Dockets the Supreme Court forgot

Judges are compelled to decide cases applying laws whose validity is under challenge

OUT OF COURT

M J ANTONY

We have all heard about obsolete laws that the government occasionally weeds out. Two gems: According to the Aircraft Act 1934, you need a licence to fly kites. The India Treasure Trove Act, 1878 defines treasure as "anything of any value hidden in the soil" and worth ₹10. Despite the government's efforts, many such vintage laws still survive. However, as they remain only on paper, like several new laws, they are comparatively harmless in contrast to the constitutional questions waiting for final answers from the Supreme Court. These cases of yore contain serious issues. Keeping them in suspended animation tends to distort law, lead to wrong orders and singed citizens.

One glaring revelation was made in a judgment of the Supreme Court delivered a few weeks ago. The validity of Article 31-C of the Constitution was vital to decide a large batch of appeals against a judgment of the Punjab and Haryana high court in land acquisition matters. However, the court has not decided whether the provision survives after it was struck down in 1981 ('Minerva Mills case'). The question was hanging fire since 1996. One bench referred the issue to a five-judge Constitution bench, which in turn sent it to a seven-judge bench and that bench again passed on the burden to a nine-judge bench. The issue involves the interplay of fundamental right to property and the directive principle of state policy ("material resources of the state"). It comes up in various courts, repeatedly.

In the present case, *Union of India vs Tarsem Singh*, when the court was confronted with the application of Article 31-C, it did not have any rule to go by as the validity of the provision had not been decided for decades. The judges wrote that "we will assume for the purpose of this case that Article 31-C, as originally enacted, continues to exist and that the 'material resources of the community' would include private property as well". In how many more cases the judges extricated themselves from such predicaments through "assumptions" is anyone's guess. But the plight of the litigants who lose their cases because of court's indecision is much worse.

This is only about one provision. The number of such cases consigned to prolonged limbo would induce shock and awe. There are some 250 cases waiting to be decided by constitution benches of five judges. Some of them were ready for final hearing since 1992. There are 11 cases referred to benches of seven judges. More than 130 cases have to be decided by benches consisting of nine judges. Even if a constitution bench sits permanently to dispose of these cases, it would take years to clear the dockets.

The subjects of these cases cover almost every aspect of national life, especially finance and economics. The government is now readying a labour code, but the definition of 'industry' in the Industrial Disputes Act is still to be decided. How many workers lost or won their cases and what the judges 'assumed' to be the law is beyond imagination. At present 520 labour cases are before the court. Similarly, there are more than 3,000 direct tax matters and 520 indirect tax appeals. Many of them will have to depend upon the interpretation of respective laws which are before constitution benches that never assemble. Chief justices in the past had given priority to politically sensitive matters and ignored economic cases, contributing to the general belief that judiciary is one of the obstacles to do business in this country. The inertia of the Supreme Court affects decisions of all the courts below.

The Supreme Court is happily at a comparatively calmer period in its history, at least on the surface. The past months saw turmoil of varied hues which have apparently subsided. There was also a shortage of judges. The new Chief Justice, who has a tenure of 17 months, can take up and dust the old constitution bench cases. If he sets the ball rolling, it will set a procedural precedent for many years to come.

A question of trusts

With the income tax department cancelling Tata Trusts registration, the first of a two-part article examines the flaws in the laws governing charitable trusts

J N GUPTA

Headlines such as "Income Tax department cancels registration of Tata Trusts", "How the Tax Department cancelled Tata Trusts Registration" make one wonder why form has overpowered substance in our tax system, despite a slew of fast-paced reforms to make it progressive and assessee-friendly. Is the law a servant of logic or its master?

The fundamental question that needs to be asked is whether the law should be enforced if it comes to contradict logic. Every law when enacted has a mother statement setting out the objective of law, which is the essence of law. The interpretation of provisions contained in the law must be in consonance with the object. Similarly, any interpretation against the object of the law must be struck down.

Changes in laws are made either as a result of the failed logic of the earlier laws or to address new developments in society. Hopefully, when the tax issue of Tata Trusts is decided by the judicial system, it will first seek an answer to the fundamental question: Why were the Tata trusts given tax exemption – or, for that matter, why is any charitable organisation given exemptions? Do the trusts continue to follow their objective? If so, obviously substance must prevail over form.

Although one does not have benefit of perusing the Tata Trusts application and file notings based on which these trusts were given their tax-exempt status, the *prima facie* rationale appears to be this: As opposed to other entities where profit is appropriated by the owners or employees for their benefit, in case of such trusts, the profit is appropriated by the trust for the benefit of unrelated beneficiaries who do not have any ownership or pecuniary relationship with the trusts and are not involved in any decision-making.

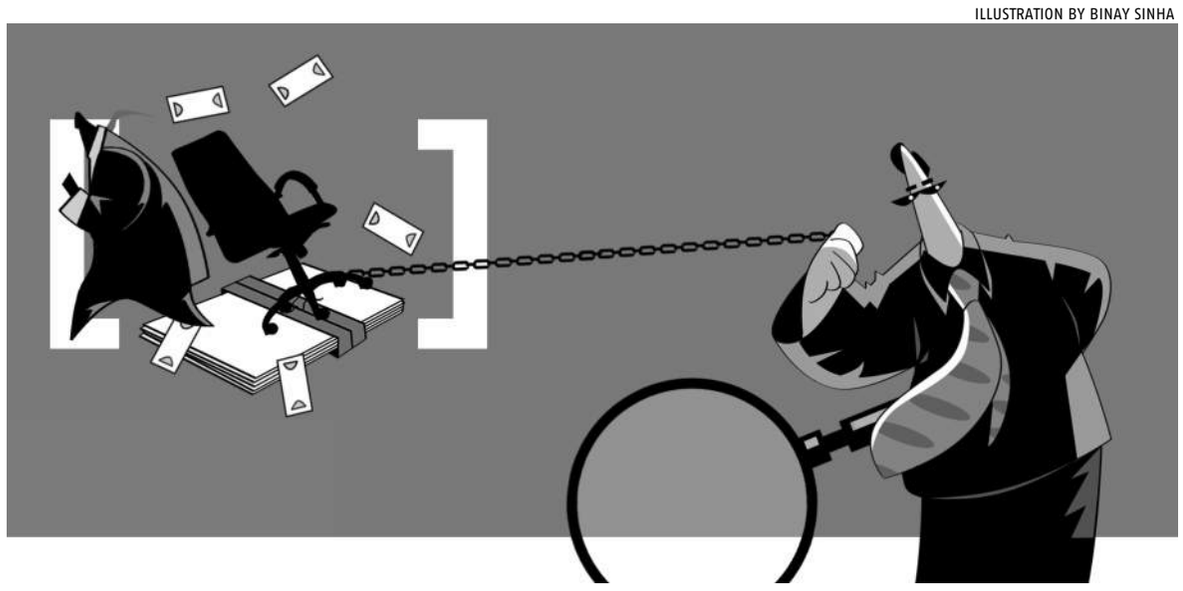
The other reason is that such tax exemptions lead to higher disposable income in the hands of trusts, enhancing their philanthropic activities.

The two paramount factors that make any trust eligible for exemption is that the owners/trustees must not enrich themselves and employees are also not allowed to enrich themselves by drawing obnoxious remuneration, and the income must be used for charitable objectives. It is not and it cannot be the case that the law expects everyone to work *pro bono*.

The intent of this piece is to rationally examine the issues behind the present mess, which appears to be hurting the public good.

First, it is nobody's case that tax exemption is the objective of the law. Therefore, as long as the prime objective is charity-oriented, tax exemption is a conscious decision of the authorities to boost the trusts' disposable income. As a corollary, any change in law must keep up with the objective or intent behind the exemption and procedures should not and cannot become the master and result in nullifying intent.

ILLUSTRATION BY BINAY SINHA



With this clarity, the first premise is that any change in law must ensure that the trusts and their activities must remain agnostic to changes in taxation laws; otherwise, one is hurting the original intent, which appears to be sacrosanct, given the public interest and public good element of charitable activities.

Issues or questions that trusts face largely relate to their investments, tax exemption, tax law changes and voluntary withdrawal by trusts of registration with tax authorities.

Investments by trust: Various restrictions are placed on trusts on where they can invest their surpluses. There is, however, no clarity as to why trusts are not free to invest theirs surplus in any manner trustees deem fit in the best interest of trust, as long as the trustees are in compliance with provisions of trust deed. The only plausible reason appears to be that lawmakers feel that the prescribed investment avenues are less risky compared to investment in shares. It reflects the mindset of an era in which shares were treated as speculative investment. There is no logic to continue with such restrictions any more when trustees of the National Pension System are allowed to invest in shares, as do the provident fund authorities and the government itself. The intent of law may be good but such restrictions have outlived their utility. In fact, some permitted investment avenues are probably riskier. For instance, the law allows trusts to deposit money with cooperative banks. Given the serial failures of such institutions, should one still bat for such prescriptions? And why are shares of only public sector companies and depositories allowed? Is this a quid pro quo for tax exemption that trusts should fund government companies? And in what way are private sector companies untouchables? With deposit insurance of ₹1 lakh should trusts having thousands of crores in bank fixed deposits risk its money? Who will bear the loss?

Therefore, there appears to be no logic for such restrictions. Ironically, while trusts can't invest directly in shares, they are permitted to invest in mutual funds and units that have investments in shares? Can anyone explain this rationale?

(**Tomorrow:** Why trust laws need a makeover)

The author is founder and managing director of Stakeholders Empowerment Services

CHINESE WHISPERS

Warrior of lost causes

Savitribai Phule, who had quit the Bharatiya Janata Party (BJP) to join the Congress amid much fanfare in the run-up to the 2019 Lok Sabha polls, is disenchanted with the workings of her new party. The Congress had fielded Phule from the Bahraich parliamentary constituency in Uttar Pradesh, but she failed to retain her seat and lost to the BJP nominee. With the Congress in the process of overhauling the state unit, which has resulted in the expulsion of 10 senior leaders, there is precious little for the self-proclaimed Dalit leader in the moribund state unit. To keep herself politically relevant, Phule has decided to launch an agitation on issues that might have just passed their sell-by date — reservation and electronic voting machines.

Murmu joins; Jahan doesn't

The Bharatiya Janata Party's Khagen Murmu, a member of Parliament (MP), on Tuesday joined Opposition MPs by mistake. MPs of the Congress, the Trinamool Congress, and other Opposition parties boycotted the function to mark the 70th Constitution Day in the Central Hall of Parliament on Tuesday. Instead, they protested the "murder of democracy" at the feet of the statute of B R Ambedkar, the architect of the Constitution, on the Parliament premises. As Congress President Sonia Gandhi *(pictured)* led the MPs in raising slogans and reading from the Constitution, Murmu joined the group. He thought the MPs had gathered there to pay their tribute to Amebdkar. He left when he realised it was a protest by the Opposition. Murmu had crossed over to the BJP weeks before the 2019 Lok Sabha polls and won a seat. Trinamool MP Nusrat Jahan sat in the Central Hall, attending the function, oblivious that the rest of her party MPs had boycotted it and were protesting.

Pride and prejudice

A Lok Sabha MP of the YRS Congress Party (YSRCP) on Tuesday took a dig at former Andhra Pradesh chief minister Chandrababu Naidu, saying he called designers from Singapore to develop the master plan for state capital Amaravati. Participating in the discussion on the National Institute of Design (Amendment) Bill, 2019, Lavu S Krishna Devarayalu said "we have to take pride in our own designs and we want that to happen in India", adding, "we do not want western people to come and show designs". Objecting to Devarayalu's comments, a TDP MP said the YSRCP had stopped all work for the state capital when projects worth almost ₹9,000 crore had been completed and those of another ₹50,000 crore were in different phases of completion. Another TDP MP wryly remarked Singapore was not in the "west".

INNOCOLUMN

Debates about entrepreneurship & growth

R GOPALAKRISHNAN

Like persistent bacteria which linger in the gut, debates about facilitating business linger in the alimentary canal of the economy. Last week, I participated in two different panel discussions, one in Mumbai and another in Bengaluru. Several issues came up for discussion, though I have selected only five for this column.

First issue: There is a strong view among some promoters that independent directors should have skin in the game through ESOPs so that they are better aligned to value creation. "Skin in the game" is an expression that is attributed to Warren Buffet. The role of boards and independent directors (IDs) is explicit in Indian regulations. To ensure that directors provide disinterested oversight of management on behalf of shareholders, their independence from management is a sine qua non. Yet some business leaders and lawyers argue that IDs should have "a closer alignment with management" for value creation (*Skin in the game*, Nithya Narayanan and Manali Gogate, Journal on Governance, vol I, no 6, 2012). To others, this sounds a bit like Ms Gandhi's committed judiciary. Anglo-Saxon countries like the US, the UK, Canada, Australia and Hong Kong count among countries that do not prohibit IDs receiving stock grants, but India does not have to adopt this American practice. ESOPs for IDs is less prevalent in European countries because if IDs watch stock prices through self-interest, then their independence will be challenged and they will defeat their cardinal role as watchdogs. This is a crucial issue at a time when global business leaders are committing themselves to stakeholder interests rather than only shareholder interest.

Second issue: India Inc is over-regulated to the point that entrepreneurs are more preoccupied with compliances than running their business. My friends from pre-2000 Sebi say that has been a persistent complaint. If it is persistent, we should not ignore it and maybe we should ask what is over-regulation? Over-regulation occurs when the laws are not fit for purpose and when there is a capability asymmetry that is, when the capability to write new laws exceeds the capabilities to enforce. An example is while driving, Indian motorists do not stop at a pedestrian crossing because there is weak enforcement. GST returns — frequency and detail every month, then every quarter, then annually — is a mendacious expectation from small business with income of ₹1-2 crore. Regulators often do not distinguish between serious, impactful errors and harmless, minor errors in matters such as a director's inadvertent insider-trading by a portfolio manager or technical breaches in pharma or food manufacturing.

Third issue: Business growth implies that disputes will occur. Our judicial system is so hopelessly inadequate to deal with business growth that it could undermine the confidence of a large investor to do business in India. So far, this aspect has not been called out as a retardant of economic growth. It will surely be so in the future. In ease-of-doing-business rankings, India is hopelessly lagging but who talks about it? I have written about this in my recent book (*Doodles on Leadership*), so I will not repeat my points here.

Fourth issue: Getting a Deming quality award is very tough. After Japan, India has the largest number of Deming awardees. Winning is a miraculous accomplishment but greatly amplified when one considers the infrastructure around our factories and employees' ways of living and travel. Changing employee mindsets in such an environment as we have is a huge challenge. Kudos to India Inc for attempting to create world-class companies in infrastructure-deficient environments.

Fifth issue: Our upcoming entrepreneurs play an important role in growing jobs and the economy. We must celebrate their accomplishments, but in a calibrated manner, must denounce their transgressions and find the right way to do both constructively. I worry about celebrating start-up founders excessively and too soon, well before they have earned any profit. We don't want to replicate the likes of Adam Neumann (WeWork) and Baba Ramdev (Patanjali). If the media hype about valuation-based start-ups continues, many founders will go the way of pop artists. Just during the last week, we have read about the tragic consequences for ABCD actress, Lauren Gottlieb (aka Rhea), American Idol star Antonella Barba and K-pop star, Koo Hara.

These points of view need debate within chambers of commerce in the face of public assertions like "less government, more governance" and imagined leaps in "ease of doing business" rankings.

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LETTERS

Not as simple as it looks

This refers to "Who's afraid of bank trade unions" (November 25). While I agree in principle that public sector banks (PSBs) must pay wages of its employees according to their individual financial positions but in reality the problem is not that simple. The PSBs are government-owned entities, have similar governance structures and are more or less managed along the same lines by finance ministry babus. They have recruitment, HR and IT policies that resemble each other. The way they treat their customers is the same. There operational costs are high and productivity is low as compared to their private counterparts. The position they find themselves in is a result of politically induced, management neglected, reckless lending in the last few years.

The bank employees had very little to do with this type of lending. So the question is how can one only separate the wage agreements and attempt to pay according to their individual ability to pay. The failure to comprehensively reform their governance and other structures makes them more or less resemble each other. You can't rationally segregate one aspect of their existence and functioning to professionalise it and lead all other systems/structures unchanged. Also performance-linked incentives work well in organisations that have clear systems and standards to judge performance.

Arun Pasricha New Delhi

Address telcos' concerns

This refers to "Telcos file review plea against AGR verdict" (November 23). As expected most of the incumbent telecom service providers (TSPs) barring Reliance Jio have submitted review petition against the AGR verdict pronounced by the Supreme Court. Though one can't be sure of the

outcome, the success of the review petition depends on TSPs presenting new facts not presented during hearing of the case, which is quite unlikely. The Supreme Court must have taken all relevant points into account during the course of hearing of the case spread over many years. Any inclination of the apex court in giving some concessions over interest and penalty depends on the government's willingness to accommodate the concerns of telcos in this regard.

TSPs have a legitimate point in seeking the concession on interest and penalty, primarily on two grounds —first, it took almost a decade and a half for the dispute to attain finality, and second, the telecom sector has significantly changed over the years with a few TSPs now facing existential crisis. However, the differing opinion of Reliance Jio on the issue would only complicate the matter. It would ultimately come down to the government — how far it is willing to go to accommodate the concerns expressed by TSPs.

Sanjeev Kumar Singh Jabalpur

Risking passenger safety

This refers to "Ground old A320neos for new ones: DGCA to Indigo" (November 25). It appears there is dilly-dallying on both sides : Indigo and Directorate General of Civil Aviation (DGCA). By asking Indigo to ground the faulty A320neos one by one, DGCA is giving a long rope to Indigo risking passenger safety in the sky and a potential disruption in domestic civil aviation. The writing on the wall is unambiguous. How can DGCA predict that the risk is not likely to materialise soon and can be leisurely dealt with? Unfortunately, there is near monopoly in this restricted market and the common citizen is happy to risk her life and disapprove disruptive regulatory action.

Ganga Narayan Rath Hyderabad

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HAMBONE

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Get down to business

The worst part of the Maharashtra political drama is hopefully over

A new government minus the Bharatiya Janata Party (BJP) will be in place in Maharashtra on December 1 after days of high drama that no democracy can be proud of. If the coming together of three parties with disparate and sometimes conflicting ideologies was disrespectful of the mandate, the skulduggery by the BJP and Ajit Pawar at the dead of night was an outright mockery of democratic norms and procedure. Now that the worst part of the drama is hopefully over, the bigger question is: Will the new government run? Or just sputter, enervated by its own contradictions, exhausted by its little internal wars?

In the past, the Shiv Sena made no secret of the fact that it saw itself as an "opposition" party, whether in power or out of it. It was the lone political party in the state that had opposed land acquisition for the Jaitapur nuclear reactor on the Konkan coast, citing danger to fisheries. This is a project the Congress won after huge political sacrifice in 2008 and the BJP continued in the teeth of determined opposition by its alliance partner. France, deeply invested in the project, is now seeking sovereign guarantees for it and is so nervous it may turn tail and run instead of opting to throw good money after bad. The Congress had announced, even before the project took off, that it was opposed to the high-speed rail link between Ahmedabad and Mumbai, principally because the link went through tribal forest areas and the locals would get nothing out of it. Japan, which is building the railroad, is holding its breath, waiting to see what will happen, now that the Congress is part of the state government. The Nationalist Congress Party (NCP) is caught between the devil and the deep sea. It is a peaceable ally, not given to quarrelling. But it is just two MLAs short of the Shiv Sena, and the chief minister will be the Sena's.

What would be really tedious is if the new Maharashtra government essays the same moves that parties have made when they have come into government from the opposition. In Andhra Pradesh, Jaganmohan Reddy has spent the first, potentially most productive six months in power, destroying almost everything his predecessor put up. The same goes for Rajasthan, where a Congress government reversed many of the previous regime's decisions including one on introducing a basic minimum educational qualification to contest elections. The new government would be well advised to learn from Tamil Nadu, which used to be one of India's most progressive states. The reason? There was always constancy and predictability in policy. M Karunanidhi and J Jayalalithaa were bitterly opposed to each other politically. But if they judged a policy addressed a delivery or administrative gap, they continued it and, frequently, even improved it, like the mid-day meal scheme. The Maharashtra voters, who have been suffering the most in the past few days, would expect the government to get down to business: The $5-billion Foxconn investment, which was supposed to come up near Talegaon, along the Mumbai-Pune Expressway in 2015; the reduction in value-added tax in Maharashtra on petrol and diesel; and a noticeable reduction in transaction costs. The afterglow of being the underdog will not last long for the new government, as the BJP, despite being badly wounded in the state, will be looking out to pounce on corners cut and promises half kept.

Misusing client assets

Sebi must work with exchanges to reassure investors

The Securities and Exchange Board of India's (Sebi's) crackdown on the Karvy group has caused some apprehension within the stockbroking industry. Apart from barring Karvy from taking on more clients, the regulator has asked all brokerages to comply with its stringent rules for the separation of client accounts from the broker's own accounts. This segregation is aimed at stopping the misuse of client assets. But a lot of brokers could be affected by this. An enforced rapid unwinding of affected positions could lead to big losses, leading to defaults. The Karvy group has been accused of diverting securities and funds from client accounts to other group companies, including its own real estate arm, as well as using those assets to meet its commitments in the stock market. This may be the tip of the iceberg and, indeed, many other brokerages are said to be in the same boat. The practice of misusing client assets is common across retail brokerages. It is easy to do: Brokers operate on the basis of power of attorney (PoA) from clients, allowing quick transfers of demat shares to honour transactions. This PoA mode of operation is both legitimate and necessary; otherwise, every transfer would require physical documentation from involved parties, slowing things and inconveniencing clients.

But PoA also makes it possible for the brokerage to dip directly into client accounts and use their assets to meet its own margin requirements. There are complicated variations. For example, a brokerage may buy shares on margin on behalf of a client, and then treat those margined shares as "unpaid" and, hence, place them in its own account. Misuse of shares pledged by clients as margin for their own trades has also been reported. The Karvy case, and others like it, came to light in an audit at the National Stock Exchange. Only further investigation will reveal the dimensions of the issue. Tapping client accounts is, of course, an unethical practice. It allows a broker to deploy assets that don't belong to it to generate a larger volume of trades than would be permissible on the basis of its own net worth. The Karvy case might be particularly egregious if the assets were used as collateral by the group's real estate arm. However, the practice of tapping client accounts is widely prevalent and it has been ignored for years. The regulator must stamp it out. Indeed, Sebi had already issued instructions, asking for a segregation of client accounts as far back as July.

Quite apart from the ethics, there are several dangers. If a brokerage, which is misusing client assets, runs into losses, it could default. This could lead to contagion in a situation where other brokers are also misusing client assets. Such defaults could lead to investors being left high and dry, and on a large scale, this would affect market operations. The regulator has to move delicately in dealing with this situation. There is this fear of contagion and that harsh action may lead to panicky investors selling off. Sebi must work closely with the stock exchanges to reassure investors and to ensure that an orderly unwinding of outstanding broker-positions margined by client assets occurs. It should act against offending brokers but also ensure that common investors are not hurt.

ILLUSTRATION: BINAY SINHA

Ayodhya, polytheism and the rule of law

Why Solomon would have been proud of the Supreme Court judgment in the Ayodhya land dispute case

DEEPAK LAL

The landmark verdict of the Supreme Court on the disputed Babri Masjid gave its land to the idol of Ram, who was given a juristic personality. The Court further said a Ram temple, to be put in a trust, was to be built to replace the Babri Masjid. The desecration of the mosque by Hindus in 1949 by insertion of an idol of Ram in the inner sanctum of the mosque, which was subsequently destroyed in 1992 by the Ram Mandir movement, were criminal acts which deprived Muslims of their place of prayer, who were to be compensated by being given land to build a mosque. The ongoing criminal cases against those involved in destroying the mosque were to be speedily completed.

This judgment has been questioned by Asaduddin Owaisi, chief of the All India Majlis-e-Ittehad-ul-Muslimeen (AIMIM), who said: "If the Babri Masjid was legal then why was it (land) handed over to those who demolished it? If it was illegal, then why the case is going on? Withdraw the case against Advani, and if it is legal then give it to us".

To sort out these differences it is useful to see the distinction between Hindu polytheism and Muslim monotheism and how the British Raj impacted India's traditional laws and effected its polytheism.

David Hume in his *Dialogues and Natural History of Religion* argued that, polytheism which is the original religion of mankind, "arose not from a contemplation of the works of nature, but from a concern with regard to the events of life, and from the incessant hopes and fears that activate the human mind" (p.139). Monotheism by contrast believes in a supreme deity, the author of nature, the omnipotent creator. Comparing the two — polytheism and monotheism, Hume notes: "The greatest and most observable differences between a traditional, mythological religion, and a systematical, scholastic one are two: The former is often more reasonable, as consisting only of a multitude of stories, which, however groundless, imply no express absurdity and demonstrative contradiction; and sits also so easy and light on men's minds, that, though it may be as universally received, it happily makes, no such deep impression on the affections and understanding". (p.176).

Discussing the relative merits of polytheism and monotheism, Hume notes that polytheism's "idolatory is attended with this evident advantage, that, by limiting the powers and functions of its deities, it naturally admits the gods of other sects and nations to a share of divinity, and renders all the various deities, as well as rites, ceremonies or traditions, compatible with each other." (p.160). In contemporary parlance it is secular. He concludes: "The intolerance of almost all religions, which have maintained the unity of God, is as remarkable as the contrary principle of polytheists."(p.162).

The British Raj in its pre-Mutiny reforming zeal introduced various legal innovations that overturned traditional Hindu law. The most important was the establishment of the rule of law by Cornwallis separating the judicial and executive functions of government and making government-executive decisions contestable in civil courts. But personal laws relating to the family, marriage, divorce, adoption, joint family guardianship, minority, legitimacy, inheritance, succession and religious endowments were largely left untouched. It was only after independence that legal reforms of personal and family law picked up. Untouchability was outlawed, bigamy became punishable, divorce, inter-caste marriages and widow remarriage were permitted and daughters were given shares in ancestral immovable property and the administration of Hindu temples and monasteries was radically altered.

The Ayodhya judgment draws on both the polytheism of Hinduism and the modern rule of law. In its arguments (in Part J of its full judgment) for accepting the juristic personality of the idol of Ram it (in J.2 para 109) cites polytheistic Roman law, saying "in conferring legal personality on the Hindu idol, courts drew inspiration from what they saw as factual parallels in Roman law." But, they note (in para 194) that "there is a significant distinction between property vested in a foundation (as in Roman law) or a deity as a juristic person (as in Hindu law) and property *per se* being a juristic person. Where the property vests in a foundation constituted for a pious purpose, it retains the characteristics as immovable property. This remains true even in cases where the property vests in the deity in an ideal sense. The purpose of conferring juristic personality is to ensure both a centre of legal relations as well as the protection of the beneficial interest of the devotees. It does not, however, alter the character of the property which vests in the juristic person. It remains subject to the framework of the law that defines all relationships governing rights or interests claimed in respect of property and the liabilities which attach to jural transactions arising out of property".

The court also rejected (in para 196) the contention that a mosque and its adjoining properties were a juristic person (like a Hindu idol) citing a 1940 British Privy Council judgment which stated "that there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships... the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, eg. that an idol may be the owner of property". The Supreme Court explains this line of reasoning as "that conferral of legal personality on immovable property could lead to the property losing its character as immovable property. Immovable property, by its very nature, admits competing proprietary claims over it" (para 197).

Thus, the Supreme Court in its Ayodhya judgment, whilst reaffirming the polytheism of Hinduism by giving a juristic personality to the idol of Ram, to whom from the strength of Hindu belief and other evidence it weighs, it gives the right to build a temple governed by a trust on the site of the Babri masjid. It also supports the modern rule of law, which does not allow private agents to unlawfully demolish immovable property, and thence supports the prosecution of the destroyers of the mosque, whilst also compensating the victims of its destruction. Solomon would have been proud of this judgment.

IL&FS was a Lehman-like moment

FINGER ON THE PULSE

T T RAM MOHAN

When IL&FS collapsed in September 2018, there was talk of a "Lehman" moment. Many felt that the collapse would devastate the Indian financial system and the economy in much the same way that the fall of investment bank Lehman Brothers had impacted the US economy.

The impact hasn't been quite the same. We haven't had banks failing. The Indian economy has not plunged into recession. But the impact hasn't been negligible either. The IL&FS debacle has shaken confidence in the non-banking financial company (NBFC) sector. It has undermined private consumption and investment. It has created more non-performing assets for banks. India's GDP growth has fallen from seven per cent in the quarter ended September 2018 to five per cent in the quarter ended June 2019. IL&FS may not exactly have been a Lehman moment. But it was certainly Lehman-like in the blow it has dealt to the Indian economy.

Whether Lehman Brothers should have been saved has been hotly debated. The three key persons involved in the Lehman decision — US Treasury Secretary Hank Paulson, Fed Chairman Ben Bernanke and New York Fed Chairman Tim Geithner— have contended that the Fed could not save Lehman because the bank did not have enough collateral against which the Fed could lend. Johns Hopkins University professor Larry Ball has argued in a book, *The Fed and Lehman Brothers*, that this is simply not true. Lehman had enough collateral to offer.

The Fed had lent funds to Bear Stearns, an investment bank, before it refused similar help to Lehman. The decision to let Lehman fail was taken under intense political pressure to avoid a bailout. The authorities under-estimated the economic risks involved. Political considerations thus trumped considerations of financial stability. Just one and a half days after the Lehman failure, the Fed went all out to save AIG, an insurance company. The catastrophic implications of the Lehman failure had become all too evident and the lesson had gone home: You can't let a major financial institution fail.

Now that the consequences of the collapse of IL&FS are before us, the question worth asking is: Was the decision to let IL&FS fail a policy blunder as the Lehman decision was? To answer the question, we need to understand the sequence of events leading up to the collapse. These are narrated in an affidavit placed before the National Company Law Tribunal (NCLT) by former IL&FS vice-chairman Hari Sankaran.

IL&FS's liquidity position came under stress due to cost overruns on its infrastructure projects. To deal with the problem, in 2015 IL&FS attempted a merger with Piramal Financial Services Enterprises. The merger would have generated around ₹8,500 crore of investible funds in the merged entity. Life Insurance Corporation (LIC), one of the principal shareholders of IL&FS, sat on the proposal for several months and ultimately did not agree to the valuation. The proposal was called off. IL&FS was subject to standstill requirements while the merger was under discussion. It could not raise debt or equity for nearly nine months. As a result, its liquidity position worsened.

In November 2017, IL&FS attempted to raise ₹6,500 crore through the sale of one of its entities, IL&FS Transportation Networks Ltd (ITNL), to an American entity. This attempt too was unsuccessful. ITNL itself sought to raise $300 million through a bond issue. The issue failed. IL&FS then asked for lines of credit for a total of ₹3,500 crore from two of its shareholders, State Bank of India and LIC. It also proposed to raise ₹4,500 crore through a rights issue of equity shares. The lines of credit were to have been made available by August 2018 and the rights issue completed by September 2018. The funds from neither source materialised. The rest is history.

As the liquidity position at IL&FS worsened over time, what steps did the shareholders take to address the problem? In August 2018, should shareholders, notably SBI and LIC, have provided the funding support sought by IL&FS? If not, should the government have organised a rescue? The questions need answering, as we reckon with the still unravelling implications of the collapse. As news about IL&FS's distressed position spread, its funding requirement rose considerably. Indeed, the capital requirement mentioned in the media at the time of its default was ₹25,000 crore.

High as this figure may seem, it pales in comparison with the significantly higher costs imposed on the economy by the collapse of IL&FS. The collapse has had a cascading effect that took in its sweep NBFCs, the realty sector, banks, the commercial paper market and non-financial enterprises. The slowdown in the economy is leading to a huge shortfall in tax revenues. Coming on top of the banking crisis, the IL&FS failure is, perhaps, the single biggest factor underlying the deceleration in growth over the past year.

The IL&FS collapse promptly led to cries of "scam" in the media. Allegations of malfeasance against the management flew thick and fast. In the face of such allegations, the government and public institutions tend to get paralysed. "Do nothing" becomes the motto. It becomes difficult to separate investigations into alleged wrongdoing from decisions required in the larger national interest. As in the case of Lehman, political concerns about bailing out a private entity prevailed over the imperative to contain the damage to the economy.

Last August, Reserve Bank of India Governor Shaktikanta Das declared that the RBI would not allow any big NBFC to fail. Alas, such determination was missing in the case of IL&FS. The failure is costing the economy dearly.

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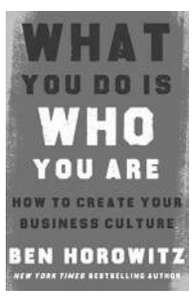
The culture challenge

BOOK REVIEW

SANJAY KUMAR SINGH

Ben Horowitz, the author of this book, had founded a company in 1999 called LoudCloud. In his organisation was a middle-rung manager who he discovered was a compulsive liar. Mr Horowitz got rid of him eventually, but it perturbed him that such a person had not only survived for long in his organisation, but had even been promoted. He fretted about the kind of signal it sent out to his other employees. This incident, and others like it, led Mr Horowitz to dwell on how he could instil the right culture within his company. This book is the result of 18 long years of research and cogitation. In it he dissects the techniques leaders—both modern-day and historical—have employed to achieve this goal. Among those whose stories he narrates is Robert Noyce, coinventor of the microchip. Noyce ran Fairchild Semiconductor in California. It was a unit of New York-headquartered Fairchild Camera and Instrument Corporation. The parent organisation was hierarchical—almost feudal—in character. Noyce, on the other hand, tried to foster a highly egalitarian culture within his unit—a prerequisite, he felt, for an organisation whose very survival rested on its ability to innovate.

New ideas are often ungainly in their early stages. They need to be protected, nurtured and refined. A hierarchical culture, where failure is punished, does not allow new ideas to flourish as employees stick to the tried and the tested. Noyce fostered a culture where the individual was valued. Ideas were evaluated on merit, irrespective of whom they came from. Many Fairchild Semiconductor employees went on to found some of Silicon Valley's marquee companies. They ran them along the same egalitarian lines they had experienced at Fairchild. Thus, Noyce, who later co-founded Intel, can, to a large extent be credited with fostering the collegial culture that is the hallmark of Silicon Valley companies today.



WHAT YOU DO IS WHO YOU ARE: How To Create Your Business Culture
Author: Ben Horowitz
Publisher: William Collins
Price: ₹699

A gripping story of cultural transformation Mr Horowitz narrates is that of Toussaint Louverture (TL), leader of the Haitian slave revolt. Slavery has existed since ancient times, but in its long history only one revolt has led to the establishment of an independent state—the one in Haiti.

Slavery shatters the human spirit. A slave has little incentive to work thoughtfully as the fruits of his labour do not accrue to him. Slavery fosters utter lack of trust in fellow human beings. How TL, with an army of slaves, created a cohesive force that defeated all the leading European powers of the late 18th and early 19th century—Spain, Britain and France—is an awe-inspiring story.

Two techniques TL used merit recounting. Despite opposition from his black followers, he incorporated white French deserters into his army. He felt he needed to learn from people well versed in French military strategy to be able to defeat the French army. According to Mr Horowitz, when trying to penetrate a new market, today's leaders, too, need to bring in leadership that has experience of that segment.

After he established control over St. Domingue (the pre-revolutionary name of Haiti), TL did not wrest control of the plantations from white planters, much to the chagrin of his black followers. He realised only they possessed the knowledge required to run the plantations, which were vital for Haiti's economic survival. Mr Horowitz says leaders at times need to take decisions that may appear incongruous to their followers. But such decisions signal in no uncertain terms where the leader's priorities lie.

Readers will also find appealing the story of Genghis Khan, history's most effective military leader, who in his lifetime conquered an area equal to the size of Africa. An egalitarian culture lay behind his success, too. In traditional medieval armies, the leaders rode on horseback and the troops marched on foot. Khan's army, organised on egalitarian principles, consisted entirely of cavalry. Each man carried his own supplies. It could cover 65 miles in a day and strike with lightning swiftness.

Khan valued merit. Positions of responsibility were bestowed not on the basis of kinship, but on ability and loyalty. He was also a master of inclusivity. When he defeated an army, he exterminated the aristocracy but absorbed its soldiers into his own with the promise that they, too, would share in the spoils of future conquests.

Things are not so different in modern corporations. Today, employee loyalty is won through profit-sharing mechanisms like stock options. Corporate employees, too, hanker for fairness in promotions. Break this sacred compact and what follows inevitably is low morale and high employee churn.