**Critical times call for strong judicial adjudication**

The Supreme Court of India will, sooner or later, consider the question whether the Citizenship (Amendment) Act (CAA) and the rules under it can pass constitutional scrutiny. That the recently promulgated CAA Rules are unclear about the fate of the applicants whose request for citizenship is turned down has aggravated concerns over the issue. There is also a fear that persons whose applications are disallowed might end up in detention centres. Some of the petitioners before the Court have also raised concerns over dual citizenship to foreign applicants who need not have to abandon their original citizenship. This would create uncertainty in the matter of citizenship, as it goes against the spirit of the parent Act, it is pointed out.

Interdicting a statute or set of statutory rules is not a routine exercise undertaken by the constitutional courts. Generally, a law made by Parliament is presumed to be valid unless it is shown to have ostensibly breached constitutional provisions. The law presumes that, normally, malice cannot be attributed to a process of legislation (Manish Kumar vs Union Of India, 2021). In Gurudevdatta Vksss Maryadit and Ors. vs State Of Maharashtra and Ors (2001), the Supreme Court said that “legislative malice is beyond the pale of jurisdiction of the law courts....”

The lack of interdiction

This conventional wisdom, however, is incapable of addressing the contemporary challenges posed by populist regimes across the world, which often invoke motivated or targeted legislation. Such dispensations also manipulate the electoral system or process by legislative means. This recent legislative trend calls for an advanced and assertive juridical approach. Refusing to interdict the operation of such enactments, by adhering to an obsolete presumption regarding validity of the law would severely diminish the counter-majoritarian role which constitutional courts are supposed to play in critical times.

Every piece of legislation is a political statement. A regime that does not believe in the idea of constitutional democracy would naturally enact laws with scant regard to the scheme of the Constitution. On such occasions, a sense of judicial euphoria about the ‘validity’ of the laws has precluded the Supreme Court from interdicting the operation of laws. The absence of an order of stay against demonetisation has allowed the tragedy to happen and by the time the case was decided in Vivek Narayan Sharma vs Union of India (2023), the situation was totally irreversible. The lack of interdiction of the dilution of Kashmir’s special status has also made the litigation almost a fait accompli, as one finds in the judgment In Re Article 370 of the Constitution of India (2023).

Anoop Baranwal vs Union of India (2023) was a radical judgment by the Constitution Bench of the top court that called for an independent body to select the Election Commission of India (ECI), with no predominance for the executive of the day. But, recently, the Centre promulgated the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023. This Act revived the earlier position of the “Prime Minister’s Committee” choosing the ECI. It comprises the Prime Minister, a Minister chosen by him and the Opposition Leader in the Lok Sabha, whose presence is inconsequential for all practical purposes. Appointments were made based on the new law.

The law was challenged in Jaya Thakur vs Union of India (2024). The Court, however, refused to prevent the operation and implementation of the statute based on “presumption” of its validity. This is not a targeted legislation, but an enactment, which, on the face of it, is unconstitutional. The statute threatens the very foundation of our democracy, of which free and fair elections are a basic feature. This is an illustrative case where the Court failed to protect its own judgment, essentially on account of the judicial superstition regarding the presumption of validity of the enactment. It is no wonder that in the general election 2024, the commissions and omissions by the ECI on several occasions remain questionable.

A case of targeted legislation

The CAA and the rules under it, on the other hand, clearly fall within the category of targeted legislation. Legislative malice is writ large in the law. The law classifies people in the name of religion and excludes Muslims from the process for grant of citizenship.

Another prominent example of targeted legislation is the Muslim Women (Protection of Rights on Marriage) Act (2019), which criminalised instant triple talaq. Significantly, the act of instant triple talaq had been invalidated by the Supreme Court in Shayara Bano (2017) and, therefore, there was no legal requirement to ‘criminalise’ an act which was non est in the eye of law. The statute only motivated the ‘clever’ husbands to resort to other means of divorce or to simply desert their wives, to get rid of the penal consequences. Thus, the law, which was aimed against the Muslim community, evidently did not come to the rescue of Muslim women. Often, it did the opposite. The enactment was however ‘successful’ in its divisive agenda. Anti-conversion laws in certain States in the country also followed suit.

An example in the U.S.

In the United States too, the conventional view did not favour judicial nullification of statutes on the ground of malice. John Hart Ely stated that the Constitution cannot be used as “an instrument for punishing the evil thoughts of members of the political branches”. But evil thoughts of the majority in the legislative bodies are a harsh contemporary reality. Therefore, motivated legislations should call for a more rigorous judicial scrutiny. Scholar Susannah W. Pollvogt correctly writes that “animus can never constitute a legitimate state interest for purposes of equal protection analysis”. By referring to the judgment in United States Dept. of Agriculture vs Moreno, 413 U.S. 528 (1973), she said that the enactment to exclude “hippies” from collective residential rights implies a “desire to harm” a particular group and therefore reflects discrimination (Unconstitutional Animus, Fordham Law Review, 2012).

There are Indian precedents where the Supreme Court has effectively interdicted operation of parliamentary legislations. In Ashoka Kumar Thakur vs Union of India (2007), regarding the prescription of 27% quota for Other Backward Community (OBC) candidates to professional colleges, the Court initially issued a judicial injunction. The Court’s order of stay in the case of the three contentious farm laws in Rakesh Vaishnav vs Union of India (2021) is another example. The Court in that case effectively prevented the implementation of the farm laws which the Centre had to withdraw ultimately following farmers’ protest.

As regarding the statutes which are glaringly unconstitutional or divisive, the process of judicial review should be strong, immediate, and unambiguous. The top court should be able to learn from its track record and understand the political consequences of its insensitivity during critical times. Delay often defeats the purpose of constitutional adjudication. Time is the essence of judicial review when it comes to malicious and unconstitutional laws.