largely been a moderating influence where the most extreme populist tendencies of the political classes have been tamed but not curbed by a reluctant judiciary seeking to limit the social disruption that attends all radical change. India has mirrored this experience. In the context of the 'ageless' India confronting an impatient polity seeking to re-engineer our society, the judiciary has tried to curb both the regulatory excesses of the overbearing left and the majoritarian obsessions of the ultra-right.

What has set the Indian judiciary truly apart in the last few years though is the seamless manner in which it has transformed itself from a force of moderation into a force of liberal modernism? It may well be a reaction to the crude majoritarian tenor of the times but that is not the whole story. In adopting the broadly liberal position on the right to privacy, decriminalizing adultery, gay sex, woman's right to equality in religious matters (Sabrimala) and in personal laws (Triple Talaaq), the Supreme Court has become the leading voice of reform in a society both confused and obsessed with its ancient past. In that sense, the court's reluctance to confront the 'prurient interest' test is a great opportunity lost which simultaneously is, for the Indian extortionist license-permit raj, an opportunity regained.

Comment-2

Who's afraid of sovereign Snoopers?

Should the government be allowed to spy on its citizens?

Ranjeev C. Dubey

(First published CNBC TV18 on Jan 4th, 2019)

Less than three months after the Supreme Court cut the ever-proliferating Aadhaar card down to size, individual privacy has taken another body blow. On December 20, 2018, the Ministry of Home Affairs conferred powers under the IT Act 2000 to ten security agencies to "direct any agency of the appropriate government to intercept, monitor or decrypt… any information generated, transmitted, received or stored in any computer resource."

The gallery of eminence thus authorised comprise not just the usual suspects such as Intelligence Bureau (IB), Narcotics Control Bureau (NCB), Enforcement Directorate (ED), Directorate of Revenue Intelligence (DRI), Central Bureau of Investigation (CBI), National Investigation Agency (NIA), the Research and Analysis Wing (RAW), Directorate of Signal Intelligence but also the Central Board of Direct Taxes and Delhi's Commissioner of Police. That's a lot of sleuths let loose! Why is India finding it so hard to restrain the exuberance of its super snooping sovereign?

I will spare you a long sociology soliloquy. Very briefly, one way or another, sovereignty is always 'captured', even if you use the ballot box to do it. Politics is about the acquisition and exercise of power and that rides on insider information.

In a society where the flow of information is perfectly symmetric, no political player has any advantage at the ballot box. That is one reason why every government places emphasis on the acquisition and management of information, a kind of insider trading.
Given this compulsion, it becomes obvious why you can't restrain sovereign snoopers any more than you can kill a ghost. This same enduring collateral motivation in the hearts of all politicians is the main reason why liberals are especially sceptical of the morally righteous rhetoric that usually accompanies the government's invasion of privacy.

The problem with this liberal 'position' is in the paranoid hostility within which its foundation is located. You may think sedition is conceptually senseless but when free speech kills a couple of constables at the hands of stone throwers in downtown Srinagar, you have to choose between the political aspirations of the stone throwers (or their daily wages, depending on your prejudices) and the fate of the orphaned toddlers the constables left behind in their native villages.

If you like the idea of protecting your parliament (or the Taj in Mumbai) from ISI trained jihadists, protecting the privacy of an idealistic PhD student dabbling in Islamic revolution as a symbolic act of rebellion may not be your priority.

There is a thin line between TV rantings which are but a case of entertaining if vulgar debauchery and a mob ready to lynch the first example it finds of people who have been demonised on that same TV channel. India has faced each of these situations, and often enough.

To this, we can add administrative attitudes that come from a more paternal ideology. You don't have to see too many Bollywood movies to recognise that Indians are borderline neurotic barely in control of their emotions. Unless you control our environment, we descend into senseless violence very easily.

Along the same basic theme is the argument that we are an utterly humourless people whose idea of a good laugh is to see someone else slip on a banana peel: we need to be 'protected'. Perhaps pithier is the argument that free speech has never been a part of any mainstream Indian philosophy. We believe hypocrisy is cultural sophisticated and truth-telling somewhat boorish. In such a society, both laws and courts will inevitably come down on the side of control over constructive criticism, leave alone constructive chaos.

Now, if we take the conservative line on snooping, what is the criterion by which such a law should be judged? The answer is clear enough. If we want our government to invade privacy, we would want to know that it has done so through the application of a reasonable law fairly applied for good reason after due process. That is more or less the view courts have long taken on the snooping that the government has always undertaken since personalised distance communication first appeared on the scene.

Both the Indian Telegraph Act, 1885 and Indian Telegraph Rules, 1951 empower the central and state governments to intercept messages. Similarly, the Indian Postal Act, 1898 allows central and state governments to intercept postal articles in public emergencies or in the interest of public safety and tranquillity.

When communication moved from paper to computers, the Information Technology Act, 2000 immediately reflected the governments' power to intercept, monitor and

decrypt electronic information. Thus, section 69 of the IT Act legislates this power "in the interest of the sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence".

Such invasions of privacy cannot be authorised without recording reasons in writing. Standard Operating Procedures for interception, handling, use, sharing, copying, storage and destruction of records have been issued by the Ministry of Home Affairs to enforcement agencies. Similarly, department of telecom (DoT) has issued standard operating procedures for lawful interception to telecom service providers.

Systemic failures apart, the December 2018 notification is not a carte blanche to the state to look over our shoulders without limit. We can also take heart from the knowledge that where surveillance is unleashed on citizens without following prescribed procedures, the authorised government official can be charged under Section 66 of the IT Act, 2000 and send to the slammer for three years with a penalty of Rs 5 lakh.

At the end, the surveillance issue in India inevitable comes down to what every vibrant democracy comes down to on every issue under heaven: the middle path. The search for this middle path must at first recognise that by the standards set by western democracies (to say nothing of dictatorships worldwide), India is probably one of the least snooped on societies.

I would like to argue that this is a result of our self-proclaimed plurality and tolerance but that would stretch credulity to point break. Our problem is the resource crunch: we haven't the money and we haven't the people. Those that we do have don't want to work long hours and demand lots of casual leaves.

The HR (human resource) problem is global. I have had the privilege to attend the annual international crimes conference in Cambridge for some years now and the refrain remains unchanged: you can get the algorithms to crunch the petabytes of data we are capturing into a variety of 'probability baskets' but you still need armies of people to troll through the hot leads and identify the criminals.

What you get then is un-utilisable capability. The sequitur is that given the HR challenge, perhaps we should be just a little less paranoid about the little surveillance we are able to mount on our citizens. In that view of the matter, when it comes to down to dust, my own view on the home ministry's new notification may be summarised thus. I don't relish the idea of being spied upon but if it is my fate that it be so, I would prefer the sleuth one knows to the sleuth no one knows. Can you say that about Google or Facebook?

Comment-3

Inherent fault-lines in the new reservation policy

The concept of reservation is based on the fallacy that wealth and opportunity are a zero-sum game.

Rohin Dubey

(First published Business Today Feb 13th, 2019)

Lack of education apart, the latest reservation for the 'backward' may, above all, be proof that our legislators continue to struggle with ideological constructs that are both anachronistic and debunked. Allow me to explain.

On January 14, 2019, the Central Government notified the 103rd constitutional amendment which confers States with the power to make "special provision(s) for the advancement of any economically weaker sections of citizens in addition to the existing reservations and subject to a maximum of 10 per cent of the total seats in each category".

These special provisions included reservation in higher education and for appointment in certain categories of jobs. The amendment is premised on Article 46 in the Directive Principles of State Policy which places an obligation on the State to "promote with special care the educational and economic interests of the weaker sections of the people". Since 'reservation' seems to have been on the menu right from independence, is this a case of new wine in old bottles or is it just more of the same old?

To contextualize, the Constitutional Assembly took the view that systematic historical oppression entitled backward castes to be compensated with an advantage that would assist them in rising out of decades of persecution. Economic backwardness in isolation had no place in this discourse. Seventy years later, and after much social churn, the legislature continues to expand the proportion of reservation for various classes of individuals without logical coherence in a classic case of legislative creep. How many more amendments will it take for us to realize that reservation laws are incapable of serving their ostensible purpose?

Since the birth of the Constitution, a series of amendments have expanded the state's discretion to engage in affirmative action. The 93rd Constitutional amendment inserted Article 15(5) which empowered the state to make "special provisions by law for the advancement of socially and educationally backward classes in so far as such special provisions relate to their admission to educational institutions".

The distinction drawn in the 103rd amendment is "economically weaker sections". Is the classification of economically weaker sections radically different from educationally backward classes that merit a new sub-section? Don't 'educationally backward classes' presuppose 'economic weakness'? Or are there 'economically weaker classes' who are

not 'educationally backward' that require the benefit of reservation? The legislature has in its customary fashion left these questions unaddressed.

That apart, an examination of the legality of the 103rd constitutional amendment raises serious concerns. The Supreme Court of India [Indra Sawhney v. Union of India, AIR 1993 SC 477], among other things, (a) limited the State's powers of reservation to 50% of the available seats in any given category and (b) held that economic criteria cannot be the sole basis for providing reservations. The Court's reasoned if economic backwardness alone were to be the test, the poor from all casts and communities would compete for the reserved quota undermining its objective. The 103rd amendment has directly violated this principle.

If everyone is oppressed, then nobody is. Besides, reservation is designed to right historical wrongs, not redistribute income from the rich to the poor. From this perspective, what is Reservation for economically backward classes but redistributive taxation on steroids?

Illegalities apart, the ideological underpinnings of the 103rd amendment are deeply flawed. Is inequality inescapably harmful? Modern intellectuals do not offer unqualified support. In 2015, Harry Frankfurt argued that inequality per se is not objectionable; only poverty is. If an individual lives a long and fulfilling life, then whether they drive a car or a bullock cart is morally irrelevant. What is essential is that every individual should have enough.

The concept of reservation is based on the fallacy that wealth and opportunity are a zero-sum game. There is no reason why others must have less for some people to end up with more. For example, since the industrial revolution, wealth has expanded exponentially.

According to the World Bank, global per capita GDP has grown in every year from 1961 to 2015 except 2009. Proponents of inequality such as Thomas Piketty claim that "the poorer half of the population are as poor today as they were in the past, with barely 5 percent of the total wealth in 2010 just as in 1910". What they fail to consider is that the total wealth today is significantly higher than in 1910, and if the poorer half do indeed own the same proportion of wealth, they are still far richer.

There is an inevitable correlation between economic development and inequality. India and Brazil have both experienced robust growth with a widening gulf between the rich and poor. Wealth is frequently a reward for the tangible delivery of extraordinary value to society generally, be it sunflower oil or iPads.

It is thus difficult to adopt the position that the accumulation of wealth and its natural corollary of inequality are iniquitous. Unless demonstrably shown to result in abject

poverty and deprivation, there seems little justification for any state to systematically uplift the economically weaker on the mere principle of it.

Perhaps this is why our corporate laws have no difficulty recognising the primacy of private shareholder in driving the creation of private wealth. The corporation's legally defined mandate is to pursue relentlessly its own economic self-interest.

Recognition of the sovereignty of shareholders value is nothing if it is not an endorsement of the inevitability of wealth concentration. Dealing with the consequences is confined to issues that directly conflict with competition and labour laws. In such a legal structure, reservation cannot conceivably be a viable modus operandi for redistribution of income, which is why the Constitution does not allow for it.

Bear in mind also that the ideological construct underlying reservations for economic backwardness fundamentally undermines the public posture of a government that projects itself as an economically growth oriented one. There is a very good reason that AAP's redistributive policies aren't at the forefront of BJP's electoral pitch.

All this said, it remains to be asked if this amendment will have the effect of curbing poverty? In India, the right to education is a fundamental right with primary education for children up to the age of 14 to be provided by the state free of cost. So it's not laws and rights that block the road to progress. This new species of reservation may swap the poorest for the less than poorest but at the end of the day, it seems obvious that hat swapping doesn't enlarge the education cake.

There is the distinction to be made between a 'right to participation' and an 'ability to avail' a benefit. The problem with inculcating students into higher education without gauging their capability is that they are often unable to exploit the opportunities presented to them. Often, students enter universities on "quotas" for the purpose of obtaining degrees in the hopes of landing jobs. Yet, when students do transition into jobs, they are often inexperienced, underdeveloped thinkers and incapable of performing at a high level. Academic underachievement translates directly into an absence of employable skills.

The irony of this constant privileging of "college degrees" is revealed in the fact that some of the most successful people didn't even receive a higher education. Gautam Adani barely finished one year of college before dropping out to enter the world of business. Our very own Prime Minister is a self-proclaimed tea-seller. And how can anyone forget the Sachin Tendulkar's success story? Successful people rarely credit their university education with their ideas. Higher education doubtlessly galvanises innovation and success, but it does not purport to combat poverty.

In conclusion, it is self-evident that the legislative history of reservation pivots not on whether its existence is justified but on who should benefit from it. At some point,

lawmakers need to acknowledge the ideological fault-lines and address the burning constitutional question: when and how can we cure the Obsessive Compulsive Reservation Disorder?

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