



Game of Shadows: An Unconstitutional Implementation of Discretionary Powers

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Abstract

In recent years, there have been a number of questionable rules and regulations made by the government, which, though they might seem unimportant on the surface, hold enough potential to corrode the democratic nature of the country from the inside and leave it barren. Such instances may include financial controversies like that surrounding Adani-Hindenburg Row, PM Care Funds, or violation of Supreme Court judgments through ordinances and legislations like the Government of NCT Delhi (Amendment) Ordinance, 2023, or downright overuse of discretionary and legislative powers. This particular article sheds light on two situations which highlight the existing government's nature to administer the country and various important positions unconstitutionally, namely –

The Controversial Criminal Procedure (Identification) Act, 2022

Controversial Extension of ED and CBI Directors

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Introduction

Every government is involved in ensuring that it carries out all the essential functions bestowed upon it by the citizens of the country. It passes various laws, undertakes administrative actions and exercises discretionary powers to facilitate the functions of a welfare state and enhance the quality of life the individuals living in the country. India, as well, is no such exception to this.

Like every other government in the world, the Indian government as of now, also passes various legislations and exercises discretion to ensure that they remain at the helm of power. However, some of these rules and regulations are played out in complete secrecy and behind a veil, with the media completely vouching for them. Many important laws are being passed by the government, which are outright unconstitutional in nature, but neither are most people aware of such laws, nor the media and the government wants them to be.

Such rules are regulations being mentioned about, may range from such laws which provide authority to executive departments to collect and hold on to essential personal information of citizens without any specified time frame, to extending tenures of influential constitutional positions without any repercussions, or to altering instrumental Supreme Court judgements through ordinances for facilitating the government's interests.

Arbitrary Administration

Irrespective of who has been in power and who harbors the union government along with all its nitty-gritty, every government has been guilty of violating the constitution for enforcing their policies, in some way or the other.

Among various noteworthy situations which could be spoken for as discretionary over- doings, there are two instances in recent history from the last year itself, which could be specified below

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as blatant overuse of discretion and administrative powers and a clear dereliction of the constitutional provisions by the Central Government.

The Controversial Criminal Procedure (Identification) Act, 2022

The Criminal Procedure (Identification) Act, 2022 was passed by both the houses of the Parliament with the intention to replace the Identification of Prisoners Act, 1920. It came into existence on 4th August, 2022. The government states that such a bill is being passed to expedite investigations and fasten convictions and identifications, but the truth of the matter is that it is simply another means at the state's disposal which would be used to misuse the justice system and harass all of them who dissent to the existing autocracy. The act if being simply put together would become vulnerable to misuse by the police, and would create a surveillance state, with every personal disposal available at the hands of the state, in the minor inconveniences as well.

The new legislation is going to do more harm than good, and it is pertinent as how this act violates the fundamental right of Right to Life and Personal Liberty as prescribed under the Indian Constitution.²

There have been a number of criticisms put forward against the bill, not only regarding how the bill was rushed through the voting process by tactfully introduced it on such a given date without even incorporating the asked recommendations to the bill, but also regarding the subject matter of the bill.

To understand the bill and its faults, a comparison must be drawn between it and its predecessor. To begin with, In contrast to the 1920 Act, which restricted its application to the acquisition of footprint and fingerprint impressions, photographs, and iris and retinal scans, the new Act aims to broaden the definition of the term "measurement" by incorporating behavioral characteristics such as handwriting, signatures, and physical as well as biological samples.

The term "*biological samples*" is not defined in this Act, so it could refer to tests such as brain electrical activation profile, polygraph, and narco-analysis, which are more invasive than other assessments, such as those listed in Sections 53 and 53A of the 1973 Code of Criminal Procedure.³

Consequently, it is debatable whether these tests qualify as "*biological samples*" for the purposes of this Act. The Supreme Court, in a landmark case regarding preventive detention and right to life and personal liberty, held that the involuntary administration of the aforementioned intrusive tests violates both the right to privacy and the prohibition against self-incrimination, which are guaranteed by Articles 20(3) and 21, respectively.⁴ The Act will, therefore, supersede the SC's ruling if the phrase "*biological samples*" is understood to encompass narco-analysis, polygraph testing, brain electrical activity profile testing, etc. It will thereby be open to constitutional scrutiny.

The 1920 Act restricted the use of measurement equipment to situations in which the subject is convicted, free on bond, or accused of a crime carrying a harsh one-year or longer jail sentence. However, Section 3 of the new Act uses the word "*any person*," whose measures could be obtained by investigative agencies in case of any offence punishable under any law enforced in

² INDIA CONST. art. 21

³ Goyam Pitalia, Vulnerable to Misuse by Police, the New Criminal Identification Act Can Create a Surveillance State, The Wire (Nov. 25, 2023, 1:05 PM) <https://thewire.in/rights/criminal-identification-act-surveillance>

⁴ Selvi & Ors v. State of Karnataka & Anr, (2010) 7 SCC 263

the nation, blurring the lines between an arrestee, convict, detainee, and under-trial. Notably, it also lists preventive detainees among the individuals whose measures may be obtained in accordance with this Act's provisions.

A protective provision that is attached to Section 3 is noteworthy because it exempts anyone found guilty, arrested, or detained for any crime punishable by law, apart from crimes against women and children, from having to provide their measurements by law. The decision to disclose measures rests with the person who committed the offense.

Nevertheless, for two reasons, it is believed that this caveat is poorly worded and so easily abused. First of all, the term "*may*" is used instead of "*shall*," implying that the officer has the authority to require someone to provide their measurement.⁵

Furthermore, it should be noted that the proviso only covers the extraction of biological samples; it makes no mention of any other measurements that this Act may mandate. This means that measurements other than biological samples may still be taken against their will. Second, the proviso only extends its operation to the case of biological sample extraction.

When a magistrate, whether judicial or executive, feels that it is necessary to request someone's measurements in order to prevent, investigate, or identify a crime, they are authorized by Section 5 of the Act to do so.

The Indian Penal Code's *Section 186* (obstructing a public servant in the discharge of public functions) may apply if the person thus instructed refuses to abide by the magistrate's order, as stated in Section 6(2). *Some claim that the proviso attached to Section 3 is neutralized by Section 5 when read in conjunction with Section 3.* The protection offered in the previous Section would then no longer be valid since those who were granted immunity under Section 3 of the new Act to excuse themselves from providing biological samples could be forced to do so by a magistrate under Section 5.

The *87th Law Commission* had flagged vivid concerns regarding Section 5 of the 1920 Act, stating it to be broad enough to be misused, as it sanctions coercive powers. A further caveat was added by the report, stating - "An all-embracing and pervasive provision might unintentionally have the effect of authorizing many practices, which may not be desirable." It ultimately recommended that, "In formulating such proposals, the law must try to strike balance between social needs and individual privacy." The new legislation, however, plainly disregards the concerns and seems to be far more regressive than its predecessor.

Lastly, in addition to the previous flagged concerns, the Act also creates a national repository for all the information gathered, which the National Crime Records Bureau (NCRB) will oversee. *For a 75-year period*, the NCRB is permitted to store, maintain, process, distribute, disseminate, and delete whatever records it may have in the interest of crime prevention and investigation. An unequivocally long time period, which can not only hamper the privacy of individuals, but also can be used as a political weapon to neutralize opposition parties.⁶

At the end, the main point of concern would be that the legislation by mandating forcible seizure of measurements of a person, violates the shield provided by the Constitution, and

⁵ Kaleeswaram Raj, Totalitarian threat: Provisions of Criminal Procedure (Identification) Bill need scrutiny, Frontline Hindu (Nov. 25, 2023, 2:44 PM) <https://shorturl.at/ftVWX>

⁶ Explained: The new Criminal Procedure (Identification) Act and why it has raised some concerns, The Times of India, (Nov. 25, 2023, 3:42 PM) <https://shorturl.at/luJ37>

directly overrides the person's right to privacy, declared to be an essential component of the Right to Life and Personal Liberty as provided under Article 21 of the Indian Constitution, by the Supreme Court, in a judgement administered by Justice D.Y. Chandrachud.⁷

Controversial Extension of ED and CBI Directors

The Enforcement Directorate and Central Bureau of Investigation are essential administrative bodies which are established and guaranteed by the Indian Constitution itself. Such bodies include number of capable of individuals, the most important position of all being the position of the director. The directors just like every other position prescribed within the Indian Constitution and harbouring essential state functions, have fixed tenures at the helm of power. Beyond such tenure, any exercise of power becomes invalid and withholding the office becomes unconstitutional.

On November 17, 2021, *Mr. Sanjay Kumar Mishra*, the director of the ED, was scheduled to retire. But on November 14, 2021, three days before he was set to retire, the President of India signed the *Central Vigilance Commission (Amendment) Ordinance, 2021*, and the *Delhi Special Police Establishment (Amendment) Ordinance, 2021*. Under these said ordinances, the tenure of the directors of the Enforcement Directorate (ED) and the Central Bureau of Investigation (CBI) may be extended for a maximum of three terms of one year.⁸

The Supreme Court had previously heard a challenge to Mr. Mishra's tenure extension as ED Director after his initial two-year term ended, where it ruled that temporary extensions can be given in "rare and exceptional cases." They did, however, state unequivocally that Mr. Mishra would not be granted any further extensions.⁹

All India Trinamool Congress (TMC) *MP Mahua Moitra* and Congress Leader *Randeep Singh Surjewala* filed cases before the Supreme Court on November 18, 2021, contesting the Ordinances. According to their argument, the Ordinances permitted the Union to further extend Mr. Mishra's tenure by overriding and going against the Court's previous ruling.

However, before any intervention of the Apex Court after the enlistment of the petitions, the Parliament changed the two ordinances into acts on December 14, 2021, and thereby the tenure extension clauses originally enacted by the Ordinances were validated by these Amendments. They contested that under the leadership of Mr. Mishra, most of the opposition leaders had been on the receiving end of the ED's stick, such examples can be seen in the likes of Congress leaders *P. Chidambaram*, *D.K Shivakumar*, NCP leaders *Anil Deshmukh*, *Sharad Pawar*, and AAP leaders *Manish Sisoda and Satyender Jain*.¹⁰

Opposition leaders, in the past, had also accused the ED of acting as a tool of the Union government instead of being an independent body, opening up investigations into many leaders. There have also been serious allegations against ED, accusing it of playing the role of a catalyst in making and breaking political alliances, and losing interest in cases as soon as an opposition leader defects to the BJP from their original party.

⁷ *KS Puttaswamy vs Union of India* (2017) 10 SCC 1

⁸ Advay Vora, *Tenure Extension to CBI and ED Directors: Judgement Summary*, Supreme Court Observer (Nov. 26, 2023, 1:44 PM) <https://www.scobserver.in/reports/tenure-extension-to-cbi-and-ed-directors-judgement-summary/>

⁹ *Common Cause (A Regd. Society) vs Union of India* (2018) 5 SCC 1, AIR 2018 SC 1665

¹⁰ SC strikes down ED Director's third extension: Who is Sanjay Kumar Mishra? The Indian Express, (Nov. 26, 2023, 12:25 PM) <https://shorturl.at/rtB58>

Following this set of events, about a year later, on July 13, 2022, *Jaya Thakur*, a Congress leader, who had previously challenged the extension of tenures through the Ordinances, asked a division bench of 3 judges, Justice Hima Kohli, Justice N.V. Ramana, and Justice Krishna Murari.

Subsequently, a year later, a 3 judge bench headed by Justice B.R Gavai started hearing the arguments of the petitioners, along with the Amicus Curiae appointed for this case, Mr. K.V. Viswanathan.

The judgment administered by the 3-judge bench was delivered in two parts, answering two important issues –

1. On the issue of whether the tenure extensions granted by the Ordinances, rendered into acts of Parliament, were constitutional -

A committee headed by the Central Vigilance Commissioner and comprising secretaries from the Ministry of Home Affairs, the Ministry of Personnel, and the Department of Revenue recommends the Director of the ED. The Prime Minister, the Minister of Home Affairs, and the Leader of the Opposition in Parliament appoint the Central Vigilance Commissioner, who serves as the head of this committee.

Comparably, the Chief Justice of India (or a Supreme Court judge selected by the CJI) and the Prime Minister, as well as the Leader of the Opposition in Parliament, form a committee that recommends the Director of the CBI.

The Bench determined that the government had very little control over the procedure in both cases. The new amendment gives the committees the authority to suggest to the current directors that they be extended if it is seen to be in the "*public interest*." It is noteworthy that the Judgement stated that the committee that suggested the initial appointment of the current director could not be forbidden from proposing the director's continued service. The Union's arguments persuaded the Bench that the extensions aren't being given out at the government's "*sweet will*."¹¹

2. On the issue of whether the extension granted to Mr. Sanjay Kumar Mishra was illegal -

As was rightly stated by Congress leader and Rajya Sabha MP, P. Chidambaram, in an interview to *The Wire*, unlike the CBI director, the head of the ED is not selected by the committee consisting of the prime minister, the leader of the opposition, and the chief justice of India. Instead, all the director's functionalities and extension of tenure are determined by a committee comprising the home secretary, secretaries of the Department of Personnel and Training and Revenue, and the chief vigilance commissioner.¹² The Union government had clearly bypassed this committee through the ordinance, by extending the tenure of the ED director.

The Bench subsequently ruled that Mr. Sanjay Kumar Mishra's last extension was unlawful and ordered the Union government to name a new director by July 31st, 2023. Until then, Mr. Mishra would continue to serve as the ED Director. The Apex court concluded that the extensions given in November 2021 and November 2022 to Mr. Mishra violated the court's

¹¹ Dr. Jaya Thakur v Union of India (2023) INSC 616

¹² Move to Allow Extension of CBI, ED Tenures Seen as Attack on Independence of Probe Agencies, *The Wire* (Nov. 26, 2023, 1:57 PM) <https://thewire.in/government/centre-ordinances-extension-tenure-cbi-ed-chiefs-5-years>

Mandamus established in *the Common Cause judgement*. The bench maintained that a legislative act could not revoke a writ of Mandamus.

Conclusion

Both the provisions of the Criminal Procedure Bill and the arbitrary extension of tenures of CBI and ED directors are worrisome circumstances in any democratic state. For the first instance, it is almost an uncanny miracle as to how a bill, laden with mistakes and loopholes, brimming with unattended recommendations, and numerous objections regarding its safety and implementation, easily passed through the voting process of not just one but both houses of the Parliament. As of now, until the act is further challenged for scrutiny, the objectionable provisions of storing and collecting data of citizens for prolonged time periods will continue to exist unattended.

Similarly, the *Central Vigilance Commission (Amendment) Ordinance, 2021*, and the *Delhi Special Police Establishment (Amendment) Ordinance, 2021*, which are now turned into acts still harbouring allowances for extending tenures of the ED and CBI directors, will continue to exist till further notice is issued. This is a sorry state of affairs for any democratic country as such constitutional provisions should never be meddled with, through legislative actions, with the only purpose of collaborating with the existing government's agenda. Even though Mr. Mishra's tenure henceforth was declared unconstitutional, adjudicating the provisions to be valid set a dangerous precedent, as any individual holding office after this, if working with bias for the government in power and not neutrally, would again make the judiciary go through the same cycle of tenure extensions.

These practices merely highlight the nature of the government to try and circumvent the constitutional limitations, and if required, override judicial decisions through parliamentary legislation. Such practices of working through the shadows cannot be encouraged, and those responsible for facilitating them must be brought to the light and be made answerable, every time it is deemed necessary, to uphold the sanctity of Indian democracy.

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