

Courts must take a holistic view of the economy

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The conviction of the former coal secretary is the 111th conviction for the prosecution in the coal cases. While several bureaucrats have earlier vouched for his integrity, the conviction will likely be remembered as undeniable travesty of justice. Let us hope that this decision does not demoralise thousands of senior officers working in the government.

Now is a time for India and the Indian courts to engage with the question of whether wrongdoings preclude a law and economic analysis of matters that have a far-reaching impact on critical industrial sectors and the Indian economy. Avoidable economic harm has been ignored as an important consideration in far-reaching judicial decisions. Just to be clear, an economic policy is not justiciable unless it is *ultra vires* to our Constitution i.e., policies are beyond the scope of judicial authority.

This is not a justice versus growth debate. Without a doubt, serious public wrongdoings such as bribery and established corrupt practices endanger the rule of law. The faith of citizens and their trust in institutions rests on treating public officials the same way as everyone else in the eyes of the law.

To start with, in the allegations of bribery, mala fide or corruption as alleged in the coal block case, the matter was litigated in the highest court of law in writ proceedings, which were initiated by a public interest litigation (PIL). PIL as a forum of litigation is not only inappropriate but counterintuitive to what the founders believed. In writ proceedings, laws and executive decisions are challenged on grounds of suspect constitutionality.

Judicial orders quashing a government licence allegedly as a result of bribery or corruption is a consequential order the legal validity of which depends primarily on the act of bribery or corruption having been proved to the satisfaction of a court beyond all reasonable doubt. The only forum where this can be done is a criminal court. A writ proceeding is not the place where the factual accuracy of an alleged act of bribery or corruption can be judicially examined.

Long delays in our trial courts add to the problem. More importantly, with heavy suspension of corruption or bribery in these matters, writ courts end up bracketing suspicion with arbitrariness to strike down an economic policy instrument i.e., the award of a government licence. The result is an extraordinary impact on the livelihood of workers, growth of industrial sectors and resilience of the entire economy. If allegations of bribery or corruption are proved beyond reasonable doubt in a criminal court, then punishment to the wrongdoers should be decided accordingly. But, either way, writ proceedings by their very nature are not the appropriate judicial forum and the legal procedure.

We need to introspect on the 'judicialisation of economy' and its impact on multiple macroeconomic parameters, including Gross Domestic Product, growth rate, industrial value add, joblessness, rising gross non-performing assets, current account deficit, and the long-term viability of businesses that make huge sunk cost investments. An important question, therefore, is: Can justice be blind to current economic imperatives or is economically responsible justice trivial after all?

Economic data during both governments under the United Progressive Alliance and the National Democratic Alliance regimes in the last two decades demonstrates that there have been major economic costs attached to some landmark decisions of the apex court. These were borne (and in some cases continue to be borne) by the public exchequer, businesses, and citizens. The infamous list includes the liquor ban on highways, the cancellation of coal blocks, telecom AGR, infrastructure projects, and many more. For example, with ten years of rich data from the telecom industry behind us, there is consensus that the 2G decision of the Supreme Court (SC) did sound the death knell for the entire industry.

People being faced with the dangerous binary choice of whether they are for or against corruption formed decisive views even before the courts, which is enormous pressure in any democratic system. Entire industries in tourism, heavy metals, power, telecom, banking had to bear the cost of the subsequent court verdicts. Sectoral data reveals that ultimately the burden was passed down to the citizens and end users in the form of higher prices, inadequate supply amidst growing demand, poor quality of service, and simply fewer providers to choose from – all textbook signs of erosion of competition that patently harms consumers.

That the courts should undertake an examination of the economic impact of their decisions is a heavily contested proposition in India. There is a clear distinction between courts interfering in matters of economic policy, and not being sensitive to economic

impacts that their decisions might have on the larger economy. The government is bound by constitutional diktats and if there are attempts to violate it, then the SC is well within its jurisdiction to review executive actions and strike them down if necessary. But it is not for the courts to formulate or examine the substantive content of economic policies that is exclusively in the domain of the executive and legislative branches of the government.

In more ways than one, we rely on trickle-down economics where the twin engine of socio-economic development is the scale and speed of growth of our economy. As the economy faces headwinds and is struggling post-pandemic, the time is ripe for our courts to take a holistic view of economic and equity considerations in their decision making.

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