Gist of EPW July Week 4, 2020

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Essential before the Pandemic

Migrant Labour and the Politics of Language

Context

- The COVID-19 pandemic saw unprecedented migration of labourers to their homes from different parts of the country. Government officials have sought to keep them in place with promises of safety and support, and through brute force.
- Preventing migrants from returning to their homes was hinged on two factors - containing the spread of the virus and the need to maintain the availability of labour for the economy once it reopens.

This article highlights the demand and disregard for the category 'labourer' by using the example of the upcoming harvest and planting season in Punjab.

The struggle of migrants to return to their homes

- A large number of migrants across the country were/are struggling to return to their homes amidst the lockdown imposed by the government because of the COVID-19 pandemic.
- Due to the suspension of bus and rail services along with the restrictions on private vehicles, thousands of migrants had/have decided to start their journey by foot, gathering their movable belongings to walk hundreds of kilometres in small and large groups.
    - This phenomenon reminds of the exhausted *kafilas* that crisscrossed the subcontinent in 1947.

The reason behind their returning:

- The major reason behind their decision to go back to their native places is the halt in all the economic activities such as agriculture, manufacturing, construction, and domestic services.
    - It implies that people are not able to work, hence, unable to earn enough money for survival.
- However, going back will again bring them into the same level of poverty because of which they were forced to leave their places.
    - Despite this, they are ready to return because they think there would be a better chance of survival amidst the familiar surroundings of their original localities.

Governments' attempt to prevent this movement

1. **To thwart the spread of the virus**

- The Prime Minister and Chief Ministers of various states have tried to stop the movement of migrants because of the fear of further spreading the virus.
    - Arvind Kejriwal pleaded that they should stay wherever they are, otherwise, coronavirus will reach their villages and families and it will then spread across the country.

- Whatever the situation in the cities, most of rural India has far fewer healthcare professionals and less adequate infrastructure to cope with a serious outbreak.
    - Therefore, officials have made appeals for migrants to remain in place.
- Governments have provided the assurance of screening and testing and also guaranteed material support.
- Many times, religious groups and local charitable institutions have stepped in to distribute rations to those who have exhausted all their minimal savings and are on the verge of starvation.
- Meanwhile, police and paramilitary forces had/have been deployed across the country to turn back convoys through arrests, beatings, and cordons.
    - Various digital and print media reports representing immense suffering have become very usual.

2. The economic reason behind stopping this movement

- Another important factor behind preventing the movement of workers is that a growing group of economists along with agricultural and industrial leaders accept the fact that these migrants play a major role in the economy.
    - They believe that if they return to their places, there will be severe shortages once the economy reopens.
- Indeed, across the world, the phrase "essential labour" has come to summarize a belated recognition of the importance of those people who were regarded as unimportant so far.
- It laid stress on the fact that people working in poorly-paid, insecure and low-status jobs are crucial to the functioning of society.
    - Without them, the taken-for-granted rhythms of everyday life are simply unimaginable.

Exploring the reasons behind Stopping the Migration through the Punjab case

- In Punjab, the issue of migrants is perhaps most severe during the months of April to July.
    - This is when the winter wheat crop is harvested and the land is prepared for the summer rice crop.
- Every year around 1.5 million people travel to the state in search of work, mostly from Uttar Pradesh, Bihar, Jharkhand, and Madhya Pradesh.
- Their major tasks include cutting, threshing, and bundling the wheat, ploughing and fertilizing the land, and transplanting the paddy along with loading and storing the grains as well.
- Although the use of agricultural machinery has led to the automation of much of the harvesting process, these technologies are not available to all, and a large number of people are still needed in the fields as well as in the markets.
- A large number of these migrants belong to the lower castes (Dalits and Other Backward Classes), while they are employed by the upper castes.
- They either work alongside landowners with smaller holdings, or in groups of 10−15 contracting on their own as they move from one village to the next.
- Men constitute a larger portion of the migrants but it is not uncommon for women and children to join them.
- In some places, landowners rely more on local groups (Mazbis and Chamars), while in other parts the work is done almost entirely by migrants.
- Last year (2019) the rate for planting an acre of paddy was around 3,000 plus basic food rations; now it might become double but with far fewer takers.
- The work done by them is very difficult. It requires hunching over in ankle-deep water under the burning sun, carefully plunging each seedling into the soft mud every few inches, slowly shuffling backward for hours on end.

In what could be unusual, in the absence of migrants for wheat harvesting, sons of large landowners were seen working in the fields with their fathers.

We may face a major Agricultural Crisis

- With thousands of migrants leaving and doubts about their return, there is a severe risk associated with the economy of Punjab.
- If the necessary steps are not taken to deal with this issue, paddy sowing will be significantly affected.
- Large landowners and commission agents are requesting the government to lay emphasis on the prevention of the movement of migrants and even find ways to induce others to come from afar.
- It is said by the agents that we are looking at a major agricultural crisis as the "seasonal labour" that usually comes to the state for procurement and planting "is totally missing".
- A delay in transplanting paddy will result in:
    - the reduction in yields and earnings,
    - reduction in the livelihoods of many people, and
    - it will also damage the potential food supply of the country.

As officials are struggling to decide when to commence the season, the clamour for labour grows more frantic.

Unpacking the Term 'Labourer'

- **Labourer:** Migrants who are employed in agricultural works have been given a generic name 'Labourer'.
    - At one level, any purposeful human activity could be regarded as labour, and might (or might not) be what distinguishes us from every other species.
    - Labour as a noun emerged in the 17th century in conjunction with its new counterpart, capital, which together laid the foundations for the modern global economy.
- **Identity of labour:** Almost all other forms of labour apart from agriculture, under capitalism, are given named occupations.
    - It takes labour to sew a shirt, deliver goods, treat a patient, or correct an article.
    - But we do not speak of tailors, drivers, nurses, or editors as labourers for textile factories, shipping companies, hospitals, or journals.
    - Instead, each has a specific designation, and with it, the coherence and dignity of a place in the economic order.
- **The insignificance of labour in agriculture:** Only those who labour in agriculture are marked by the generic name labourers with such imprecision and thus insignificance.
    - That is why it is routine to discuss fluctuations in the "price of labour" and track changes in the "supply of labour," and now due to the pandemic, make coarse demands about the "need for labour."
    - It is as if these people are just another input, akin to diesel or fertilisers or pesticides, to be acquired and put to use, and then tallied as an expense.
    - Behind the current alarm is a blunt calculation of the price of their abrupt absence.
- **Agricultural labourers are not peasants:** At the same time, these migrants are never called "peasants" or "farmers" as that would challenge the existing monopoly of landowners to that esteemed title.
    - Although both groups, labourers and peasants do identical works, it is unthinkable that Punjab would require *peasants from Bihar* for cultivation.
    - Hardly an acre of wheat or paddy is planted, grown and harvested without the collective labour of a variety of individuals and groups.
    - Peasants and labourers diverge where one has the power of land ownership and caste dominance while the other is forced to sell their labour to earn what they need to live.
- **The colonial legacy of Peasant vs Labour discrimination:** Such heterogeneity came into conflict with the rise of colonial land settlements amid a new rule of capital from the mid-19th century onward.
    - In order to calculate the precise amount of tax to collect, British officers imposed racialised accounting techniques to determine the gross income, expenditures, and net profits for each parcel of land.

    - Among other aspects, that meant keeping track of the amounts of grain taken by different groups involved in the production process, and recategorizing them as payments made to village menials or servants.
    - Certain castes who paid the tax became outright landowners, while everyone else ended up as labourers.
- **Formalisation of peasant and labour identity:** Over time, this was formalised through census operations that aligned occupation with identity, and codified into laws such as the Punjab Alienation of Land Act (1901), which restricted access to the land market to only those deemed a "member of an agricultural tribe".
    - **Strengthening by Green Revolution**
        - The new logic of landed/landless carried across the upheavals of partition and -independence, and into the Green Revolution era of the 1960s−1970s.
        - Intensified cultivation, and the switch from in-kind to cash payments, brought increasing numbers of migrants to the state to first augment and then supplant the local workforce.
        - The only modicum of specificity they acquired was the designation *khet mazdoor,* or "field labourer."

Conclusion

- The above discussion represents a glimpse into the basic tension between the value of labour and the ideology of the language.
- Perhaps the most celebrated subject of modern India, the peasant, is today regarded as the sole proprietor of agriculture and central to the rural economy.
    - Nevertheless, this pandemic has exposed the fallacy of such autonomy and exclusivity.
- Well before the lockdown, field labourers from both near and far were absolutely essential to cultivation despite being materially and etymologically reduced to its periphery.
- Their double subordination - poorly paid and without status is neither traceable from the past nor is the result of the economic progress.
    - It is rather a recent and immediate outcome of the hierarchical yet interdependent arrangement of priorities, people, and capital in the countryside.
- The migrant labour crisis represents a unique feature of the agrarian capitalist system in South Asia.
- During the 19th century, global economic imperatives intersected with the racial logic of colonial domination to generate a process of accumulation and reproduction without obvious equivalents elsewhere and earlier in the world.
    - Certain groups acquired new authority and privileges while others were exploited and excluded in new ways.
- The simultaneous demand and disregard for migrants is therefore an utterly modern phenomenon, one that exemplifies how human beings themselves have been commodified far away from the factory floor.
- However desperate, their compulsion to labour under such conditions is thus systemic rather than momentary, and cannot be redressed through compassion, much less coercion.
    - Instead, it might begin with rethinking how the division of labour is itself a product of many labours of division.

Domicile Reservations in National Law Universities

Context:

- Cases have been filed in the Delhi High Court against domicile reservations in two national law universities (NLUs).
- The article argues in favour of the domicile reservation system by stating various supreme court judgements and through evoking the mission for which National Law Universities (NLUs) have been established.

Intervention by Delhi High Court:

- **Stay on admission notification:** On 29th June 2020, the high court stayed the admission notification of the National Law University of Delhi (NLUD), which had reserved 50% of its seats in favour of students who had completed their education from an institution in Delhi.
    - The high court held that the move was not backed by the authority of the law and, therefore, stayed the notification.
- **Case of NLSIU Bengaluru:** Another petition was filed in the Delhi High Court requesting a stay on the domicile reservations in the admission to the National Law School of India University (NLSIU) located in Bengaluru.
    - This was a legally questionable move since the Delhi High Court does not have territorial jurisdiction over either the NLSIU located in Bengaluru or the Karnataka Government which had amended the National Law School of India Act, 1986 to provide for such domicile reservations.
    - The Delhi High Court was unwilling to entertain the petition on the grounds that it had no territorial jurisdiction but permitted the petitioner to withdraw the petition.
    - The whole exercise seemed like a transparent attempt at forum shopping in the hope of getting a favourable order.

Issue of domicile reservations or State quota in NLUs

- **The debate over domicile issue:** Domicile reservations or state quota have become an argumentative issue among the legal fraternity as they were sought to be implemented in the oldest and arguably prestigious NLU, the NLSIU.
    - The idea of this state quota was first proposed by the State Government of Karnataka in 2017.
    - Amid the political instability, it seemed to gain greater political support from the political parties in the state.
- **Political backing of domicile reservations:** In 2017, Karnataka Assembly passed an Amendment to the NLSIU Act but it was delayed by the Governor of Karnataka, Vajubhai Vala in an unaccountable manner. He refused his assent to the bill and returned it to the assembly.
    - At some later time, once again, when the same bill was passed by the Bharatiya Janata party, the Governor provided his assent to the bill and the bill has now become a law.
    - Now, 25% of the seats for admission are reserved for "students of Karnataka" across the board.

Constitutionality of Domicile Reservations

- Article 15(1) of the Constitution prohibits, among other things, discrimination on the basis of place of birth.
    - In the strictest sense, domicile reservations by states, reserving seats in educational institutions on the basis of place of birth being in that state would, therefore, be unconstitutional.
    - However, domicile reservations do not necessarily work that way.

Supreme Court

According to the Supreme Court, domicile and place of birth are not at all synonyms with each other. It is evident from the following judgments:

- **Saurabh Chaudri v Union of India:** A distinction between 'place of birth' and 'residence' was marked by a Constitutional Bench of the Supreme Court in Saurabh Chaudri v Union of India, noting that the term residence does not occur in Article 15 of the Constitution even if it was found in Article 16(2).
- **D P Joshi v State of Madhya Bharat 1955:** In fact, as far back as 1954, a Constitution Bench of the Supreme Court had held that a state's measures giving preference to students who are residents of a state would not offend Article 14 or 15 of the Constitution.
- Place of birth vs residence: The Supreme Court has, in the past, struck down as unconstitutional reservation on the basis of place of birth (*State of UP v Pradeep Tandon* 1975), but has consistently maintained a distinction between "place of birth" and "residence" (*P Rajendran v State of Madras* 1968).
- Judgments of the Supreme Court represent that the Supreme Court did not intend to forbid the government from giving preference in educational institutions to those residing in an area, but it did not want the same criteria to be applied in the context of public employment.

The validity of domicile reservations by NLUs:

- Both NLUD and NLSIU (along with other NLUs) have constituted their domicile reservations in such a way that it would fall within the constitutional boundaries laid down by the Supreme Court.
- 25% horizontal reservation for the students of Karnataka has been made mandatory under Section 4 of the amended NLSIU Act.
    - The law defines a 'student of Karnataka' as a student who has studied in any recognized educational institution situated in Karnataka for a period of 10 years.
- Similar demand of 50% horizontal reservation for students who have completed the qualifying examination from any school/college/university located in Delhi, is sought by the now stayed notification issued by NLUD.
- Some variants of this are followed in other NLUs, which also provide for "domicile reservations" or "state quota."
- If the NLUD's domicile reservation is backed by a proper law framed for this purpose, it would likely stand scrutiny from a constitutional perspective.

What is the need for state quota?

1. **Elitism in NLUs:**
    1. **NLUs as islands of excellence:** In 2010, at a national consultation on legal education, the then Prime Minister Manmohan Singh used a very evocative but apt metaphor to describe the national law universities: "islands of excellence".
    2. While he may have been referring to the "sea of mediocrity" to describe the wider landscape of legal education, there is another reason that the "islands" metaphor holds up in the context of NLUs, namely their elitism.
    3. Recent studies, at both the NLSIU and at the West Bengal National University of Juridical Sciences, show how unrepresentative the student body at these institutions are of the wider population of India.
    4. They are drawn almost exclusively from a narrow cross-section of the well-off, urban Indians belonging to Savarna castes and from English-speaking schools, and, reservations notwithstanding, tend to be dominated by these groups.
    5. In a diverse country with states divided on a linguistic basis, this has led to the creation of literal islands—institutions whose students fly in and fly out, forming little by way of long-lasting bonds with communities around them.
2. **Inequalities created by Common Law Aptitude Test (CLAT)**
    1. "National" entrance exams, such as the Common Law Aptitude Test (CLAT), tend to favour already privileged students and reinforce existing inequalities in society.

2. The emphasis on merit and ranking gives students a heightened sense of entitlement and a superiority complex based on their CLAT ranking and the relative ranking of their institution in the wider scheme of things.
3. With the demand for lawyers trained in corporate law to work in India's high-paying law firms, there is little if any incentive to communicate with, let alone contribute to, the local community.

Exceptions to the elitism:

- Exceptions can also be seen in some law schools. Students are encouraged by certain law schools to organize legal aid camps and something similar to these for local communities in and around these areas.
- Even without the encouragement (or sometimes in the face of the hostile antagonism of) their universities, students have been able to work with local communities to help them with their problems.

That said, these instances stand far apart as exceptions, and not the rule.

Conclusion

- **Domicile reservations in NLUs are not a new phenomenon.** They have been applied from the start in NLUs, such as the National Law Institute University, Bhopal.
    - They have been introduced much later to institutions such as NALSAR University of Law years after their establishment.
- **CLAT and argument of Merit in NLUs:** The idea that domicile reservations affect the "standards" in the institution is a flawed argument based on the belief that a CLAT ranking is an accurate assessment of the "merit" of the students taking up the study of law.
    - The unstated argument is that an NLU is only as good as the sum total of the CLAT ranks of the students who get in.
    - This is only a repackaging of the "merit" argument used to argue against reservations for Dalits and Adivasis and deserves to be rejected for the same reasons.
- **Correcting the 'elitism' in NLUs:** Domicile reservations alone will not remedy the problem of elitism in the NLUs.
    - They need to go hand in hand with more extensive scholarships and public funding of these institutions.
    - They also need to be augmented with a fundamental rethinking of the pedagogy in terms of what constitutes the "practical learning of the law." This will require a rethinking perhaps of what the "national" in the NLUs really means.
    - Does 'national' mean elitism or India being a nation-in-the-making? Is it a reflection of India being a nation-in-the-making or is it about imposing one artificial identity on diverse people?
- **The egalitarian mission of NLUs:** NLUs have not been set up to provide an endless supply of top-quality talent to the law firms of India and the world.
    - They were supposed to provide justice education and create a very different breed of the socially aware lawyer for India. NLUs have strayed from this mission.

Domicile reservations are perhaps one small step towards restoring the NLUs to their original mission.

COVID-19 and Dwindling Indian Federalism

Context:

- The article analyses federal features of the Indian Constitution and how the Centre has overlooked them centralising the whole decision-making process in fighting the pandemic.

Legislative and Executive powers of the Centre and states

- **Division of subjects under Schedule VII of the Indian Constitution:**
  - Entry 81 of Union List: Inter-State migration, Inter-State quarantine: To the Centre.
  - The entries 1, 2 and 6 of the State List: Public order, Police, Public health and sanitation; hospitals and dispensaries.
  - The entries 23 and 29 of the Concurrent List: "Social security and social insurance; employment and unemployment and "prevention of the extension from one state to another of infectious or contagious diseases or pests affecting men, animals or plants".

Inference

- The executive power of the union and states is "coextensive with the legislative power" under Articles 73 and 162 respectively.
  - It means that constitutionally, during the COVID-19 pandemic, the Centre has the power to legislate and execute the laws and policies with respect to interstate migration, interstate quarantine, social security and social insurance, employment, and prevention of the spread of infection in the country.
  - The states have the legislative and executive power in the area of public order, police, public health, sanitation, hospitals, social security, and containment of infection.

Disaster management and Indian federalism:

- **"Disaster" under Residuary power:** The subject area of "disaster" is missing in all the three lists of Schedule VII, hence disaster falls under the residuary power of the Centre under entry 97 of the Union List.
  - Accordingly, the Disaster Management Division of the Ministry of Home Affairs has declared the spread of COVID-19 as a "notified disaster for the purpose of providing assistance under State Disaster Response Fund (SDRF)".
- **Disaster Management Act (DMA)** enacted in 2005 by the Centre derives its powers under entry 23 of List III (Concurrent List).
  - The very idea of the Concurrent List is to provide for cooperative efforts of the Centre and states, and therefore, it was a wise decision on the part of the Centre to not invoke its residuary powers.
  - With the legislations framed under entries of the Concurrent List, there is an added obligation on the Centre to bestow equal powers and obligations on the states.
- **Schedule VII and Indian federalism:** Schedule VII is one of the significant elements of Indian federalism.
  - The Supreme Court in its historic case of *Kesavananda Bharati v State of Kerala* in 1976 had declared federalism as the basic structure of the Constitution.
  - In this light, it is important to reread entry 23 of List III, that is, "social security and social insurance; employment and unemployment" to understand the inefficiency of the requisite powers in times of disaster for both the Centre and states.
- **Limitations of the Disaster Management Act (DMA):** The role of the DMA is limited and restricted in a disaster like situation in India.
  - Under Section 11 of DMA, the national plan to deal with the epidemic has to be prepared "in consultation with state governments and other expert bodies in the field of disaster management".
    - It is missing in the present COVID-19 pandemic.
  - The role of the states in formulating a common agreeable plan is missing completely.

- The central government has declared the national lockdown successively and that too without any national plan.

Legal Framework for Disasters

I) National Disaster Management Authority (NDMA)

The Disaster Management Act (DMA) under Section 3 constitutes the National Disaster Management Authority (NDMA) with the Prime Minister as the ex officio chairperson and its nominees.

- **Functions and powers of NDMA:** The powers and functions of NDMA under Section 6 are as follows:
  - Laying down the policies, plans, and guidelines for disaster management.
  - Under Section 6(2)(i), NDMA has the power to take such other measures for the prevention of disaster, or mitigation, or preparedness, and capacity building for dealing with a threatening disaster situation or disaster as it may consider necessary.
  - Also, the power of the chairperson under Section 6(3) "in the case of emergency, to exercise all or any of the powers of the National Authority" is subject "to ex post facto ratification by the National Authority".
  - Similar provisions are also made for State Disaster Management Authority and District Disaster Management Authority with the chief minister and collector/district magistrate/deputy commissioner as *ex officio* chairperson respectively.

National Disaster Response Fund

- The Central Government has constituted the National Disaster Response Fund and is made available to the National Executive Committee under Section 46 with the following sources:
  - An amount which the central government may, after due appropriation made by Parliament by law in this behalf provide;
  - Any grants that may be made by any person or institution for the purpose of disaster management.
- Similarly, under Section 48 of the Act, the State Disaster Fund and District Disaster Fund are also constituted. But, there is no clarity regarding the amount which could be credited to it.

Overriding Effect Clause of DMA

- The Act also has an overriding effect clause under Section 72 wherein "the provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

II) The Epidemic Disease Act (EDA)

The Epidemic Disease Act was framed in 1897 with an objective to provide for the better prevention of the spread of Dangerous Epidemic Diseases.

Powers of Centre and states under EDA: The EDA provides various powers to the Centre and states. They are discussed below:

- **Powers of states:** Section 2 under EDA provides the following powers to the state governments:
  - To take special measures and prescribe regulations as to tackling dangerous epidemic diseases. It includes:
    - Inspection of persons,

    - Segregation of persons suspected by the investigating officer of being infected with the disease.
- **Power of the Centre:** Section 2A of the EDA gives the following powers to the Central government:
    - "take measures and prescribe regulations for the inspection of any ship or vessel … and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary."

The Indian states have used their powers under EDA to issue the State Epidemic Diseases COVID-19, 2020 regulations for their states which mandate:

- The obedience of lockdown measures by the residents, and
- Closure of various establishments, offices, or other places along with punishments under Sections 188, 269, 270, and 271 of the Indian Penal Code, 1860 for the violators.

Issue Area

- The presence of both legislations, that is, the DMA and the EDA, show that the states play the primary role in the epidemic-disaster-like situation and the centre has guardian-like roles of policy framing, guidelines, and monitoring the situation.
- Unfortunately, the practice of the centre has been different as Section 6(2)(i) of the DMA has been used by it to give itself extensive powers in times of disaster, including epidemics.
- The simultaneous observance of the EDA and the DMA maintains the federal relations between the centre and states as both the governments get their due share of role in accordance with the enunciated fields of legislation in Schedule VII.
- The actions of the centre in subsuming all the legislative and executive functions to itself in difficult times of epidemic using merely one of the listed powers and functions of the NDMA is not worthy of any praise.
- The basic structure of the Constitution cannot be trampled upon by making an excuse of disasters or pandemics.
    - It is not being said here that the centre should take a back seat, but in fact, the proposal is to involve the states equally rather than imposing central rules and policies on them.
- The Constitution itself provides the avenues to the Centre to go astray from the path of federalism under Articles 249, 250, 252, 352, 356, 360, etc.
- Therefore, the legislation made under an entry of the Concurrent List should not be misconstrued by the Centre to impose emergency-like situations using the colourable exercise of power and flouting the constitutional mandates for the same.

Fiscal Federalism during the Covid-19 Pandemic

- After discussing the issues of legislative and executive federalism in the country, it becomes essential to analyse the status of fiscal federalism also in the prevalent Covid-19 crisis.
- In this pandemic, the states are at the forefront as their functions include:
    - Monitoring the implementation of the lockdown,
    - Stepping up production of hand sanitisers and face masks,
    - Having food delivered to school children reliant on mid-day meals,
    - Making arrangements to provide shelter,
    - Ration and financial assistance to families of daily-wage workers,
    - Setting up mental health helplines, and so on.

Revenue and expenditure of Centre and States during the Pandemic

- The revenue collection of both the Centre and states is hampered due to the halting of the operation of industries and the exchange of goods and services.

- Moreover, there has been a significant increase in the expenditure of both the Centre and the states in an unplanned and unforeseen manner.
- **The expenditure of the Centre and the states include:**
    - Procurement of health infrastructure,
    - Protection kits,
    - Reimbursement of hospital charges,
    - Spending on travel, food, and shelter of the unorganised workforce including migrant labourers.
- The estimated loss of revenue of the Central Government stands at Rs 5 lakh crore out of which the fiscal transfer to states suffers by around Rs 3 lakh crore.

Major sources of revenue of the states

- The tax revenue inclusive of states' own collection and central transfer of its share, forms around two-thirds of the total revenue receipts of the states.
- The three major sources of revenue of the states are explained below:
    - **Goods and services tax:** GST is one of the major sources of revenue to the states but the states do not have the independent powers to decide the rates of GST.
    - **Sales tax:** The second important source of revenue is the sales tax. Its contribution has already reduced because lesser items are available after the implementation of the GST Act.
        - Now it has been further reduced due to the strict restrictions on travel across the country.
    - **Excise Duty:** The third major source of revenue is the excise duty which suffers during any casualty due to its proportional relationship with the containment measures.
- The mandate of GST (Compensation to States) Act, 2017 also seems dismal in this pandemic as the cess levied on coal, tobacco and its products, pan masala, automobiles, and aerated drinks has also been severely affected, jeopardizing the availability of compensation to states and hampering the already crippled fiscal status of the states.

Fiscal Federalism and CSR

- Keeping the prevalent fiscal crisis in view, the Central Government started to seek the support of the companies to deal with the financial crisis in the country.
- Considering the constitutionally mandated roles of the centre and state governments as mentioned above, the state governments must have the equal access to the voluntary contributions that are, Corporate Social Responsibility (CSR) funds, just like that of the Central government, in fact, more so.
- The centre must coordinate the ways and means to achieve the fair and equal access and sharing of CSR funds with the states rather than making the very linking cord between the companies and states look unappealing to the companies.
- It requires basic knowledge of finance to know that the companies would contribute to those funds and activities which make them eligible to meet CSR obligations as well.

Responsibilities of CSR during the Covid-19 pandemic:

- Schedule VII of the Companies Act, 2013 provides an inclusive list of CSR activities for the companies. For the present COVID-19 pandemic, the following two entries are relevant for us:
    - Contribution to the Prime Minister's National Relief Fund or any other fund set up by the central govt. for socio-economic development and relief and welfare of the Scheduled Castes, Tribes, Other Backward Classes, minorities, and women;
    - Disaster management, including relief, rehabilitation, and reconstruction activities.

Non-inclusion of Chief Minister's Relief Fund (CMRF) in the CSR:

- It is clear that contribution to disaster management activities will qualify as CSR activities by the company.
- And thus, the PMNRF, Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund), Chief Minister's Relief Fund (CMRF), National Disaster Management Fund and State Disaster Management Fund should be included for the same purposes as they deal with "disaster management."
- But, the "COVID-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR)" by the Ministry of Corporate Affairs (MCA) has created confusion about the intention of the central government as it includes PM CARES Fund in it and not CMRF.
    - It makes the states' funds a less desirable option for the companies to contribute to.
- The vague and unreasonable rationale provided for the inclusion of PM CARES Fund has been that it falls under item No (viii) of Schedule VII of the Companies Act, 2013 and for non-inclusion of CMRF that it does not fall under Schedule VII at all.
- Even though the given rationale is accepted on the ground of CMRF not being a central fund, the reasoning for not to include it in item No (xii) of the Schedule VII has been unsatisfactorily left unanswered.
- The intention for non-inclusion of CMRF in item No (xii) of the Schedule VII appears to be more dubious as the contributions to the State Disaster Management Authority have been considered worthy enough to be included in the same item.
- Interestingly, the Ministry of Corporate Affairs has accepted in its expressly written words that:
    - Funds may be spent on various activities related to COVID-19 under item numbers (i) and (xii) of Schedule VII relating to the promotion of health care including preventive health care and sanitation, and disaster management.
- The Ministry of Home Affairs (Disaster Management Division) has also declared the spread of COVID-19 as a "notified disaster for the purpose of providing assistance under SDRF."
- The issue of non-inclusion of CMRF becomes graver in view of the entry 6 of List II, which provides legislative competence to the states in the area of "public health and sanitation" and consideration of contributions to State Disaster Management Authority as CSR expenditure under item No (xii) of Schedule VII of the Companies Act.

The above discussion shows the intentional dwindling of fiscal federalism in India by the Centre. The states have the right to receive funds from their taxpayers, central government, and institutional mechanisms created for the same. The Centre must not become a one-stop collector of funds without any legal obligation to disburse the same to the states. The states cannot become "Atmanirbhar" without access to financial resources and avenues to enhance the same.

A brief review of the PM CARES Fund

- **Composition of PM Cares:**
    - The PM Cares Fund is headed by the Prime Minister as its *ex officio* chairperson.
    - Minister of Defence, Minister of Home Affairs and Minister of Finance, Government of India are ex-officio Trustees of the Fund.
    - Chairman can nominate three trustees to the Board of Trustees who shall be eminent persons in the field of research, health, science, social work, law, public administration, and philanthropy.
- **Nature of PM CARES:**
    - The claims regarding the democratic structure of PM Cares Fund in comparison to PMNRF could have been better justified with the inclusion of members of the opposition as well as the ex officio Trustees of the Fund.
    - The PM Cares Fund will not be audited by the Comptroller and Auditor General of India but "by one or more qualified independent auditors who will be appointed by the Trustees".

- The contributions to the PM Cares Fund qualify for 80G benefits for 100% exemption under the Income Tax Act, 1961; has "got exemption under the FCRA" and will be counted as Corporate Social Responsibility (CSR) expenditure under the Companies Act, 2013.
- So, a public charitable trust is created by the Centre, managed by the central ministers, and is to be audited by a person who is again appointed by the managers of the fund itself.
- The cited reasons are sufficient to question the extent of democracy, transparency, accountability, and cooperative federalism preserved or destroyed in both PM Cares and PMNRF.

Way forward

- Nobel laureate Abhijit Banerjee recently in an interview discussed the federal relations between the centre and state and has advised the central government to not plan the lockdown activities and expenditure management for the states, and instead, the primary lookout for the centre should be to transfer money to the states to make them capable to revive their economy according to their state-specific requirements.
- It should be noted that the constitutional body of the Finance Commission also recommended fiscal transfer keeping the state priorities as one of the factors for consideration and hence, the Centre should not arbitrarily legislate, execute, or transfer money to the states according to its own views and opinions about the states.
- The demands for relaxation of the mandated three percent fiscal deficit under the Fiscal Responsibility Management Act, 2003 should be considered by the Centre in this exceptional situation.

Draft EIA Notification, 2020

Institutionalising Information Blindspots

Context

- The Central Government has circulated a draft Environmental Impact Assessment (EIA) Notification (MoEFCC 2020), which is intended to replace the existing EIA Notification, 2006.

The article critically analyses various provisions of the draft EIA and highlights its shortcomings.

Draft EIA notification

- The major objectives of this draft are mentioned below:
    - To consolidate the existing EIA Notification, 2006.
    - To streamline and rationalise the processes, and
    - To implement decisions of various courts.
- A closer look reveals measures that do not align with some of the fundamental principles of environmental governance.
- In its attempt to expedite the EIA process, the proposed changes compromise the very logic of a decision-making system.

At a time where the unintended impacts of uncontrolled environmental degradation are felt by every community, a revised system should reflect a greater emphasis on strengthening, rather than weakening environmental safeguards.

Need for EIA:

- **Assists in informed decision making:** EIA formulates the information on the basis of which the environmental clearance (EC) is granted or rejected to a project.
    - The long-term, direct and indirect impacts on a complex ecosystem and livelihoods need to be understood in deciding whether to grant clearance and under what conditions.
- **Sustainable development:** An effective EIA "institutionalizes foresight" to meet the objective of sustainable development by its ability to reflect the relevant information in the appropriate stage of the process.

Purpose of draft EIA notification

- The draft notification proposes to make significant changes to the framework, that might create significant information blind spots.
    - Many categories of projects are omitted from any scrutiny, the amount and quality of - information that needs to be considered for granting clearance have been diluted, and the scope of public engagement has been limited.

Draft notification and categorization of projects

Categorization of projects under EIA:

The EIA notification classifies projects into the following categories:

- **A category:** It involves the projects which require the most extensive process.
- **B1 and B2 categories:** Category B2 projects involve significantly less scrutiny.
    - For example, no public hearing is required for B2 category projects, and many B2 category projects can proceed on the basis of "Prior Environment Permission" without even requiring an EIA study.
- **Basis of Categorization:** The categorisation is supposed to be on the basis of the potential social and environmental impacts and spatial extent of these impacts.

Diluting the criteria for categorisation of projects

- Although not all activities require an equal level of scrutiny, the draft notification inexplicably has recategorized many activities to a lower requirement of scrutiny.
    - For instance, Liquefied Natural Gas (LNG) terminals, which are listed as Category A in the current notification, are proposed to be recategorised as B2 in the draft notification.
    - Likewise, many irrigation projects, metallurgical industries, and aerial ropeways, inter alia, which are considered as Category A projects in the current framework, have been reduced to Categories B1 and B2.
- The dilution of the EIA requirements of these projects leaves out of consideration significant environmental impacts. Any recategorization should be evidence-based, and not arbitrary.

Quality of Information in draft EIA:

- **Scoping:** The EIA report is prepared according to the terms of reference (ToR) for the EIA study, which is determined by the relevant appraisal committee. This stage is called "scoping".
    - It is crucial since it sets out the premise of the information to be included in the EIA report.

- **Draft EIA and Scoping:** The changes proposed in the draft notification would reduce the scoping stage to a mere formality.
    - It relies excessively on standard sector-specific ToRs.

    - The regulatory authority has the discretion to refer a project for scoping to the appraisal committee only where it is "deemed necessary."

- **Terms of Reference (ToR) and EIA:** The ToR for EIA studies should involve an independent application of mind to identify the context-specific information that might need to be evaluated, in addition to the general information outlined in the ToR.
    - By reducing the relevance of the ToR stage, the draft notification creates the possibility of generic EIA reports, which do not include significant context-specific factors.
- **Dilution of Quality of Information:** The draft notification also dilutes the quality of the information included in the EIA report.
    - It allows for projects to proceed on the basis of baseline data for only one season for most projects.
        - This is severely inadequate for a comprehensive understanding of environmental impacts since it would not reflect seasonal or temporal variations.
    - It allows for the collection of baseline data "at any stage, irrespective of the application," not only making the scoping stage irrelevant but also allowing for data, which is up to three years old, to be used.
    - In densely developing areas, such data might be severely outdated and would leave out the cumulative impacts of other projects that may have commenced at the time of application for clearance.
- **CAG on EIA:** In 2016, the Comptroller and Auditor General of India (CAG) Report on Environmental Clearance and Post Clearance Monitoring had scathing findings on the quality of EIA reports precisely on such EIA practices.

Instead of including provisions for improving the quality of EIA reports, by preventing such practices, the draft notification proposes to legitimise them.

Public Engagement and draft EIA

- **Conflict of interest in EIA study:** The EIA study is conducted by an authorised consultant on behalf of the project proponent.
    - It raises questions of conflict of interest and a possibility that information that is disadvantageous to the project may not be presented at all.
    - The best safeguard against this is a robust and broad-based public engagement with the EIA process.
- **Draft notification dilutes scope of public engagement:** The draft notification betrays a deep mistrust of public engagement by restricting the scope for such engagement.
    - It proposes to remove the requirement of public consultation for many projects by recategorising them as B2 category projects.
    - In addition, it creates widely worded exemptions from public consultation.
    - Specifically, it leaves open the possibility of any project to be classified as exempt if it involves "strategic considerations as determined by the Central Government."
        - All developmental activities have strategic considerations, and such vague phrasing could be misused to pre-empt any expression of dissent by affected communities.

- **Reduction in notice period for public hearing:** For projects that need to undertake public consultation, it proposes to reduce the notice period for the public hearing from 30 to 20 days.
- **Reduced engagement of communities:** The draft notification also restricts the engagement of affected communities in the operational stage of projects.
    - EIA framework provides for continuous engagement and accountability of actors and institutions.
    - This is available in the present framework where violation of EC conditions can be registered by any person.

- **Grievance redressal mechanism:** Under the draft notification, complaints can be registered only by regulatory bodies, or raised by the proponent itself.

Ex Post Facto Clearance provision in Draft EIA

One of the most problematic provisions of the draft notification attempts to institutionalise *ex post facto* clearances, which turn the entire logic of EIA on its head.

Supreme Court judgments in the context of Ex post facto clearance:

- The Supreme Court has held on multiple instances that such a concept of ex post facto is not valid in law.
    - **Common Cause v Union of India:** The Supreme Court had held that "the concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006."
    - **Alembic Pharmaceuticals v Rohit Prajapati & Ors (2020):** The Supreme Court held unequivocally that an executive notification allowing post facto clearance goes against the parent statute.

Limitations of Ex post facto clearance:

- Not only is a post-facto clearance bad in law in the current environmental jurisprudence, but it also defeats the purpose of EIA.
- The basic principle of EIA is that before granting clearance to a project, a comprehensive assessment of all impacts should be considered.
- The shortcomings of ex post facto clearance are mentioned below:
    1. The regularisation of illegal activities is tacit approval of the illegalities and reflects a fait accompli; it preempts the possibility of rejecting the project since it has already been undertaken.
    2. Second, the impacts of activities that have commenced, particularly in sensitive or ecologically significant ecosystems, may be irreversible.
    3. Finally, in the absence of proper baseline studies, the ecosystem changes may not even be understood in their entirety.

Any mitigative measures would be either a very meagre attempt or only a paper reality.

Information Choices for EIA

- In its ideal sense, the EIA framework should reflect a deliberation of complex, interdependent, and multidimensional considerations to facilitate an informed decision.
    - The proposal of a revised framework should enable better decisions, and not just expedited or convenient decisions.
- Undoubtedly, it is a challenging task to simultaneously address concerns of efficiency, comprehensiveness, engagement, and uncertainty.
    - It is precisely for these challenges that emerging and well-recognized norms of environmental governance should be relied on; most pertinently, the precautionary principle and environmental rule of law.
- The opportunity that a new framework provides should be used to introspect on the shortcomings of the current system.
- The manner of collection of information and the process of appraisal need to be aligned with the logic of EIA. The sequential nature of each of these processes directly speaks to the quality of information that is collected and the independent application of mind at each stage.

- However, the proposed change dilutes the rigours of many such requirements and reduces them to mere paper formalities.

Conclusion

- The draft notification, if notified, would systematically weaken the decision-making framework.
- Projects and activities could be granted clearance on the basis of limited or outdated information.
- These information gaps will lead to sanctioning activities that could irreversibly threaten fragile ecosystems and the broader ecological balance.