

Gist of EPW August Week 1, 2020

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Political Crisis in Rajasthan

Context:

- The former Deputy Chief Minister Sachin Pilot, with his group of Congress members, has destabilised the Ashok Gehlot-led Congress government in Rajasthan.
- This has created a political crisis in the midst of this raging pandemic and once again Indian democracy has witnessed constitutional authorities denting the trust of the public in government institutions.
- The article analyses the roles of the judiciary, office of the [Governor](#), and the Speaker in the ongoing political situation.

Recent developments:

- A group of MLAs headed by Sachin Pilot has refused to attend the meetings of the Congress legislative party and hence has weakened the Ashok Gehlot-led Congress government.
- The reason behind the trouble could be the reckless aspiration of Pilot about holding the higher position or the intention of Gehlot to sideline Pilot and his bunch of MLAs.
- The High court of Rajasthan and the Governor of the state have inhibited the attempts to stabilize the situation.
- C P Joshi, the Assembly Speaker of Rajasthan, has issued disqualification notices to the 19 MLAs, belonging to Pilot's group. However, they have been stayed by the intervention of the Rajasthan High court.

NDA government's bid to destabilize opposition ruled state governments

- Since the victory of the National Democratic Alliance (NDA) by a thumping majority in 2014, destabilising opposition-led state governments has become an unhealthy pastime for the regime.
- The habit did not begin with them for sure, and the Constitution has conceivably given too much power to the union government to intrude in the affairs of the state governments.
- The crux of the problem lies in the two offices that were anticipated to be impartial and neutral, namely the Governor and the Speaker. However, as proven a number of times, they have proven to be anything but.

Role of the Governor

- The Governor seemed to be wanting to dictate how the assembly session would be carried out. This was well outside his constitutional mandate as he had not questioned the Congress's majority in the assembly.
- Although he eventually relented and has agreed to call the assembly to session on 14th August.
 - It is again evident from this incident that the power of the Governor can be used for partisan motives.

Role of the Speaker

- If the Governor has been turned into an “agent” of the union government at the state level, the Speaker has proven to be an “agent” of the ruling party in helping create majorities and break oppositions at will.
- No political party in power has covered itself in glory on either of these matters. They do the same thing when they are in power and complain about the same when out of power.

Also read: [Speaker – Roles & Responsibilities](#)

Tracing the flaws in the office of Governor and Speaker

- Blaming political partisanship for the existing situation won't do us any good. The constitutional provisions relating to the appointment and removal of the Governor and the [Tenth Schedule](#) relating to the defection of elected representatives are inaccurate.
 - They have created corrupt incentives for the parties to act in the way they do.
- The Governor of Rajasthan has behaved in a certain way due to the fear of removal from the office as his position is under the obligation of the NDA government at the centre.
- The same can be said about the Speaker. When the issue in question was in favour of the ruling party, the Speaker didn't take much time to provide his judgment on the disqualification of Bahujan Samajwadi Party MLAs, but when the need for the party was dire, he tried to disqualify the disaffected legislators of his own party.
- He took such steps because he too enjoys his position at the pleasure of his party.

The rationality of High Court intervention

- The High Court of Rajasthan has indefinitely stayed the disqualification proceedings without offering any tangible reasons. Such judicial intervention has only caused further confusion and instability.
- In *Kihoto Hollohan v Zachillhu and Others* (1992), the Supreme court upheld the Tenth Schedule and interpreted that sweeping discretion is available to the Speaker in deciding cases of disqualification of MLAs.
- The act of the Rajasthan High Court to stay the Speaker's notice goes against the judgment, which itself needs to be reconsidered.
- Moreover, the High Court proceeded without going into the basic question of whether it is legally permissible to pronounce such judgment.

Conclusion:

- All these events portray a dismal picture of the plight of the constitutional government in India.

- These events are similar to what happened in Manipur, Goa, Maharashtra, and Karnataka, which eventually resulted in the toppling of opposition ruled governments.
 - Irrespective of the outcome of the Rajasthan issue, such events will erode the trust of the people in the idea that constitutional institutions of India are upholding their respective constitutional mandates.
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Our Essential Workers Need Essential Care

Context:

The healthcare infrastructure is under immense pressure amid the [COVID-19](#) pandemic. The article discusses the status of frontline workers who are not only facing profession related issues but also caste discrimination, making the situation worse. The article also highlights the plight of Accredited Social Health Activist (ASHA) workers.

COVID-19 and Public Health System:

- One of the major concerns mentioned by the epidemiologists, medical practitioners, and governments across the world amidst the raging Covid-19 pandemic is the lack of healthcare resources such as hospital beds, Intensive Care Units (ICUs), and ventilators.
- This is not a recent phenomenon; public hospitals in India have been facing this harsh reality for decades.
- Accommodating two patients on one bed and some patients on the floor can be often seen in the public hospitals in India.
- Maternity wards, which receive a greater share of funds under the National Health Mission of the government, also face the same hardships.
- The public health system in India was not satisfactory for both the citizens as well as the staff. The condition is now exacerbated by the Covid-19 pandemic.

Shortage of Protective Equipment:

- It is evident that the medical facilities across the world are facing the lack of protective equipment amidst the Covid-19 crisis, but PPE kits being denied to doctors, dealing with cases other than COVID-19, due to shortage raises questions on the preparedness of the country in dealing with medical emergencies.
- Medical staff working in Outpatient Departments (OPDs) and emergencies come in direct contact with the patients. Therefore, they should be provided with protective equipment otherwise, the health of the entire staff and patients will be at risk.

Overcrowding and Inadequate Staffing in Hospitals:

- The general condition of hospitals in India is pitiful.
- In a study conducted by writers in a district hospital of Madhya Pradesh, they found that biomedical wastes were piled up in the general ward of the hospital.
 - Such unhygienic conditions could become hotbeds of infection.
- Also, there are issues with staff management, like unofficial absence.
- According to the *National Health Profile 2019*, published by the Ministry of Health and Family Welfare:
 - There are a little over seven lakh beds in public hospitals across India.
 - India has 60 hospital beds per one lakh population as compared to 360 in Sri Lanka.
 - Densely populated northern states have a more dismal ratio with UP and Bihar having 38 and 11 beds per one lakh population respectively.

- Under such circumstances, it is impossible to maintain 1 meter of distance between beds.
- This inadequate availability of beds is the result of low public expenditure on health which in turn has also resulted in inadequate staffing of hospitals. This leads to greater dependence on patients' attendants to provide patient care.
- Although during a pandemic, attendants are being kept outside of the hospitals, the problem of inadequate staff remains.

Hierarchy: Social and Institutional:

- A study conducted on workers at a hospital in England shows that the number of health workers testing positive is almost similar to that of non-clinical workers such as cleaning staff.
 - It depicts that non-clinical workers are also facing similar occupational hazards.
- The Indian scenario reflects that there is a lack of training as well as protective equipment for the non-clinical workers.
- Furthermore, they are also subject to caste-based discrimination as most of the cleaning staff in Indian hospitals are Dalit.
- Repeatedly, through various actions and justifications, cleaners are shown their place in the “institutional hierarchy.”
 - There are rules and regulations defined for the cleaning staff. They are not allowed to sit with everyone and they have to maintain some distance from other people.
 - Lower status in the social and institutional hierarchy and the discrimination faced by the cleaners imply that they are not in a position to demand their legal rights, for example, asking for protective gear.
- A combined effort is required by the staff, collectively, at hospitals to maintain hygiene and prevent infection.
- It is evident that the responsibility of cleaning the hospitals falls on the cleaning staff. Therefore, during this pandemic, it is essential to cast away the caste prejudice and provide training and protective equipment to the cleaners.

Health Workers outside the hospitals:

During this pandemic, rural health workers such as ASHAs are also facing various difficulties. The challenges faced by them are mentioned below:

- ASHAs are honorary volunteers. Hence, they do not receive any salary and their monthly remuneration is based on the type of work done by them in a month.
- According to the [National Rural Health Mission \(NRHM\)](#) guidelines, there are 43 functions assigned to ASHAs. Some of them are:
 - Creating awareness of health and nutrition.
 - Providing primary health care facility.
 - Promoting the construction of toilets.

- Taking pregnant women to hospitals for deliveries.
- Ensuring the immunization of children and women, etc.
- The workload for ASHAs has increased during the pandemic. They are conducting door to door surveys, raising awareness about the pandemic, tracking the migrant workers, and ensuring their 14 days quarantine.
- They are performing very critical functions amidst the pandemic and the only incentive they have received is a meager Rs.2000 named corona duty.
 - This is not the first time they are facing hardships to get their remuneration.
- In addition to not getting their incentives on time, they are facing some other challenges as well. For instance, no training is provided to them on Covid-19, its symptoms, precautions to be taken, etc.
- An insurance scheme of 50 lakhs for 90 days was announced by the Finance minister under the [Pradhan Mantri Garib Kalyan Yojana \(PMGKY\)](#) for the workers performing Covid-19 related functions.
 - The scheme covers the loss of life due to Covid-19 and not the expenses incurred on illness.
 - Moreover, the 90-days period of coverage has lapsed and it is not clear whether this has been extended.
 - The ASHAs are not sure whether this scheme is applicable for them or not as they have not received any official notice about the scheme.
- The ASHAs have been able to perform their services effectively in the past and they played a pivotal role in improving the rate of immunization in rural areas.
- They have also proved to be helpful and efficient in tracking the suspects and conducting check-ups during the pandemic.
- They get demotivated if they are not provided adequate training and there is a delay in payments.

Conclusion:

- The outbreak of the pandemic has led to a number of deaths across the world. India is also facing similar hardships.
- How effectively India will be able to flatten the curve and how efficiently it will be able to speed up the recovery rate, are dependent on the health workers.
- Therefore, it is essential to take care of the health workers all the time; but, amidst the pandemic, gratitude, protection, remuneration to the cleaners, ASHAs, and the trained medical staff should be offered, as the healthcare of India is highly dependent on them.

Intellectual Property as Collateral

Intellectual Property Right (IPR) as collateral is generally perceived as an unreliable asset due to its volatile nature. With the help of various examples, the article analyses the nature of IPR and focuses on the need for better methods of valuation and registration to enhance the confidence of lenders in IP as collateral.

Intellectual Property Rights (IPR) as collateral:

- Recently, the idea of using Intellectual Property as collateral has emerged.
- It is observed by the World Intellectual Property Organization (WIPO) that collateralisation and securitisation of IP have emerged as a recent trend especially in sectors such as the music industry, internet startups, and in high technology sectors.
- Also, the National Intellectual Property Rights (IPR) Policy, released in 2016 proposed the securitisation and collateralisation of IPR
 - There is emerging importance on mainstreaming of IP collateralisation.
- Though this could be beneficial for the entrepreneurs, it is controversial as banks are apprehensive about accepting IP as collateral because of its nature and risks associated with it.
 - The apprehension has to do with the fundamental nature of Intellectual Property itself.
 - As it is intangible, it might not retain its value and would also pose a high amount of risk to any bank accepting it as collateral for a loan.
- A study suggests that there are various difficulties associated with using IP as an economic asset.
- The importance of IP has increased over time but its status remains underutilized as collateral. The major reasons are enumerated below:
 - **Erratic in nature:** A study conducted on intangible assets shows that IP is erratic and there is no evidence of any set pattern regarding its market behaviour.
 - **Valuation is not clear:** The valuation of IP is not clear and there are greater risks involved with it.

Routine Forms of Collateral:

The suitability of an asset as collateral depends on various factors such as valuation, asset recognition, transferability, risk, and liquidity.

- **Asset valuation:** Any financial asset is judged based on its past performance in the financial markets. Its valuation becomes easy when the predictable patterns are available. IPR does not reflect any set pattern of behaviour in the market thereby making its valuation difficult.
- **Asset recognition:** An asset is recognized in the balance sheet when it is probable that the future economic benefits will flow to the entity and the asset has a cost or value that can be measured reliably. The perceptions of risk associated with intangible assets have also posed a major hurdle towards the use of intangible assets such as IPR in capital markets.

- **Risks associated with IPR:** There have been various examples of loan defaults in case of IPR. Therefore, investors overestimate the risks involved in the securities.
- **Liquidity:** Liquidity also plays an important role in financial markets. Liquid assets are highly preferable by the lenders. Markets for the sale and lease of IP, although up and running, need to be regularised and brought into the mainstream.
 - It becomes twice as long to liquidate IPR in case of loan default. That is why high-interest rates are charged by banks in case of such loans.
 - Since the estimated recapture rates of IP assets are usually low, they appeal to only risk-tolerant investors.

Real world instances of IPs being used as collateral:

Despite having several problems associated with IP, there are various real world examples of the usage of IP as collateral. Some of them are mentioned below:

Lewis Waterman Case: Recent example of using IP as collateral is the case of the founder of Lewis Waterman Pens Company who borrowed money backed by his iconic fountain pen patent.

Toys R Us: When the American retail chain ‘Toys R Us’ went insolvent, it’s debt backed by real estate was 70-90% recoverable while the debt backed by IP was only 10% recoverable.

Bowie bonds: In 1920, David Bowie along with his manager used IP innovatively and issued Bowie bonds to collect cash from Bowie’s extensive body of work.

- These “Bowie bonds” essentially bestowed upon investors a share in Bowie’s future royalties for a period of 10 years.
- The arrangement was beneficial to Bowie but the same was not applicable for investors.
- Eventually, its rating was downgraded by Moody’s, due to the high risk of default associated with it.

Case of Tranlin Paper: A paper manufacturer company Tranlin Paper secured a loan from China Development Bank, against IP as collateral. The company defaulted on repayments and 21 cases were filed against it. The financial health of the company is still very weak and it is observed that the bank might not be able to recover the amount of loan from IP.

Kingfisher airlines: The case of Kingfisher airlines is well known as the owner Vijay Mallaya obtained a loan from the State Bank of India and offered Kingfisher airlines brand as collateral.

- The amount was not recovered because when the airline was sought to be auctioned by the bank, the financial health of the company was hardly hit.

Indian Scenario and Drawbacks:

The Indian Patents Act, 1970 and the Designs Act, 2000, Trade Marks Act, 1999, and the Copyright Act, 1957 allow patents, trademarks, and copyrights to be kept as mortgage.

Canara Bank v N G Subbaraya Setty and Anr

- In *Canara Bank v N G Subbaraya Setty and Anr*, The Supreme Court of India had invalidated the assignment of the trademark “EENADU” for the manufacture of incense sticks as it was not a part of the agreement when taking up the debt.
- The Supreme Court held that under the Banking Regulation Act, 1949, a trademark could not be assigned to a bank by a borrower, after the borrower had defaulted on the loan.
- This was unlike the *Kingfisher* case, where the trademark had been offered at the time of the agreement. Hence, it formed the part of security under Section 6 of the Banking Regulation Act.
- Also, in the *Canara bank* case, the court observed that the bank cannot sell incense sticks and collect a royalty from a trademark.
- This is because banks cannot do any other business apart from banking. At most, it could sell assets to recover its security/loans.

SARFAESI Act and IP

- It must be noted that Securitisation and Reconstruction of Financial Assets and Enforcement of Security - Interest Act, 2002 ([SARFAESI Act](#)) includes even intangible assets such as trademark, copyright, licence or franchise under the definition of ‘property’.
- The act goes on to define ‘security interest’ as right, title or interest of any kind upon property, created in favour of a secured creditor and includes such right title or interest in intangible assets.
- The bank becomes a secured creditor once it provides loans by accepting a trademark as collateral. Hence, the bank would possess a security interest over the trademark and can be permitted to sell or assign the trademark for a royalty and to recover the defaulted loan.

Unreliable nature of IPs:

The nature of IP that is patents, copyrights, trademarks, trade secrets are different and they create different kinds of hurdles when the question comes to their valuation.

- **Copyrights:** In India, there is no requirement of registering a copyright. If someone is offering copyrighted work as collateral, it would be difficult to determine whether there already exists similar other copyrighted work, which may result in a lawsuit of copyright infringement in the future. In case of a successful claim by the challenging party, the value of copyrighted material pledged as collateral will fall sharply.
- **Patents:** Similarly, there are concerns over Patents as they may not retain their value in the future, hence focus will be to exploit the patent and extract the maximum possible value from it within a given period of time.
- **Trade secrets:** owing to their very nature, trade secrets are unlikely to be disclosed in the first place, hence can be considered safe.
- **Trademarks:** Trademarks also have their drawbacks. Trademarks are closely associated with the value of the brand. If the goodwill of the company declines, the trademarks would also lose its value as was the case with *Kingfisher*.

Way Forward:

Following measures should be taken:

A web-based market place is required: A lot of effort is required for the promotion of usage of IP as collateral in India. Recently, Internet Content Adaptation Protocol Ocean Tomo has established a place entirely dedicated to IP assets and their auction. These marketplaces can lead to:

- Reinforcement of transfer of technology and aid businesses that seek to sell or license their IP.
- Selling or auctioning its IP will generate upfront cash for the company.
- Licencing will enable the creation of a future revenue stream.

National IPR Policy: In its recent National IPR policy, India explores the ways to promote commercialization of IPR and considers it as a potential option. There is a need for a platform to connect potential investors and buyers.

The decision of the Supreme Court should be revised: The judgment provided by the Supreme court in the case of Canara Bank v N G Subbaraya Setty and Anr should be revised concerning the SARFAESI Act, to facilitate lending against IP.

High rates on loans should be reconsidered: Loans that are backed by IP carry a very high rate of interest and low loan to value ratios hence, the cost to borrowers is also very high.

- Recovery rate in the case of IP is very low therefore, it generally attracts risk-tolerant investors. These risks, however, tend to be overestimated on account of the small market and general lack of information.

Conclusion

- While the concept of IP as a collateral or security is legally permitted, it is yet to pick up in practice.
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