Wish list for judiciary

Decades of neglect has brought the system to near collapse

OUT OF COURT

M J ANTONY

The new government is in place and the nation is waiting for unravelling of the promised hundred new steps like Digital India, solar energy and space flights. One area that cries for attention is the venerable judiciary. The higher judiciary has undergone a traumatic period in recent years. While finance, telecom, energy and other sectors have lobbyists galore, judges have no power brokers to advance their cause. They have to take largely what comes to them and defend their independence, sometimes coming out openly.

It is their constant grievance for years that the third estate is not getting its due in the budgets. The average provision for this vital sector is a miserable 0.2 per cent. The coming budget should see that it is raised to a respectable level. Judges have lamented the condition of infrastructure of courts in judgements as well as from public platforms with little impact on successive governments.

The next serious problem is the persistent discord between judiciary and the executive. It has delayed appointment of judges at all levels. Though the Supreme Court now has its full strength of 31 judges, for the first time in recent decades, vacancies in the high courts and subordinate courts are staggering. There is no consensus on the mode of appointment and transfer of judges. The collegium system devised by the Supreme Court is not acceptable to a large section of the legal profession. The proposed 'memorandum of procedure', pending acceptance by the judiciary and the executive, should be finalised to avoid constant bickering between the judiciary and the government, which happens mostly in the dark.

The powers of the Supreme Court need a second look after examining its working in the past decades. The court was conceived as a constitutional court by the founding fathers. But it has become largely an appellate court. In the past three months, scores of judgments delivered by the Supreme Court dealt with partition of property, tenancy disputes and service matters. While deciding these issues pending for years, judges have little time to take up hundreds of old constitutional cases. Scores of new appeals add to the deluge every week. Special leave petitions, which are routinely filed against judgements of the high courts and tribunals take up most of the time of the judges. Therefore, the long-standing demand for a constitutional court is urgently necessary, even if it requires amendment to the statute.

Recent events in the Supreme Court have highlighted the need for a workable procedure to deal with allegations against judges. Impeachment has been proved to be impractical. Therefore a procedure should be laid down by law to tackle such situations. The Chief Justice Ranjan Gogoi has warned that it would be difficult to get quality judges if they have to face trumped-up charges.

One of the legal aspects of 'ease of doing business' is arbitration, which has been found to be inadequate to attract disputing parties. International arbitration now invariably goes to foreign centres. Domestic arbitration is caught in procedural tangles which last years. An ordinance to make New Delhi a preferred centre for arbitration is presently under challenge in the Delhi high court. It is therefore of utmost urgency to speed up arbitration process by setting up sound institutions and professionalising this alternative dispute resolution mechanism.

Though there are a score of tribunals which deal with economic matters, many of them are functioning with much less than the required number of members. Some of them are even topless. Therefore, appointments to these quasi-judicial institutions should get priority. The National Company Law Tribunal and its appellate body are active but half of more than 12,000 cases filed are reportedly waiting in the queue. The competition law also needs a second look in view of wrangles over mergers and amalgamations.

This indeed is a tall order. However, the momentum created by the landslide victory of the ruling party should be utilised to carry forward reforms in the legal field. It has been neglected far too long.

CHINESE WHISPERS

Fight for Rajya Sabha seats

A fight has ensued in Tamil Nadu for Rajya Sabha seats. Next month, six Rajya Sabha MPs will be elected from the state because the terms of four AIADMK leaders, one DMK and one CPI(M) leader are getting over. In the recently concluded bypolls, the ruling AIADMK won nine assembly seats, which means the party can send three representatives to the Rajya Sabha. The party had promised one seat to the PMK as part of its alliance and one is expected to go to the BJP. Among the top contenders for the third seat are V Maitreyan, whose Rajya Sabha term gets over next month, 16th Lok Sabha Deputy Speaker M Thambidurai, Krishnagiri MLA K P Munusamy, and Jayakumar Jayavardhan, son of AIADMK leader D Jayakumar. As for the DMK, of its three seats, one is allocated to the alliance partner MDMK and one to the Congress. The party's labour union president Shanmugam, and former ministers K S Radhakrishnan and Subbalakshmi Jagadeesan are said to be in contention for its seat.

Wait for the drama

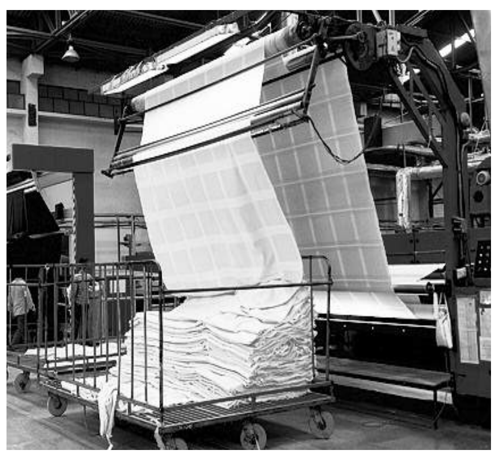
One of the key positions under the new government, that of the central vigilance commissioner (CVC), will remain open for application till the first week of June. The last date for filing applications for the post was May 22. Applications barely trickled in as many prospective candidates waited to see which way the results of the general elections went. Now the date for filing applications for the post of CVC and one vigilance commissioner has been extended to June 6. The appointment to the post of CVC will be through a committee comprising the prime minister, the Chief Justice of India, and the leader of the Opposition. Since the Congress does not have the numbers that the last post requires, expect more drama in the matter.

A lesson in history

Chhattisgarh Chief Minister Bhupesh Baghel must brush up his knowledge of the country's history and must not open his mouth until he had done that, advised former chief minister Raman Singh. Singh's retort came after Baghel said while the Rashtriya Swayamsevak Sangh had always linked Jawaharlal Nehru with the partition of the country, the real culprit was Hindu Mahasabha leader Vinayak Damodar Savarkar. According to Baghel, it was not Muhammad Ali Jinnah but Savarkar who first mooted the two-nation theory. Citing the results of the just-concluded Lok Sabha elections in which the Bharatiya Janata Party won nine of the 11 seats in the state, Singh said it was not uncommon for people to lose their minds after an election loss.

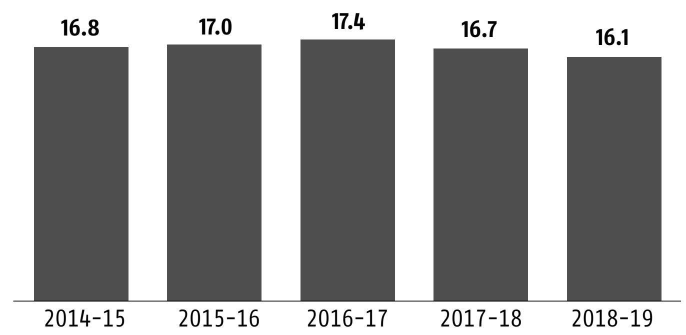
Fashioning a revival after fall season

After falling for two years in a row, garment exports are showing early signs of a revival. But it will take more than just government support to sustain it



ALL INDIA RMG* EXPORTS ($Bn)

–3.46% MoM growth of 2018–19 over 2017–18



* ready-made garments

T E NARASIMHAN

India's garment exports have been on a steady slope downwards, falling for a second year in a row in 2018-19. At $16.37 billion, apparel shipments were 2 per cent lower than in FY18. This fall has come after exports grew an impressive 9.8 per cent annually during 2009-10 to 2017-18.

The reasons for the slowdown range from intense competitive pressure from Bangladesh, Vietnam and Sri Lanka, which have a cost advantage over India, subvention of rebates after GST and over-reliance on one particular type of fabric, namely cotton, for making garments. These headwinds buffeted the growth momentum of India's exports over the past two years but created opportunity for other countries to expand their markets. In the period that India's exports shank, Bangladesh and Vientam's exports grew 10-13 per cent, riding on lower manufacturing costs.

A big hit for domestic manufacturers came from the withdrawal of the 7 per cent of duty drawback on costs after the implementation of GST. At a time when Bangladesh had started to enjoy preferential duty access in key markets, this hurt Indian exporters' profitability and competitiveness in international markets.

India is further expected to lose market share to Bangladesh and Vietnam for garment exports to the European Union (EU). Average tariff on Indian textile products is around 5.9 per cent in the EU and 6.2 per cent in the United States (US), compared to zero tariff in the US and 3.9 per cent in the EU for Bangladesh. The wages, meanwhile, for Indian manufacturers have climbed, growing from 9 per cent of overall cost in FY10 to 13 per cent in FY18, according to CARE Ratings.

A quick revival of exports is crucial as textiles has a significant share in the economy — it contributes approximately 7 per cent to industrial output in value terms, 2 per cent to the Gross Domestic Product (GDP) and 15 per cent to the country's export earnings. It also provides direct employment to over 45 million people and is the second largest provider of employment after agriculture, according to a CARE Ratings report. Of this, ready-made garments (RMG) account for 50 per cent of industry revenue.

TAKE TWO

Although it is too early to call it a revival, government measures undertaken late last year have started to bear some fruit. After falling for the first six months, in October exports showed a promising 36.36 per cent growth over the previous year. The six months since October have maintained the positive momentum.

Some of it is the result of government measures such as increasing the Rebate of State and Central Taxes and Levies (ROSCTL) by 3.2 per cent to 4.5 per cent depending on the item, says Raja M Shanmugham, president, Tirupur Exporters Association.

"I feel we are finally turning the corner after stagnacy or slight de-growth. The government support has gone up. Bangladesh is becoming expensive and Vietnam is showing signs of reaching the peak of its capacity," says Rahul Mehta, president of Mumbai-based Clothing Manufacturers Association of India.

Yet the pace is going to be slow and the peak growth rate of FY10 to FY 18 is unlikely to be achieved soon. "Notwithstanding a depreciation in the rupee vis-a-vis the US dollar (which could increase rupee realisations), apparel exports would increase marginally in rupee terms and decline by 4-5 per cent in dollar terms in FY19 before increasing marginally in 2019-20," said the CARE Rating report.

Currently, the US and EU together constitute approximately 60 per cent of the total apparel exports from India in value terms. The US is the single largest importer, while the EU is the largest regional importer. The US government's decision to withdraw duty free access to over 3,000 products under the Generalised System of Preferences scheme may not have a major impact on garment exporters as the current list of items does not include ready-made clothing. But if the list is expanded to include it, exports to the US would shrink 30-35 per cent from the current level.

For now, industry representatives have said that while the impact would be marginal, under the current circumstances it would not be good as exports are already dropping. They have also said Centre should compensate the price increase through susbidy or incentives and should learn from the US when it comes to protectionism.

According to the Apparel Export Promotion Council (AEPC), the US imports $586.58 million worth of RMG products under 15 categories that currently enjoy GSP. India's share of this pie is $17.97 million.

But apparel manufacturers are looking beyond these countries and focusing on diversifying their markets; thereby the apparel exports to countries such as Japan, Israel, South Africa and Hong Kong are growing at a very fast rate.

Many have also started to think beyond cotton clothing. "We are primarily dependent on cotton shirts and t-shirts, cotton blouses, etc. It is a limited summer and casual wear product basket. That is another reason why we are not able to take advantage of any growth in those areas," says Mehta.

India loses out on a big share of the exports market as it is not competitive in the man-made fibre (MMF) or polyester-based garments and does not have the capacity to make winter-wear or active wear. A major chunk of global trade comprises formal clothing, whether it is polyester-based shirts, suits, jackets, woolen clothes, leather garments, hard winter-wear or specialised performance garments, which are not part of India's export basket. In terms of market share, cotton garments contributed around 51 per cent of the overall apparel exports in FY18, while MMF was the second-largest segment contributing about 28 per cent to the overall apparel exports from India.

MMF has been eating away at the share of cotton apparels, mainly due to the price differential and the unavailability of cotton in many parts of the country. However, for the 11 months of FY19, cotton has increased its share to 54 per cent, while MMF's share has shrunk to 24 per cent, says CARE Ratings.

To remain competitive and grow, India needs to increase its production of MMF based apparels. Going forward, steps taken to address these challenges would be crucial for creating and sustaining a broad-based recovery across the sector.

But all this work well when India also adopts a faster manufacturing turnaround time, from designing new clothes to delivering them. If exporters are able to take care of these things, Mehta says, Indian RMG exports can go back to 8-10 per cent growth.

INSIGHT

Why perpetuate differential treatment?

In the concluding part, the authors explain why, in spite of strong performance by many PSUs, they are generally getting a "governance discount" instead of a "governance premium" in their share prices

U K SINHA & SAPARYA SOOD

In part I of this article, we discussed how the mechanism of having special provisions in laws/rules/circulars was used by the government to perpetuate differential treatment to public sector undertakings (PSUs) in corporate governance norms. We will now discuss the other two mechanisms. The first is through special provisions in the regulations framed by regulators or the case by case exemptions routinely granted to PSUs.

Under the Substantial Acquisition of Shares and Takeover Regulations, 2011, an acquirer is required to make an open offer to acquire shares or voting rights to public shareholders of the target company. There are strong protection tools for minority shareholders of these companies. Arguably, these should be uniformly applied and there should be no exception. But, the regulations also empower the Securities and exchange Board of India (Sebi) with a general power to exempt certain entities from the open offer requirement. The Sebi frequently uses this power to exempt PSUs from the open offer requirement. The ONGC buyout of HPCL and the Port Trusts-Dredging Corporation deals are examples.

Related party transactions are also worth mentioning. Regulation 23 of the Sebi LODR Regulations requires such transactions to be approved by the audit committee and in case the transactions are material, the majority shareholders are not allowed to vote in favour of it. The idea is that the minority shareholders should be able to apply their independent judgment, but PSUs are exempt from these requirements. As such, the audit committee or the non-interested shareholders cannot evaluate these proposals objectively. No doubt, it provides an easy route for the management to escape accountability.

Globally, in the last two decades a strong shift has taken place towards more institutional money getting into companies, rather than large number of smaller shareholders taking a punt

There are other examples of exemptions from various requirements. In IDBI's acquisition by LIC — where the stake of LIC in IDBI Bank rose up to 51 per cent — relaxation was provided by the Insurance Regulatory and Development Authority from the general bar on insurance companies from holding more than 15 per cent in any company under the Insurance and Regulatory Development Authority (Investment) Regulations, 2016.

Soft treatment of governance violations is another way in which PSUs are meted out special treatment. Listed companies have a requirement of minimum 50 per cent independent directors if the chairperson is an executive director or minimum one-third, if the chairperson is a non-executive director. Even today, there are a number of PSUs that do not meet this criteria. The requirement of having at least one woman director with effect from December 1, 2015, has not been followed by more than one-third of PSUs. This is in spite of the government's proclaimed policy of taking measures to encourage women participation in decision making. From April 1, 2019, the requirement of having at least one woman independent director on the boards of the top 500 listed companies has kicked in. Proxy advisory firm Stakeholders Empowerment Services (SES) has stated in its report that 27 per cent of the PSUs in the NSE top 500 companies as on March 31, 2019, failed to comply with this requirement.

There are several reporting requirements under various Sebi regulations where PSUs are found wanting but hardly any action has been taken against any PSUs so far. Violations by privately owned listed companies are strictly dealt with, but PSUs are often treated differently.

The government has to realise that there are several advantages in ensuring that laws are same for all and there is no discrimination based on ownership of companies. First, it is an important message about commitment towards protecting the interest of the smallest shareholder in a company. Second, these protections and special privileges lead to lack of accountability and tendency to hide inefficiency and avoid evaluation in comparison to competitors. Third, uniform laws and uniform treatment to all companies by the government as well as the regulators give a clear signal to institutional investors in India and abroad that as a nation we respect 'rule of law'.

Another reason for following higher corporate governance principles in PSUs is that it is becoming increasingly clear that large investors are willing to pay a "governance premium" in buying shares of companies rated high on governance. Globally, in the last two decades a strong shift has taken place towards more institutional money getting into companies, rather than large number of smaller shareholders taking a punt. Such shareholders are demanding more accountability and better governance practices. The example of the UK based fund, The Children's Investment Fund Management' selling their shares in Coal India Limited (CIL) and suing CIL and the government is fresh in the mind. Unfortunately, the current scenario in India does not invite those sentiments for the PSUs. It is not a surprise that in spite of strong operational performance by many PSUs, they are generally getting a "governance discount" instead of a "governance premium" in their share prices. The ultimate losers are the government and the people of this country.

(Concluded)

Sinha is senior advisor and Sood is an associate with Cyril Amarchand Mangaldas

LETTERS

Time for change

This refers to the edit "Bring back the Syndicate" (May 28). A strong Opposition party led by a capable leader is as much a necessity as a strong government and prime minister for the continuance of a vibrant democracy. Ninety crore voters in India are also equally concerned about the future of the Congress party. It has reached its nadir because of the strategy adopted by Sonia Gandhi since 2004, of choosing pliant and loyal (instead of able) party persons, for key positions in the government, national party organisation and in the states. As such, the party high command is required to redesign its entire organisational structure and working style. Apart from the "syndicate" approach mentioned in the edit, the alternative is to appoint an honest and competency party leader as its president like the way Sonia Gandhi did in selecting Manmohan Singh as prime minister in 2004. Then the high command should leave everything to the party president. At the state level, the high command should take a feedback from party workers to decide on the state leader. A syndicate strategy may be adopted where infighting is rampant.

Y G Chouksey Pune

Biased view

Reading letters of G David Milton, including "Shallow pitch" are always amusing. His tendency to see all Narendra Modi and Bharatiya Janata Party (BJP) actions through his glasses of bias is not surprising. For him, pitting the Dalit-Muslim combine against OBC/upper castes, and pitting the Yadav/Muslim combine against others is secularism. The Congress party kept Muslims in fear of the BJP to control the vote bank. This is secular for him. All the development of infrastructure like roads, availability of power etc is enjoyed by all communities. The official figure of murders in West Bengal (under the Congress rule) in 1970 was 436, in 1971 it was 1,169. Between April 1970 to March 1972, more than 600 CPI (M) cadres were murdered. Then Congress MLA (he's moved to TMC since then) Sadhan Pande in 1989 claimed that more than 1,000 Congress workers were killed between 1977 and 1989 during the CPI(M) rule. In 2013, Rahul Gandhi had said that 25,000 Muslims will die if Modi is elected. A few stray cases of attacks on Muslims exposes false claim of "seculars" -- that is, Modi is anti-Muslim. I am not justifying these attacks on Muslims but putting them in perspective. In fact, we had far more peaceful five years compared to the Congress raj. I wonder why the word minority is appropriated by Muslims alone when we have many other minorities like Sikhs, Jains, Jews, Christians etc.

Abhay Dixit via email

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