Impatient move

Lack of consensus in the Rajya Sabha is no reason to issue an ordinance on triple talaq

The Union Cabinet's decision to take the ordinance route to enact a diluted version of its law making instant triple talaq a criminal offence is a sign of undue impatience. This is a matter that required deliberation, especially after serious objections were raised to some provisions of the Bill passed by the Lok Sabha; also, there is an ongoing debate on the desirability of criminalising instant triple talaq. The Muslim Women (Protection of Rights on Marriage) Bill, as approved by the Lok Sabha, sought to give statutory form to the Supreme Court ruling of 2017 that declared talaq-e-biddat as illegal. The Bill made this form of divorce punishable by a three-year prison term and a fine. In the face of Opposition concerns, the government proposed significant changes to water down the provisions relating to the treatment of talaq-e-biddat as a criminal offence. Despite a notice for these amendments being given, the matter was not taken up in the Rajya Sabha in the last session due to a lack of consensus. When the Bill has been deferred to the next session of Parliament, it is not clear what exigency impelled the government to take recourse to the extraordinary power of promulgating an ordinance. Could it be the elections to some State Assemblies this year? Clearly, the Centre wants to demonstrate that it is espousing the cause of Muslim women. But the mere lack of consensus in the House is not a good enough reason to promulgate an ordinance. It could even amount to subversion of the parliamentary process, as the Bill has been passed in one House and the other is likely to consider it in an amended form.

However, the changes to be introduced through the ordinance do address some of the reservations about the original Bill. The first makes the offence cognisable only if the woman, or one related to her by blood or marriage, against whom triple talaq has been pronounced, files a police complaint. Second, the offence has been made compoundable, that is, the parties can settle the matter between themselves. And third, it provides that a magistrate may grant bail to the husband after hearing the wife. These amendments will not only restrict the scope for misuse by preventing third parties from setting the criminal law in motion against a man pronouncing instant triple talaq against his wife; they will also leave open the possibility of the marriage continuing by allowing bail and settlement. But the core issue that arises from the proposed law remains: whether a marital wrong, essentially a civil matter, should lead to prosecutions and jail terms. Also, when the law declares instant triple talaq to be invalid, it only means the marriage continues to subsist, and it is somewhat self-contradictory for a law to both allow a marriage to continue and propose a jail term for the offending husband.

Upping the ante

The U.S. ratchets up the trade war with China, but to what end?

The rules-based world order for international trade appears to be in for a rougher ride yet after the administration of U.S. President Donald Trump announced this week that it would be slapping $200-billion worth of Chinese exports with 10% tariff, ratcheting it up to 25% by the year-end. In the latest round of the ongoing trade skirmishes between the world's two largest economies, almost 6,000 items will be hit by the new U.S. tariffs, from September 24 onward. Typical of Mr. Trump's aggressive approach on "unfair" trade policies, the tariff announcement came with the warning, "If China takes retaliatory action against our farmers or other industries, we will immediately pursue phase three, which is tariffs on approximately $267 billion of additional imports." Less than 24 hours after the U.S. announcement, China said it would apply retaliatory taxes to the tune of $60 billion. Given that over the summer both countries started taxing $50-billion worth of the other's imports, if Mr. Trump makes good on his threat of additional tariffs, all Chinese imports to the U.S., nearly 4% of world trade, will come under the tax net. On both sides of the tariff war, economic pain is likely to be widely distributed.

There are two questions that this escalation raises. First, what is the likely trajectory of this conflict? Economists concur that in the near term the trade war will cause a shrinkage in bilateral trade volumes. Businesses in the U.S., China and nations with close trade and investment links to the two countries, such as those in Europe, will find themselves in considerable economic trouble. Over the longer term, a reversal of the globalisation of supply chains may take place – perhaps that is the very aim of the Trump administration. However, the U.S. could have gone about this by applying its resources through bodies such as the World Trade Organisation to penalise China for overproduction, dumping overseas and excessive restrictions on market access. Second, what impact will this trade war have on the future of the hyper-connected world that we live in today? China, and indeed any other nation that trades with the U.S., may seek alternative markets and trading partners if the American government persists with its retreat into economic isolationism. Yet, even if countries can avoid some of the punitive costs of this battle, global institutions such as the WTO and a myriad other multilateral rule-making bodies will wither away, losing their authority. Philosophically, this would fly in the face of the foundational economic principles regarding division of labour and comparative advantage. This would, in the much-longer term, be a loss for the world community of nations, many of whom have worked hard to establish and credentialise the post-World War order precisely in order to stave off the dark forces of parochialism that engendered the horrors of that period.

Guilt by association and insinuation

A recap of the Saibaba case shows just how urgently the UAPA needs to be read down

GAUTAM BHATIA

In the 1950s, the U.S. was gripped by an anti-communist hysteria that is now known as "McCarthyism", after Senator Joseph McCarthy, its chief propagandist. McCarthyism was characterised by blacklists and harassment, investigations and inquiries, dismissals from employment, and sometimes arrests and imprisonment of persons suspected of having left-wing sympathies. Many of these activities took place under cover of broadly-worded and vaguely drafted laws, and were sanctioned by judges who were hardly immune from the corrosive public mood at the time.

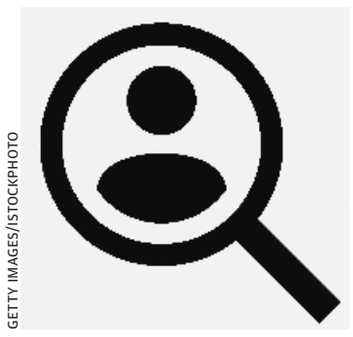
Pathological approach

Senator McCarthy was ultimately brought down, and McCarthyism has since become a byword for persecution of dissent and state paranoia. However, noting the prevalence of McCarthyist cycles in the lives of contemporary democracies, the American legal scholar, Vincent Blasi, proposed taking a "pathological approach" towards the constitutional right of freedom of speech and expression. Prof. Blasi argued that courts must interpret the right to free speech so that it can "do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." This means that laws and statutes allowing wide discretion to state agencies and to judges should be interpreted narrowly, and judicial doctrines marking the line between criminal conduct and the permissible exercise of fundamental rights should be clear and specific. In this way, he believed, the rule of law would act as a protector of individual liberty and a constraint upon state power in those times when the temptation to view dissent as treason was at its highest.

The ongoing case before the Supreme Court, pertaining to the arrests of numerous activists on the ground of their having links with Naxalism, has brought to the fore the operation of a law that goes directly contrary to Prof. Blasi's pathological approach: the Unlawful Activities (Prevention) Act. Much has been written about the UAPA's draconian procedures: pre-charge sheet detention for up to six months, the near-impossibility of getting bail, and the inordinate length of an average trial, effectively leading to years of incarceration before a final acquittal. The problem with the UAPA, however, is not simply the manner in which it sanctions the long-term deprivation of personal liberty even before an individual is found guilty. Equally seriously, what the UAPA deems criminal is phrased in such broad and vague terms that a finding of guilt or innocence itself entails an extraordinary amount of discretion. This discretion is vested both in the prosecution (when it builds up its case against the accused), and in the trial judge who hears and decides the case.

The Saibaba judgment

To understand how this works in practice, consider the recent, high-profile case of Professor G.N. Saibaba. In March 2017, the Sessions Judge at Gadchiroli convicted Prof. Saibaba – along with five other persons – under various provisions of the UAPA, and sentenced him to life imprisonment. The accusations against him included criminal conspiracy to wage war against the government, membership of the banned Communist Party of India (Maoist) and its "front organisation" (the Revolutionary Democratic Front), an



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intention to facilitate and abet the commission of terrorist activities, and so on.

In order to prove Prof. Saibaba's "membership" of the banned organisation and its "front", the primary inculpatory material included, for example, interviews in which he had discussed the history of the communist movement, his attendance at a public meeting where government policy had been criticised and the release of political prisoners had been demanded, his offer (as part of a team of persons) to mediate between the government and the Maoists, and copies of various pamphlets and videos that already existed on the Internet. The Gadchiroli Sessions Court put great store by this material as demonstrating Prof. Saibaba's membership of, and involvement in, the activities of the CPI (Maoist) and the RDF.

In addition, the court also held that Prof. Saibaba operated under different pseudonyms while carrying out his work. It formed this opinion by noting that, in some incriminating letters, a Naxal operative called "Prakash" had been referred to as handicapped, and also that – at one point – his hard-disk had crashed. Since Prof. Saibaba was also handicapped, and one of the external hard-drives seized from him was not working, the court held that Prof. Saibaba was Prakash. Similarly, part of the evidence included a 2007 RDF letter claiming that Prof. Saibaba was handling certain parts of the country, and a 2013 CPI (Maoist) document claiming that an individual called "Chetan" was handling those parts. On this basis, it was held that Prof. Saibaba was also Chetan.

The fault in the UAPA

No doubt, the Sessions Court's analysis of the evidence, and the conclusions that it drew, will be tested by the appellate courts. However, the core issue is not how the judge examined the evidence before him, but how the UAPA facilitates and encourages judges to draw sweeping conclusions of criminality on the basis of thin and, at best, suggestive material. In his critique of the Saibaba judgment, the criminal lawyer, Abhinav Sekhri, points out three ways in which this happens. First, the UAPA does not define what a "front organisation" is, or what makes an organisation a "front" of a banned unlawful or terrorist group. The wording of the UAPA, with references to "any combination of persons", is vague and unhelpful. Second, the UAPA uses a number of broad terms that overlap with each other. Section 20 criminalises "membership" of a terrorist organisation; Section 38 uses the terms "associating" or "professing to be associated" with a terrorist organisation; and Section 39 criminalises "support" to a terrorist organisation, and includes "inviting" support as well as organising a "meeting" to support the terrorist organisation. And third, the UAPA punishes both "unlawful activities" and "terrorist acts", but the definitions tend to overlap (and, in the Saibaba case, convictions were returned under both definitions for the same conduct).

Our criminal legal system is based upon the idea of individual responsibility: I am guilty for a clearly-defined offence that I have committed (either by acting or, in some cases, failing to act). The UAPA, however, takes us into the shadowy, McCarthyist world of banned organisations and "fronts" of banned organisations, "membership" and "association" (even a "profession" of association), "support" and "inviting support". With terms like these, there is little wonder that even judges see pseudonyms seven years apart, conspiracies and code names, and the possession of literature, books and documents as damning. With its loose language and ambiguous words, the UAPA creates a climate in which the focus shifts from individuals and crimes to groups and ideologies.

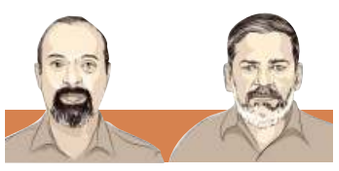
There have been some judicial attempts to push back against this climate. The Supreme Court has held, for example, that the word "membership" has to be restricted to active incitement of violence (and not possession of books or attendance at meetings). In a famous judgment granting bail to members of the Kabir Kala Manch, the Bombay High Court applied this standard, and specifically rejected the prosecution's argument that it was the "ideology" itself that was contagious. However, such judgments are few and far between, and the dominant approach remains one that is antithetical to individual liberty, and deeply McCarthyist in character.

Back in 1952, while debating the extension of the Preventive Detention Act, Syama Prasad Mookerjee protested that while preventive detention may be justified in some extreme circumstances, "you cannot just treat it as sandesh and rasgulla that you make it a normal part of the law of the land and start relishing it." There is now enough evidence to suggest that our state has begun to relish the crackdown on dissent under the cover of combating terrorism. It is time for citizens and courts to ensure a dialling down. Interpreting the provisions of the UAPA through the lens of Prof. Blasi's pathological principle might be a good start.

Gautam Bhatia is a Delhi-based lawyer

Preparing for the floods

Kerala has a unique opportunity to put in place climate-resilient water management



A.J. JAMES & G. ANAND

The recent floods in Kerala saw heroic rescues from raging rivers swollen by unprecedented rains – and the opening of shutters of major dams. There were allegations of 'human blunders' while the government said it could have done little else. The truth is that India has not learnt its lessons from recent floods, in Assam, Bihar and Tamil Nadu, and without addressing the underlying causes, history will repeat itself; if not in Kerala, elsewhere.

Three factors stand out.

Reluctant dam managers

In Kerala, as elsewhere, more flooding was caused by emergency releases from dams that were full. Despite forecasts of more rain, there were no controlled releases. World Bank analysis while preparing the National Hydrology Project (NHP) in 2015 showed that although weather forecasts are more accurate now, dam managers (especially bureaucrats) are reluctant to authorise advance controlled releases.

This is partly because operating schedules are not based on predicted rainfall. These usually specify that dams must be filled up as soon as possible (because rain is not guaranteed later in the season) and must be full by the end of the monsoon (for the summer). But the world has moved to dynamic reservoir operations based on weather forecasts. While Bhakra dam's managers switched to this after much persuasion, others in India have not because of the memory of notoriously inaccurate weather forecasts.

The political leadership and the bureaucracy too do not tolerate mistakes. Therefore, dam managers are reluctant to risk their careers and order controlled releases in advance.

The NHP is improving hydrometeorological and weather forecasting systems across India but unless dam managers feel free to take credible risks, these will not be used for dynamic reservoir operations. A 'plan B' is also needed for water scarcities such as basin-scale water modelling and analysis supporting contingency planning (inter-basin transfers, linking canals to intermediate storage structures, and water re-allocation to higher-priority uses). None of these exist in India today.

Blocked waterways

In the badly-affected Tiruvanvandoor area of Chengannur in Kerala, none of the 23 small streams (Pravinkoodu to Tiruvanvandoor area) and a larger stream (*thodu*) called Madanthodu exist today, having been filled-in and encroached. This caused the Pamba river to flow on the roads and wreak havoc. This is the story across Kerala: roads, railway lines and housing colonies being laid and built without regard for natural water ways, but with formal planning permission. The State Department of Inland Waterways focusses on large waterways while district and local panchayats have no mandate or interest in maintaining these to reduce flood risk. The State Disaster Management Agency also ignores them.

River-basin specific flood inundation modelling with climate change simulations is a necessary first step to understand the full impact of potential unprecedented flooding. This includes worst-case scenarios such as twice the maximum historical rainfall, as was recently done by a Department for International Development, U.K.-supported project for the Mahanadi in Chhattisgarh. The second is for the local community to co-manage water resources with the government (by planning intermediate storage, drainage and emergency responses).

There must be massive awareness generation, to ensure that airports are not extended into river floodplains (an example being Chennai airport and the Adyar river), that road culverts let storm water through without hindrance, and that excess water is not blocked but allowed to saturate the soil strata (especially of sloping land) so that it does not cause mudslides (including the *urul pottal* that devastated hillsides in upland Kerala).

AP/AIJAZ RAHI

Unprepared populations

Despite India being a signatory to the UN's Sendai Framework for Disaster Risk Reduction, little has changed on the ground. Disaster management has improved and heroic efforts were made in Kerala to reduce human/animal casualties. Information was also shared through social and other media such as precautions to be taken after the flood. But most people were caught unawares by the ferocity of the flooding. Had such information been disseminated and absorbed earlier, disaster risks could have been greatly reduced, and everyone may well have coped better.

Most modern cities have elaborate flood management plans. But India cannot even protect known flood-plains, tank foreshores and lakes peripheries from encroachment and illegal construction.

Addressing these and other issues mentioned such as deforestation, encroachment and unplanned construction are self-evident priorities when development is viewed using the lens of climate-resilient water management (CRWM). A 2018 paper on an operational CRWM framework for South Asia defines three criteria for this.

We need to use the best-available information for decision-making. This means improved hydromet systems and weather forecasts, robust modelling of catchment water flows with simulations of different climate-related scenarios, international norms for safety factors and building codes.

We must prioritise buffers, flexibility and adaptability. This includes reviewing safety criteria of dams and canals, re-building these with higher safety factors, creating new intermediate storages, and introducing dynamic reservoir management.

Finally, we must reduce the vulnerability of the poor who pay a disproportionately higher cost in calamities.

Kerala has a unique opportunity to plan its future with a renewed awareness of the potential impact of climate-linked events. With more such extreme climate events likely in the future, it is better to be prepared than to be caught unawares – again.

A.J. James is an environmental and natural resource economist based in Delhi. G. Anand is a consultant on sanitation and wastewater management

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

With impunity

The series of cases of rape across the country reflects the conspicuous lack of deterrent punishment. Even after the Nirbhaya case, there has been a disturbing increase in cases, especially those involving minors (Page 1, "Class X girl gang-raped in boarding school", September 19).

More worryingly, the abysmally low conviction rate in such cases compounds the woes of survivors, with justice either proving elusive or inordinately delayed. The Protection of Children from Sexual Offences Act remains a paper tiger.

P.K. VARADARAJAN,
Chennai

■ Creating new laws or promising strict action does not seem to have had any impact on the growing number of cases of rape being reported. Not a day passes without disturbing reports and coverage of the horrifying assaults on girls and women. Whether it is a girl in a boarding school or a board examination topper in Rewari, Haryana, the law seems to have no effect in stopping the steep rise in criminal assault. In all this are issues of upbringing, the education system, and the importance of sex education

AGRIM JOLLY,
Zirakpur, Punjab

Bank merger

It is claimed that consolidation of banks would help meet the capital requirements of infrastructure-based companies. But going by the financial stress created by infra companies, banks, even after the merger, may be reluctant to fund them fearing escalation in non-performing assets. One wonders whether the strategy to bail out weak banks by infusing funds through recapitalisation has failed to produce results so that a merger is resorted to while near the general election.

Raising equity through public issue to meet the capital needs of such merged banks may not elicit the desired response. Middle class deposit holders who form the bulk of contributors to banks have a right to know the process of 'due diligence' that preceded the merger proposal.

V. SUBRAMANIAN,
Chennai

■ Amalgamation is hardly a remedy. Bank dues should be held on a par with tax liabilities as it is public money that banks trade in. There should be separate courts for realisation of bank dues, with time-bound justice dispensation. Bank boards should be apolitical. Even an exclusive banking career channel on the lines of the IAS and other specialised fields should be chalked out to enhance professionalism in banks.

SIVAMANI VASUDEVAN,
Chennai

Private health care

The chairman of Apollo Hospitals, Dr. Prathap C. Reddy says, "We are the cancer capital of the world, the stroke capital, heart disease capital of the world" (OpEd page, "The Wednesday Interview", September 19). The fact is that in terms of medical infrastructure, we are behind the West. There is even a wide gap between India and Sri Lanka in public health. It is unfortunate that no association or political party campaigns for better care. I hope the day will come when every citizen forgets political ideology/agendas and instead demands better, affordable health-care facilities.

MUKESH BHAGAT,
Varanasi

■ Dr. Prathap Reddy has dwelt on how the government of the day can help strengthen health care in India.

Interestingly, he has not delineated how the private sector, which is perceived to be only serving people with deep pockets and therefore out of bounds for the majority of people, can contribute its mite towards society.

These corporate hospitals are becoming money minting machines and spare no effort to fleece patients. If they stop milking people, there could be a paradigm shift in health care in India.

DEEPAK SINGHAL,
Noida

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