Course correction?

Revenue and optics seem to play a greater role in GST decisions

Under attack on how the indirect tax regime has panned out, the Goods and Services Tax Council on Saturday announced a set of feel-good moves to reassure diverse stakeholders. For consumers, the peak tax rate of 28% levied on cinema tickets above ₹100, large screen television sets or monitors, digital cameras and lithium ion batteries, among others, was bought down to 18%. For businesses still coping with compliance niggles, more time has been granted for filing this year's annual returns; the promise of a simpler return filing system has been dangled (by July next year); and a single, fungible e-cash ledger has been proposed to replace the present system in which credits available under Central GST cannot be set off against State GST dues. Last but not the least, concerns expressed by several States about revenue trends since the GST's introduction in July 2017 have been taken on board, and a ministerial group will be tasked with assessing the structural patterns affecting revenue collections in some States. This is an accommodative gesture from the Council, whose chief – Finance Minister Arun Jaitley – cited recent revenue trends that suggest compensation payable to the States has reduced substantively from last year. It is anyone's guess how much of a role the recent reverses suffered by the Bharatiya Janata Party in Assembly elections played in the latest decisions to slash rates or to ease the burden on businesses.

GST rationalisation is still a work in progress. It has long been clear that traders need a simpler filing system, faster refunds and other mechanisms to ease their cash flows. Consumers, for their part, are yet to get a clear definition of what qualifies as a good or service for the 'sin' category. From over 200 items that were initially kept in the 28% 'sin' goods rate bracket, it is now down to just 28 items, which include cement (hardly a luxury for a country with a massive infrastructure investment agenda) and auto components. That the original rates were neither thought-through nor reviewed prudently is apparent with the Council's decision to reduce the 28% levied on disabled persons' carriage parts and accessories to 5%. Since cement yields ₹13,000 crore in GST and auto parts another ₹20,000 crore, the Council has resisted rate cuts on these items for now. This is the problematic part – revenue and optics considerations seem to have a greater role in rate setting than the nature of the goods or services to be taxed. The Prime Minister announced impending cuts in the 28% slab, and reacted positively to the film industry's demand for lower GST. Seeking to correct popular perception ahead of the elections is one thing. But frequent tweaks to the structure, and an impression that rates can be altered by lobbying the powers-that-be, risk ruining the promise the GST held for investors wary of India: a predictable, simple and stable tax regime.

A disquieting exit

James Mattis's departure heightens concerns about the Trump White House

While the string of high-profile departures from the Donald Trump White House is longer than in the case of any of its recent predecessors, last week's announcement by the President that Defence Secretary James Mattis would step down by the end of February 2019 set alarm bells ringing in Washington and beyond. Soon after, Mr. Trump said he had advanced Mr. Mattis's exit, and that Patrick M. Shanahan would be acting Defence Secretary from January 1. Mr. Mattis, a retired four-star Marine general who served in Afghanistan and Iraq, was a respected voice within an otherwise chaotic and impulsive administration. In his letter of resignation, he indicated that he did not share his boss's worldview on "countries whose strategic interests are increasingly in tension with ours", including China and Russia; and that he believed in "treating allies with respect and also being clear-eyed about both malign actors and strategic competitors". The trigger was reportedly a phone conversation between Mr. Trump and Turkish President Recep Erdoğan, during which Mr. Trump abruptly decided to concur with Mr. Erdoğan on withdrawing roughly 2,000 U.S. troops from Syria. This has been attacked on both sides of the aisle, for fear that it could pave the way for a Turkish retaliation against Kurdish forces in Syria, which have been critical to efforts in recapturing more than 95% of the territory taken by the Islamic State, and cede space in Syria to Russian and Iranian interests.

Mr. Mattis's departure comes at a fraught juncture for the Trump administration. On the one hand, Democrats are on the front foot after taking over the House of Representatives. They will doubtless double down on the multiple investigations working their way through the Congressional and judicial systems, relating to possible covert Russian involvement in the 2016 presidential election as well as to the Trump Foundation and conflict-of-interest questions. Mr. Trump's supporters are as incensed as his critics over questions around his stalled campaign promise to build a border wall with Mexico to stymie undocumented immigration. A budget-related shutdown of the government has begun, and the anxiety of the financial markets is palpable. To lose a trusted adviser, considered by many to be the last "adult in the room" in the proximity of a tantrum-prone Commander-in-Chief, is to risk isolation on the global stage. Mr. Trump's decision to bring troops home from wars in faraway lands is in keeping with promises made during his campaign. But such a move could prove to be rash and self-defeating. Mr. Shanahan, who has been Mr. Mattis's deputy in the Department of Defence, will have to deal with the reality that the balance of strategic power has slipped further from Washington's grip.

The case against surveillance

Regardless of which government enhanced powers of surveillance, reform is long overdue

GAUTAM BHATIA

Last week, a Ministry of Home Affairs (MHA) notification authorising 10 Central agencies to intercept, monitor, and decrypt online communications and data caused a furore in both Parliament and the wider civil society. The notification was described as an incremental step towards a surveillance state. The government's defence was equally swift: it protested that the notification created no new powers of surveillance. It was only issued under the 2009 Information Technology Rules, sanctioned by the previous United Progressive Alliance government. The 10 agencies had not been given a blank check; rather, specific surveillance requests, the government contended, still had to be authorised by the MHA in accordance with law.

But whatever one makes of the government's defence, the MHA notification lays bare the lopsided character of the surveillance framework in India, and highlights an urgent need for comprehensive reform.

The problem

The existing surveillance framework is complex and confusing. Simply put, two statutes control the field: telephone surveillance is sanctioned under the 1885 Telegraph Act (and its rules), while electronic surveillance is authorised under the 2000 Information Technology Act (and its rules). The procedural structure in both cases is broadly similar, and flows from a 1997 Supreme Court judgment: surveillance requests have to be signed off by an official who is at least at the level of a Joint Secretary.

There are three features about the current regime. First, it is bureaucratised. Decisions about surveillance are taken by the executive branch (including the review process), with no parliamentary or judicial supervision; indeed, the fact that an individual will almost never know that she is being surveilled means that finding out about surveillance, and then challenging it before a court, is a near-impossibility.

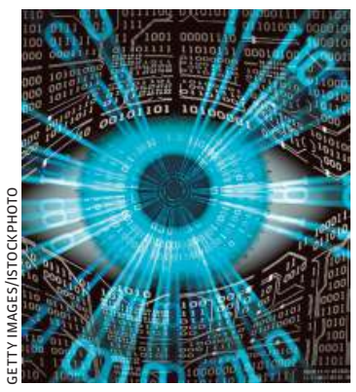
Second, the surveillance regime is vague and ambiguous. Under Section 69 of the IT Act, the grounds of surveillance have been simply lifted from Article 19(2) of the Constitution, and pasted into the law. They include very wide phrases such as "friendly relations with foreign States" or "sovereignty and integrity of India".

Third, and flowing from the first two features, the regime is opaque. There is almost no information available about the bases on which surveillance decisions are taken, and how the legal standards are applied. Indeed, evidence seems to suggest that there are none: a 2014 RTI request revealed that, on an average, 250 surveillance requests are approved every day. It stands to reason that in a situation like this, approval resembles a rubber stamp more than an independent application of mind.

The illusion of a trade-off

To arguments such as these, there is a stock response: the right to privacy is not absolute. Surveillance is essential to ensure national security and pre-empt terrorist threats, and it is in the very nature of surveillance that it must take place outside the public eye. Consequently, the regime is justified as it strikes a pragmatic balance between the competing values of privacy and security.

This is a familiar argument, but it must be examined more closely.



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First, let us clear a basic misconception: it is nobody's case that privacy is absolute. The staunchest civil rights advocates will not deny that an individual reasonably suspected of planning a terrorist attack should be placed under surveillance. The debate, therefore, is not about 'whether surveillance at all', but about 'how, when, and what kind of surveillance'.

In this context, the evidence demonstrates clearly that a heavily bureaucratised and minimally accountable regime of surveillance does nothing to enhance security, but does have significant privacy costs. For example, while examining the U.S. National Security Agency's programme of mass surveillance, an American court found that out of more than 50 instances where terrorist attacks had been prevented, not even a single successful pre-emption was based on material collected from the NSA's surveillance regime. Indeed, such a system often has counterproductive effects: a government that is not checked in any meaningful way will tend to go overboard with surveillance and, in the process, gather so much material that actually vital information can get lost in the noise. In the famous 'privacy-security trade-off', therefore, it is exceedingly important to assess the balance on the basis of constitutional principles and fundamental rights, rather than blindly accepting the government's rhetoric of national security.

After the Supreme Court's 2017 judgment in K.S. Puttaswamy v. Union of India ('the right to privacy case'), the constitutional contours within which the questions of 'how, when, and what kind' have to be answered have been made clear. Any impingement upon the right to privacy must be proportionate. One of the factors of the proportionality standard is that the government's action must be the least restrictive method by which a state goal is to be realised. In other words, if the same goal – i.e., protecting national security – can be achieved by a smaller infringement upon fundamental rights, then the government is constitutionally bound to adopt the method that does, indeed, involve minimal infringement.

Under these parameters, there is little doubt that on the three counts described above – its bureaucratic character, its vagueness, and its opacity – the existing surveillance framework is unconstitutional, and must be reconsidered. To start with, it is crucial to acknowledge that every act of surveillance, whether justified or not, involves a serious violation of individual privacy; and further, a system of government surveillance has a chilling effect upon the exercise of rights, across the board, in society. Consequently, given the seriousness of the issue, a surveillance regime cannot have the executive sitting in judgment over the executive: there must be parliamentary oversight over the agencies that conduct surveillance. They cannot simply be authorised to do so through executive notifications. And equally important, all surveillance requests must necessarily go before a judicial authority, which can apply an independent legal mind to the merits of the request, in light of the proportionality standards discussed above.

Second, judicial review will not achieve much if the grounds of surveillance remain as broad and vaguely worded as they presently are. Therefore, every surveillance request must mandatorily specify a probable cause for suspicion, and also set out, in reasonably concrete terms, what it is that the proposed target of surveillance is suspected of doing. As a corollary, evidence obtained through unconstitutional surveillance must be statutorily stipulated to be inadmissible in court.

And last, this too will be insufficient if surveillance requests are unopposed – it will be very difficult for a judge to deny a request that is made behind closed doors, and with only one side presenting a case. There must exist, consequently, a lawyer to present the case on behalf of the target of surveillance – even though, of course, the target herself cannot know of the proceedings.

Root and branch

To implement the suggestions above will require a comprehensive reform of the surveillance framework in India. Such a reform is long overdue. This is also the right time: across the world, there is an increasingly urgent debate about how to protect basic rights against encroachment by an aggressive and intrusive state, which wields the rhetoric of national security like a sword. In India, we have the Supreme Court's privacy judgment, which has taken a firm stand on the side of rights. Citizens' initiatives such as the Indian Privacy Code have also proposed legislative models for surveillance reform. We now need the parliamentary will to take this forward.

Gautam Bhatia is a Delhi-based lawyer. Disclaimer: he assisted in the drafting of the Indian Privacy Code (saveourprivacy.in), a draft data protection law that proposes surveillance reform

A solution in search of a problem

The argument that a centralised judicial recruitment process will help the lower judiciary does not hold up

PRASHANT REDDY T. & DIKSHA SANYAL

Last week, in its report, 'Strategy for New India@75', the NITI Aayog mooted the creation of an All India Judicial Service (AIJS) for making appointments to the lower judiciary through an all India judicial services examination conducted by the Union Public Service Commission (UPSC) in order to maintain "high standards" in the judiciary.

Similar proposals were made by the Union Law Minister Ravi Shankar Prasad on three different occasions this year as a solution to the problems of vacancies in the lower judiciary and a lack of representation in the judiciary from marginalised communities. This last argument appears to have caught the attention of Dalit leaders such as Ram Vilas Paswan, a Minister in the Central government, who voiced support for the AIJS following the Supreme Court's controversial judgment, earlier this year, that diluted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

In our opinion, the AIJS is not a solution to these problems and the government would be well advised to reconsider its stance. So, how serious is the problem of vacancies, and is centralisation the solution?

The facts speak

The argument that the creation of the AIJS and a centralised recruitment process will help the lower judicial services is based on the assumption that the current federal structure, that vests the recruitment and appointment for the lower judiciary in the hands of State Governors, High Courts and State Public Service Commissions, is broken and inefficient. On facts, however, this assumption does not hold up.

Going by the latest figures published by the Supreme Court in its publication *Court News* (December 2017 and the last available figures), many States are doing a very efficient job when it comes to recruiting lower court judges. In Maharashtra, of the 2,280 sanctioned posts, only 64 were vacant. In West Bengal, of the 1,013 sanctioned posts, only 80 were vacant. Those are perfectly acceptable numbers.

However, there are States such as Uttar Pradesh where the situation is shocking. Of the 3,204 sanctioned posts, 1,348 are vacant, i.e. 42% vacancies. These numbers show that the problem of vacancies is not uniform across different States. The solution is to pressure

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poorly performing States into performing more efficiently.

Further, the argument that the centralisation of recruitment processes through the UPSC automatically leads to a more efficient recruitment process is flawed and not a guarantee of a solution. For example, the Indian Administrative Service – its recruitments are through the UPSC – reportedly has a vacancy rate of 22%, while the Indian Army's officer cadre, also under a centralised recruitment mechanism, is short of nearly 7,298 officers.

Impact on State politics

Will the creation of an AIJS lead to more representation from marginalised communities and women? The second argument in support of the AIJS is that its creation, along with provisions of reservations for the marginalised communities and women, will lead to a better represented lower judiciary. Dalit and tribal politicians are supporting the AIJS on these grounds. The fact is that several States already provide for reservations in their lower judicial service.

For example, at least 12 States, which include Madhya Pradesh, Chhattisgarh, Uttar Pradesh, Rajasthan and Kerala, provide for caste-based reservation in the direct recruitment examination for district judges from the bar. In addition, U.P., Karnataka, Rajasthan and Chhattisgarh provide women with special reservations. Karnataka also recognises two additional categories of reservation within caste-based reservation – for those from a rural background and those from Kannada medium backgrounds. Karnataka is an example of how States are best suited to assess the level of intersectional disadvantage of various communities residing in the State.

Unlike States, the Centre almost never provides reservation for women in the all India services. On the issue of caste, an AIJS may provide for SC/ST reservation along with reservation for the Other Backward Classes (OBC) but it should be noted that a recent Supreme Court ruling has held that SC/STs can avail the benefit of reservation in State government jobs only in their home States and not when they have migrated. The same principle is usually followed even for OBC reservations. Thus, instituting an AIJS would mean that nationally dominant SC, ST and OBC groups would be at an advantage as they can compete for posts across the country, which they would otherwise be disqualified from because of the domicile requirement. Thus an AIJS will have consequences for State-level politics.

As originally enacted, Articles 233 and 234 of the Constitution vested all powers of recruitment and appointment with the State Public Service Commission and High Courts. During the Emergency, Parliament amended Article 312 of the Constitution to allow for the Rajya Sabha to pass a resolution, by two-thirds majority, in order to kick-start the process of creating an all India judicial service for the posts of district judge. Once the resolution is passed, Parliament can amend Articles 233 and 234 through a simple law (passed by a simple majority), which law will strip States of their appointment powers. This is unlike a constitutional amendment under Article 368 that would have required ratification by State legislatures. In other words, if Parliament decides to go ahead with the creation of the AIJS, State legislatures can do nothing to stop the process.

Prashant Reddy T. and Diksha Sanyal work on judicial reforms at the Vidhi Centre for Legal Policy, New Delhi

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Immense possibilities

Kartarpur has opened a window of opportunity to break the ice that bedevils the India-Pakistan relationship. Pakistan Prime Minister Imran Khan is quite right in saying that champions – by which term he must include statesmen as well – would not shy away from taking chances. We have no choice but to trust him and cannot be too circumspect to get the peace process moving ("India to limit pilgrim flow to Kartarpur", December 24). The majority of people in both countries yearn for a resolution of outstanding issues in a spirit of give-and-take. A perpetual state of conflict benefits no one besides causing a huge drain of resources. The core issue of Kashmir is too complex to lend itself to a quick-fix solution but we may get around to solving many issues by building people-to-people contact on a large and unprecedented scale and encouraging cultural and trade exchanges.

R. RAVICHANDRAN,
Chennai

The Gandhi statue

The article, "When Gandhi's statue is removed in Ghana" (Editorial page, December 24), should prompt Indians, especially those living in Africa, to introspect about our racist nature. As one who has lived and worked in Africa, I have come across such unpleasant experiences, by fellow Indians, which include referring to skin colour. Unless we come out of this petty mindset, no amount of statue unveiling or visits by Indian leaders will help. Mahatma Gandhi, with all his faults, did invaluable service to mankind as is humanly possible in one's lifetime. We, as a nation, need to take it to the next level.

SUNIL KUNNATHULLY,
Kochi

Regulating surrogacy

Unfortunately, there are still many grey areas in the Surrogacy (Regulation) Bill (Editorial page, "What is altruistic surrogacy?", December 24). A waiting period of five years is too long. There are studies pointing out that the chances of getting near relatives to help in the surrogacy process are minuscule. There is also the issue of the privacy of the couple concerned. A single parent can adopt a child but cannot go in for surrogacy. The absence of a clause to regulate assisted reproductive technology clinics is a hurdle. Permitting commercial surrogacy in a well-regulated manner and with more patient-friendly options could have been thought of rather than a complete ban. Surrogacy is also a source of income for poor women. There should have been more discussion before the Bill was passed.

HARSAHIB SINGH,
Ludhiana, Punjab

Sinking island

There is only one response to global warming and calamities that it induces: to keep our habitats in prime health ('Ground Zero' page, "The sinking island of Kerala", December 22). From the shoreline to the top of the Western Ghats, the impact of global warming is perceptible. The vast compendium of science can be used in developing precautionary principles. This was precisely what Prof. Madhav Gadgil and his team tried to do for the Western Ghats. It is time that Kerala undertakes a development management plan for each ecozone in the State if it is to win the battle against global warming.

T.V. SAJEEV,
Peechi, Kerala

Team and coach

Indian coach Ravi Shastri may be right in saying that it is easy to be critical of the Indian team from miles away. But if he is elated with the victory at Adelaide, he should be prepared to receive brickbats too. Unfortunately our cricketers, and now the coach, feel that they are above reproach. Moreover, since there was a fitness issue about Ravindra Jadeja, he should have come clean. If Jadeja was nursing an injury even before the tour, how was he included in the team? The Supreme Court needs to review the administration of Indian cricket by implementing the Lodha Committee recommendations in full.

N. MAHADEVAN,
Chennai

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