

Business Standard

SC blamed for economic slowdown, but it was just upholding the law

Recently Senior Advocate Harish Salve accused the apex court for economic slowdown, repelling foreign investors

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Advocate Harish Salve's remarks on economic slowdown due to the Supreme Court seemed puzzling at the outset. Isn't the highest judiciary of the land a beacon of hope to the billions who tug at their lives; lives that are rendered chaotic by ever-changing laws and often, a wavering rule of law? Does the judiciary not shoulder democracy along-with its oft-independent cousins — the legislature and the executive? Indeed, or so one expects.

But the vast field between expectation and reality is a breeding ground for discord. And here's the catch. It is not the indigenous citizens alone, but also foreign investors, who tug at a nation's legal and administrative framework to make investment decisions. Decisions that could cost billions, lose millions or return trillions.

Foreign direct investment in India has grown from \$4 billion in 2000 to \$44.8 billion in 2018. While modern India attempts to promote swadeshi with its Make in India campaign, the significance of foreign investment cannot be undermined. Not only because of what it promises to give to the state, but more so

what it threatens to take away from the public exchequer in the event of a conflict, sometimes through claims under various bilateral investment treaties (BITs).

BITs promise protection to investors from the signatory countries in the territory of the other. Violation of BITs constitute a violation of international law, and attract compensation that can scale up to billions of dollars. Per case. These claims often rest on breach of legitimate expectations of foreign investors, couched under catch-all protection of "fair and equitable treatment" promised in the BIT.

Salve rightly said that the Supreme Court cancelled 2G licenses at the stroke of a pen. However, while we place the Supreme Court under public scanner for inciting investor ire resulting from the 2G decision, it is worthwhile to remember that the Supreme Court quashed the Indian income tax authorities' tax demand of Rs 12,000 crore by way of capital gains tax on Vodafone Bly's acquisition of Hutchinson Essar in India. However, the subsequent arbitrary move by the legislature to retrospectively amend taxation laws and bring Vodafone within its ambit triggered two investment treaty arbitration cases by Vodafone Bly and Vodafone Plc under the India-Netherlands BIT and the India-United Kingdom BIT.

These cases raise claims for breach of fair and equitable protection standard under the BITs. Interestingly, in these cases, Salve suggested and the apex court decided that the arbitration proceedings can run in parallel without risk of double recovery in case of a win in both cases. This was because Vodafone Plc and Vodafone Bly belonged to the same group of companies. A good move to save the Indian public coffer there!

Yet, this was a trail-blazer. In 2015, Cairn Energy Plc and Vedanta Resources Plc filed separate arbitrations challenging the retrospective amendment of taxation laws that also brought them under the radar. India now faces claims of \$1 billion and \$3 billion in these cases respectively under the India-UK BIT.

Did the Supreme Court bring about the economic slowdown by repelling foreign investors? Maybe. But it was the executive and the legislature which embarked on misadventures, such as retrospectively amending tax laws, with an obvious intent to enrich the public exchequer, all while turning a deliberate blind eye to a result which was equally obvious in its contrariety.

Besides, the question as to who triggered the economic slowdown is misplaced. So is the assumption that foreign investment brings economic development. The answer lies in who and what can reinstate the promise of a development-centric, investor-friendly environment in the country. The answer lies unequivocally in harmonious sync between the three pillars of our democracy.

It is quintessential for the judiciary, the legislature and the executive to work in tandem, more so in matters of public policy and foreign investment, to encourage public consultation, responsible regulation and effective conflict management to avoid measures that could create fissures between the Indian government, foreign investors and the people of India.

As for the law, Mahatma Gandhi said during the satyagraha movement, "Once a law is enacted, many difficulties must be encountered before it can be reversed. It is only when public opinion is highly educated that the laws in force in a country can be repealed. A constitution under which laws are modified or repealed every now and then cannot be said to be stable or well organised."

Upholding the rule of law is not the mission of the Supreme Court alone. Maybe it is time the media and the public, the fourth and fifth pillars, rose to the occasion, to further economic forces and honour the rule of law.

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