Commachen (Dead), yet 'His' Immutable Dissent

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Electoral politics lies at the heart of Indian democracy. To protect, regulate and to ensure a path for the healthy evolution of electoral politics in India, the Representation of the People Act, 1951 was enacted by the Indian Parliament which also contains some penal provisions for its disregard. These penal provisions, as any other, must only be literally interpreted. This article critiques the effective judgment in *Abhiram Singh* v. *CD Commachen (Dead) by Lrs. & Ors.*[1]

This column was written before the 2019 General Elections commenced.

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I. Introduction

The Hon'ble Supreme Court of India [hereinafter 'Sup. Ct.'] commenced the year 2017 with one of the most crucial verdicts from a political vantage. The judgment in *Abhiram Singh* v. *CD Commachen (Dead) by Lrs. & Ors.*,[2] [hereinafter '*Commachen*'], with its far reaching observations, assumed much value as it could not have come at a more opportune moment – the electoral stage was all set in five Indian states[3] for the upcoming assembly polls.

In a sharply divided verdict, by a margin of 4-3, the Sup. Ct., while interpreting section 123(3)[4] of the Representation of the People Act, 1951 (Act 43 of 1951)[5] [hereinafter 'the Act'] in *Commachen*, pronounced that the electoral candidates stand barred from appealing to voters on grounds of either their own or the electorate's religion, race, caste, community or language. The minority opinion, however, favoured a more restrictive interpretation of section 123(3) of the Act and ruled that the word 'his' should allude only to affiliations of religion, caste, etc., of the candidate or the candidate's opponent and not of the voter or electorate.

What is interesting to note is the fact that section 123(3) of the Act, before *Commachen*, made it a corrupt practice for any candidate to appeal to the electorate asking it to either vote or refrain from voting for any candidate or his/her opponent on grounds of his religion, race, caste, community, or language. The section, as interpreted before *Commachen*, did not envisage a bar on appeal to voters on their (that is, the voters') religion, race, caste, community or language.[6]

However, *Commachen* expanded the definition of the word 'his' in section 123(3) of the Act by construing it to mean that it should refer to the candidate, the candidate's opponent as also the individual voter or the electorate. This new interpretation imperils not only the evolving democracy that India is, but is also antithetical to the principles enshrined in the Constitution of India, 1950 [hereinafter 'Constitution'].

II. Interpretation

The majority's interpretation[7] of the word 'his' in *Commachen* is not viable and goes beyond the established interpretational practices[8] with regard to penal provisions and statues.

The generality with which the majority in *Commachen* unanimously agrees to assign this more recent interpretation to section 123(3) of the Act is indeed astonishing. While Lokur, Rao and Thakur, JJ., relied upon secularism as one prong of their arguments to construct section 123(3) of the Act as it stands today, Bobde, J., in authoring his opinion did not even touch upon any other issue except the one concerning interpretation of statutes.[9]

It is, therefore, imperative that the principle of interpretation of penal provisions and penal statutes is briefly discussed.

Strict Interpretation of Penal Statutes

It is a settled position world over that penal provisions and penal statues have to be strictly interpreted. In fact, in *Wiltberg*,[10] Chief Justice Marshall, delivering the opinion of the court, categorically laid:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the Judicial Department. It is the legislature, not the court, which is to define a crime and ordain its punishment.
>
> It is said that notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.

The courts in India have also, with much conviction, duly considered and recognized the common law maxim of strict interpretation of penal statutes, i.e., only a plain and literal interpretation has to be accorded to penal statues.[11]

In fact, it is the mandate of the principles of statutory interpretation that any dubiety or ambiguity has to be resolved in favour of the person accused or charged of any offence.[12]

Any attempt to give a broad interpretation to any penal provision or statue inevitably leads to extension of the original meaning of such provision or statue. This in effect leads to creation of new punishment(s) for the accused which is contrary to the principles of statutory interpretation of penal statues. Verily, this amounts to subjecting the accused to *ex post facto law*, i.e., subjecting the accused to newer punishment(s) which never existed at the time of the commitment of the prohibited act, which is diametrically opposed to Article 20(1) of the Constitution.[13] As such, it can be safely stated that the majority's opinion in *Commachen* is *de hors* the confines of the Constitution.

The 'Language Canon of Construction' or the 'Gramatical Interpretation'

A basic analysis activated to adjudge whether an interpretation of a statue or provision ought to be resorted to is to go back to the simple usage and practice of the English language and test whether the meaning assigned to a provision or statute is within the rules and usage of the language. The 'language canon of construction' is neutral and serves as an analytical guide in discerning the meaning of a particular penal provision.

The majority in *Commachen* lay down that the word 'his' shall refer to the candidate, the candidate's rival as also the voter/electorate from whom the votes are asked for. However, applying the 'language canon of construction' to section 123(3) of the Act, it becomes amply clear that the interpretation assigned therein to the word 'his' is inconsistent with the basic usage of the English language and has all potential to wreck havoc in the justice administration system if the same is allowed to cement over time.

The rules of English grammar[14] make it amply clear that only one potential subject could have been intended to be referred to by section 123(3) of the Act. The word 'his' is a pronoun which can be

placed only after the usage of a noun. As in section 123(3) of the Act, there is not one place in the sentence where any noun preceding the pronoun 'his' can even loosely be categorized to include the electorate/voter.

Chandrachud, J., in his dissenting opinion in *Commachen*, makes very similar observations and rules that a grammatical and lingual interpretation verily brings to forth the intention of the legislature as is evident from the words employed in the legislation. Thus, according to the lingual interpretation, it will not be wrong to say that the word 'his' shall have to be interpreted only and only in that sense as it refers to or discusses about a previously named person.

It has, in fact, and rightly so, been impressed upon by Gautam Bhatia that:[15]

> The Section *does* not say "*the appeal by a candidate… to any person to vote or refrain from voting for any person on the ground of his religion…*" If *that* was the language of the statute, then, linguistically, it would be equally plausible for "his" to qualify "to any person" (i.e., the elector), or to qualify "the candidate." We would then have to look to the purpose of the statute to determine which of the two was the correct interpretation. However, when we have the sentence "*the appeal by a candidate… to vote or refrain from voting for any person on the ground of his religion*," there is only one plausible interpretation: "his religion" refers to the religion of "any person," who is to be voted (or not voted) for.

Legislating from the Bench

For the courts to graft a provision on to a statue is a practice entirely foreign to our jurisprudence.[16] In fact, the act of legislating from the bench has been often deprecated, especially in matters concerning penal provisions:[17]

> [The duty of Judges] to expound and not to legislate, is a fundamental rule. By no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature.

When the Court advances to liberally interpret any penal provision or statute, it most often virtually creates a new punishment. This is problematic insofar as the power to create a new punishment is the sole prerogative as well as the duty of the legislature. In fact, the duties and functions of the courts have been well documented in the Constitution and elaborately expounded by the Sup. Ct. in several cases.[18] The majority in *Commachen* does exactly the same thing – it creates a new punishment by redefining the category of people who may now be covered within the meaning of the word 'his', which most certainly amounts to an act of a judicial overreach.[19]

The courts have a limited role to play which is not to make laws but to fill gaps by interpreting the law as made by the legislative arm of the state. The role of a judge, as Justice Holmes rightly put it, is no more than to make laws interstitially, i.e., the only sort of legislative powers given to the courts is to make laws which fill and answer the voids instead of imparting an altogether new interpretation.[20]

The interstitial role of a judge must not be conflated with a legislative one. The fine line that exists between legislating and adjudicating has been made clear by the Sup. Ct. in *Kesavananda Bharti v. State of Kerala*[21] which has been reiterated time and again. In fact, the Sup. Ct. while reiterating the same in *Eera v. State*[22] has stated:

> Let it first be admitted that under our constitutional scheme, Judges only declare the law; it is for the legislatures to make the law. This much at least is clear on a conjoint reading of Articles 141 and 245 of the Constitution of India.

The court went on to further note down that:[23]

> The Legislature cannot 'declare' law is embedded in Anglo Saxon jurisprudence. Bills of Attainder, which used to be passed by

> Parliament in England, have never been passed from the 18th century onwards. **A legislative judgment is anathema**. As early as 1789, the U.S. Constitution expressly outlawed Bills of Attainder vide Article I, Section 9(3). This being the case with the Legislature, the counter argument is that the Judiciary equally cannot 'make' but can only 'declare' law.

An apprehension, that while *declaring* the law the courts could unintentionally supply an unforeseen meaning to the words of the statute and result in *creation* of a new law neither envisaged nor intended by the legislature, still persists. In fact, this apprehension has haunted Anglo-Saxon jurisprudence for at least 500 years. Nariman, J., relying on *Crawford v. Spooner* [24] which is considered to the landmark precedent in the interpretation of statutes, attempted to clear all doubts in this regard; the courts are not empowered to '*fish-out*' as to what the legislature would have meant nor can the courts aid or amend, in any manner, the defective framing by the legislature. The courts need to go by the word of the statute and interpret the statute as given to them by the legislature. Concluding his judgment, Nariman, J., points out an excerpt from the *Spooner*:[25]

> It appears to their Lordships, therefore, that this is a case, free from all reasonable doubt, and that they must construe the words of the Act, as they find them.

III. Concluding Remarks

The reading imparted by the Sup. Ct. to section 123 (3) is unique and rather unheard of when it comes to interpretation of penal or quasi-penal statutes. That being said, while the court's real bent towards dealing with divisive political speech is certainly laudable, the real challenge this judgment invites is something the court did not foresee – the challenges of implementation which are many and more than the problem of the numbers that might emerge, the unpredictability issue would loom as the real concern. It is also important to note that the majority opinions in *Commachen* did not draw a clear distinction between what is prohibited (and hence, penalized) and what is undesirable political speech.

The penalizing of a certain category of political speech gives rise to some serious concerns especially with respect to the future of identity based politics in India – while the Sup. Ct. through this judgment aims towards bringing an end to the identity based political movements which emerged especially during the later half of 1980s (in the form of the Rashtriya Janata Dal, the Samajwadi Party or the Bahujan Samaj Party), it is also the concern of many that in the name of promoting the idea of secularism the court has completely ignored the struggles of caste or religion based oppressions and the possibility that these parties created for the minorities. Also, the effective judgment in *Commachen* stands at loggerheads with canons of free speech jurisprudence in India. Further, the judgments do not clarify as to what extent the provision would now legitimize a reference to identity. Another concern is the failure of any of these majority opinions to distinguish between an *appeal* on the ground of identity and a much broader category of just invoking identity. Yet another follow up concern is whether this judgment, in effect, penalizes even a discussion about caste, religion, language, etc. in political rallies?

With the Lok Sabha elections around the corner and the Model Code of Conduct now already in place, it will be interesting to see how the Election of Commission of India (ECI) will choose to deal with the can of worms that this judgment opens up!

Notes

[1] (2017) 2 SCC 629.

[2] Ibid.

[3] Assembly polls were scheduled to be held in the coming months in the Indian states of Uttar Pradesh, Punjab, Uttarakhand, Goa and Manipur.

[4] '123. Corrupt practices.- [(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

[Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]'

[5] The Representation of the People Act, 1951 (Act 43 of 1951) is the principal statute governing electoral politics in India.

[6] *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130.

[7] Para 50.2 of the judgment in *Abhiram Singh v. CD Commachen (Dead)*, (2017) 2 SCC 629, which forms a part of one of the conclusions drawn by the majority reads, 'So read together, and for maintaining the purity of the electoral process and not vitiating it, sub-section (3) of Section 123 of the Representation of the People Act, 1951 must be given a broad and purposive interpretation thereby bringing within the sweep of a corrupt practice any appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate on the ground of the religion, race, caste, community or language of (i) any candidate or (ii) his agent or (iii) any other person making the appeal with the consent of the candidate or (iv) the elector.'

[8] See for example, *Dyke v. Elliott*, [1872] LR 4 PC 184. Lord Justice James, speaking for the Board, observed '… No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there, a penal statute is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute.' See also *Boyles v. City of Roanoke*, 179 Va. 484 [Va. 1942]; *Duport Steels Limited v. Sirs*, [1980] 1 WLR 142; *State v. King*, [1857] 12 La. Ann. 593; *State v. Peters*, [1885] 37 La. Ann. 730.

[9] *Supra* note 2.

[10] *United States v. Wiltberger*, [1820] 18 U S (5 Wheat).

[11] Sir Peter Benson Maxwell, *The Interpretation of Statutes* 29 (W. Maxwell & Son, London, 12th edn., 1969). See also *Ms Eera through Dr Manjula Krippendorf v. State (Govt. of NCT of Delhi)*, (2017) SCC Online SC 787; *State v. Viator*, 87 So 2d 115 [1956]; Stephan J in *Vallance v. Falle*, [1884] 13 QBD 109; *Cutler v. Wandsworth Stadium Ltd.*, [1949] AC 398, 410 (HL); *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg*, [1975] (HL); *Rahill v. Brady*, [1971] IR 69; *Unwin v. Hanson*, [1891] 2 QB 115; *Salomon v. Salomon & Co Ltd.*, [1887] AC 22, 38; *State v. Viator*, [1956] 87 So 2d 115.

[12] *State v. Brunson*, [1927] 111 So 321; *Lane v. State*, [1930] 232 NW [96][98]; *Caldwell v. State*, [1926] 154 NE [792] [793].

[13] The Constitution of India 1950, art 20 (1). '20. Protection in respect of conviction for offences - (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.'

[14] Wren & Martin, *High School English Grammar & Composition* 36 (S Chand Publishing, 2009).

[15] Gautam Bhatia, "Of Missed Opportunities & Unproven Assumptions: The Supreme Court's Election Judgment" *Indian Constitutional Law and Philosophy, available at:* https://indconlawphil.wordpress.com/2017/01/02/of-missed-opportunities-and-unproven-assumptions-the-supreme-courts-election-judgment/ (Last Modified Jan 02, 2017).

[16] Lord Salmon in *Buchanan (James) & Co Ltd v. Babco Forwarding and Shipping (UK) Ltd*., [1978] AC 141, 160 (HL).

[17] *Union of India v. Elphinstone Spinning and Weaving Co Ltd and Ors*., (2001) 4 SCC 139. See also Jessel MR in *Lowther v. Bentinck*, [1874] LR 19 Eq 166-169; *Eastman Photographic Material Co Ltd v. Comptroller-General of Patents, Designs and Trademarks*, [1898] AC 571, 575; *Buchanan (James) & Co Ltd v. Babco Forwarding and Shipping (UK) Ltd.*, [1978] AC 141, 160 (HL).

[18] See for example *L Chandra Kumar v. Union of India and Others*, (1997) 3 SCC 261; *I C GolakNath v. State of Punjab*, 1967 (2) SCR 762; *Indira Nehru Gandhi v. Raj Narain*, 1975 (3) SCR 333; *Asif Hameed v. State of J&K*, (1989) Supp (2) SCC 364.

[19] For settled understanding please see *State of Gujarat & Anr. v. Lal Singh @ Manjit Singh & Ors.*, (2016) 8 SCC 370; *Divisional Manager Aravali Golf Club & Another v. Chander Hass & Anr*., (2008) 1 SCC 683; *Indian Drugs & Pharmaceuticals Ltd. v. Workmen*, (2007) 1 SCC 408; *S.C. Chandra v. State of Jharkhand*, (2007) 8 SCC 279; *Tata Cellular v. Union Of India*, **(**1994) 6 SCC 651.

[20] See *Southern P. Co. v. Jensen*, 244 US 205 [221].

[21] See Sikri, J in *Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225.

[22] *Ms. Eera through Dr Manjula Krippendorf v. State (Govt. of NCT of Delhi)*, (2017) SCC Online SC 787.

[23] Ibid.

[24] [1846] 4 MIA 179.

[25] Ibid.