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Supreme Court on three farm laws: Another act of judicial evasion

INTRODUCTION

On January 12, 2021, the Supreme Court of India [‘the court’] passed an interim order in the case pertaining to the legal and constitutional validity of the three farm legislations¹. The said order² stayed the implementation of the three farm laws until further orders and constituted a committee of four agriculturalists so as to listen to the grievances of the parties concerned and make recommendations accordingly. As a consequence of staying the implementation of the three farm laws, the court also ordered the maintenance of the existing Minimum Support Price (MSP) system and protection of the land holdings of the farmers. Soon after the order was made, it came under a lot of criticism not only from the side of petitioners and sections of people opposing the farm laws but also from the respondent’s side and the union government favouring the constitutionality of the laws. For petitioners and farmers, they suspect the committee to be partisan in composition and for respondents and government the stay on the implementation of farm laws is against the judicial precedents. Let us have a close scrutiny of the court’s order in this short article.

STAYING THE IMPLEMENTATION OF THE LAWS

Without hearing the parties on the merits of the case (even a preliminary hearing), the judiciary staying the implementation of an act of legislature is quite unheard of. The order of the court elaborating the decision to take this extraordinary step of staying the farm laws says that this has been done in order to assuage the concerns of the protestors so that they get back to their lives. But the point is – Are the courts meant for this purpose? The judiciary has no role to play in the implementation of the laws the only role that it can play is to see to that the laws passed are not unconstitutional.. It is a well settled principle of law that if at all the imple-

mentation of the laws can be stayed then the laws prima facie must be shown to be either out of the competency of the legislature or in violation of fundamental rights given in Part III of the Constitution. But none of it was shown to the court (as per the averment made by the learned Attorney General for India) or atleast the 11-page order doesn’t discuss these grounds. In the absence of any such proof by the petitioners, the order is clearly an *encroachment* on the prerogative of the legislature and executive – because it is only they who can very well stay the implementation of laws (atleast in a democratic country). In the latter case, the order is devoid of any legal reason for staying the implementation of farm laws and therefore the court which champions the principles of natural justice has in this case itself violated it by failing to give a reasoned order. Also there exists a strong presumption in favour of the validity and constitutionality of a law unless shown and proved to be otherwise³. In the author’s opinion, the court’s order on staying the implementation of the laws amount to *judicial overreach* and violates the principle of separation of power which according to the court itself is a basic feature of Indian Constitution.

Furthermore, it is pertinent to mention here that though the protest was also staged against the enactment of the Citizenship (Amendment) Act in the year 2019, but the court did not deem it fit to stay the implementation of the said law⁴. The court relied on the recent interim order passed in *Dr.Jaishri Laxmanrao Patil v. The Chief Minister &Anr.*⁵ [case relating to Maratha reservation] holding that the court cannot be said to be completely powerless to grant stay of any executive action under a statutory enactment. However, again the court didn’t take the similar stance in the similar situation when need arose in the case of challenge



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¹The Farmers’ Produce Trade and Commerce (Promotion & Facilitation) Act, 2020; The Farmers’ (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020; and The Essential Commodities (Amendment) Act, 2020.

²Rakesh Vaishnav & Others v Union of India & Ors., WP (C) No. 1118 of 2020. The order dated Jan. 12, 2021 can be traced from <https://main.sci.gov.in/supremecourt/2020/21097/21097_2020_31_19_25372_Order_12-Jan-2021.pdf>.

³Refer Health for Millions v UOI & Ors., 2014 (14) SCC 496.

⁴Indian Union Muslim League v Union of India, WP (C) No. 1470 of 2019.

⁵Civil Appeal No. 3123 of 2020.

to the EWS reservation⁶. This selective approach on the part of the highest court of the land stifles *judicial consistency, judicial certainty* and *judicial discipline*.

CONSTITUTION OF A COMMITTEE

In addition to the questionable blanket stay on the implementation of the farm laws, the court constituted a committee of 4 experts in the field of agriculture so that negotiations can take place between those who are opposing and supporting the laws. The purpose of the committee is to listen to the grievances of the farmers relating to the farm laws and the views of the Government and to make recommendations. The court clarified that the committee has not been conferred with any adjudicatory powers⁷.

The very next day of the passing of the order i.e. on January 13, 2021, one of the 4 members of the committee has recused from the committee. Further, the remaining of the 3 members have already shown support to the three farm laws one way or the other, for this reason a number of farmers' unions decided not to participate in any of the deliberations of the said committee. Furthermore, how did the court selected these experts is unknown. What is known is that all these facts and subsequent events (negatively) affect the impartiality, neutrality and transparency of the court constituted committee.

By appointing this committee, the court also seems to have ensured that no hearing takes place until committee submits its report – which means that the court has given some breathing time to the government which was looking to be bailed out of the corner somehow. This illustrates of what David Landau and Rosalind Dixon have described to be an instance of 'abusive judicial review' where the court not only fails to act as an impartial adjudicator but also aids the executive in fulfilling its strategies.

CONCLUSION

In the recent times, the court has increasingly been criticised for not only failing to act positively in exercising its judicial power by keeping the time-sensitive and remedy oriented matters pending for long⁸ but also for refusing to

adjudicate on some of the matters by rolling the ball in the court of one of the disputing parties (generally seen in favour of the largest litigator of the state i.e. the Government)⁹. Some of the writers and scholars have referred this version of the Supreme Court of India as '*judicial evasion*'¹⁰. The court's approach in the farm laws case depicts the similar trend and is just another instance of judicial evasion. Explanations to this stance of the Supreme Court points to what **Alexander Bickel** has explained as a strategic behaviour of the judges of the court in order to avoid open confrontation with the government (especially majoritarian one) in the service of '*passive virtues*'.

As per the orders of the court, the said committee met first on January 15, 2021 and it has already submitted its recommendation report to the court on March 19, 2021. Though in light of all these developments, all the above mentioned arguments and criticism against the order of the court may seem to be infructuous, redundant and *fait accompli*, but it must be remembered that the acts of the court has always have a bearing on its credibility, integrity, legitimacy and independence before the eyes of the people which repose *uberrimafidei* in the Supreme Court in comparison to other public institutions in India.

Moreover the court has not set for any further hearing in the matter since then. The court has already evaded from its duty to adjudicate and decide on the matter of constitutionality of farm laws by constituting a committee to negotiate the matter, the court is now further and continuously evading from its duty by postponing the matter which requires urgent and timely hearing. It is expected of court now to take up the matter at the earliest and decide on the legal challenge to the farm laws which are pending before it for months now so as to redeem its lost glory in the times of present majoritarian government. Not only that, an immediate and timely judicial adjudication on the farm laws can bring a reduction in the ongoing protests on the streets amidst pandemic.

⁶Youth for Equality v Union of India, WP (C) 73 of 2019 (case challenging the constitutionality of the Constitutional (103rd Amendment) Act, 2019 which provides reservation to the economically weaker section of the society).

⁷See order dated January 20, 2021 <https://main.sci.gov.in/supremecourt/2020/21097/21097_2020_31_18_25531_Order_20-Jan-2021.pdf>.

⁸To illustrate the few: Vivek Narayan Sharma v Union of India WP (C) No. 908 of 2016 (generally referred to as 'demonetisation case'); Association for Democratic Reforms and Anr. v Union of India and Ors. WP (C) No. 333 of 2015 (electoral bond case); Indian Union Muslim League v Union of India WP (C) 1470 of 2019 ('CAA case'); SajalAwasthi v Union of India WP (C) 1076 of 2019 ('Constitutionality of UAPA Amendment case'); Youth for Equality v Union of India WP (C) 73 of 2019 ('EWS Reservation case'); ManoharLal Sharma v Union of India WP (C) 1013 of 2019 ('Article 370 case'); Assam Public Works v Union of India WP (C) 274 of 2009 ('NRC case').

⁹See judgment dated 11 May 2020 in Foundation for Media Professionals v Union Territory of Jammu And Kashmir & Anr. Diary No. 10817 of 2020 ('J&K 4G restrictions case').

¹⁰Gautam Bhatia, 'O Brave New World: The Supreme Court's Evolving Doctrine of Constitutional Evasion' (Indian Constitutional Law and Philosophy, 06 January 2017) <<https://indconlawphil.wordpress.com/2017/01/06/o-brave-new-world-the-supreme-courts-evolving-doctrine-of-constitutional-evasion/>>. Also see, MihirNaniwadekar, 'India's Doctrine Of Judicial Evasion' (Bloomberg Quint, 25 September 2019) <<https://www.bloombergquint.com/opinion/kashmir-article-370-and-indias-doctrine-of-judicial-evasion>>; ApporvaMandhani, 'With no Constitution bench set up yet, challenges to demonetisation now an 'academic exercise' The Print (05 January 2021) <<https://theprint.in/judiciary/with-no-constitution-bench-set-up-yet-challenges-to-demonetisation-now-an-academic-exercise/579203/>>; Gautam Bhatia, 'Judicial Evasion, Judicial Vagueness, and Judicial Revisionism: A Study of the NCT of Delhi vs Union of India Judgment(s)', (27 June 2020) 15, <<https://ssrn.com/abstract=3637009>>; Mihir N, 'The Supreme Court's 4G Internet Order: Evasion by Abnegation' (Indian Constitutional Law and Philosophy, 11 May 2020) <<https://indconlawphil.wordpress.com/2020/05/11/the-supreme-courts-4g-internet-order-evasion-by-abnegation/>>.