'STATUTORY' WARNING

Regulatory overreach is injurious to society

The proposed amendments to the anti-tobacco legislation criminalise poor vendors by making selling of loose cigarettes a cognisable offence

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GOVERNMENTS AND MARKETS are inextricably intertwined. The government sets the legal and institutional frameworks, within which markets must operate, based on the activities of businesses and consumers in markets. The government has an interest in market outcomes and the way these are distributed among different groups and firms in society. But, sometimes the government wants to curtail particular products and services for wider social benefits. In doing so, it makes decisions which, at times, cater to its political interests or key constituents, or pander to populism. These decisions often create regulatory overreach that limit competition, breed inefficacies and may even be legally untenable.

A case in point is the question of retroactive taxation on capital gains introduced in 2012, to tax Vodafone PLC for payment of capital gains on its purchase of mobile operations from Hutchison Wampoa in 2007. Though the Supreme Court held that Vodafone was not required to deduct such tax, the government made a retroactive amendment to tax laws, bypassing the Court. Since then, the Indian government has lost in many forums, such as the Permanent Court of Arbitration at The Hague that held that India's retrospective demand was "in breach of the guarantee of fair and equitable treatment" and asked India not to pursue the tax demand against Vodafone Group. Such overreach often has long-term consequences, in terms of trade, investments and commerce, where investors look for transparency and predictability of the regulatory environment in respect of medium-and long-term investments. Apart from the ignominy of losing various appeals in international courts, India also lost significant sheen as a favourable investment destination due to capricious polices in relation to investments.

Another case in recent times of regulatory overreach was that of taxing angel and venture capital investments in start-ups. Despite India making its bid as a key innovation economy through Start Up India, Stand Up India programmes, tax regulators, in order to shore up tax collections, taxed equity in start-ups as capital gains if the officer, based on the methods applicable to a brick&mortar companies, felt that the infusion was more than the fair value of the start-up. Most start-ups were staring at capital-gains taxes on funds received as equity from their investors, causing panic among them across India.

In the tyre industry, inverted duty structure means that import duty on natural rubber is higher than excise duty on tyres, making manufacturing in India non-competitive and susceptible to dumping by Chinese and other manufacturers. This was done to protect rubber producers at the cost of manufacturers of rubber products, though manufacturing creates a significant higher value-add and multiplier to the economy than growing rubber. There are many more examples of regulatory overreach and overzealous executive decisions which are detrimental to the interests of citizens and unfair and inequitable to investors, employees, consumers, supply and sales chains and other stakeholders.

Consider a recently proposed amendment to The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Amendment Bill, 2020. All citizens welcome government's attempts to improve public health and, in this context, the Bill will have far-reaching impact. However, some provisions of the Bill are ill-conceived and have little rationale and equity in their pronouncements. One of the proposed amendments deals with punishment for selling cigarettes not in the minimum quantity packaging or "loose cigarettes or tobacco products", which can attract punishment of imprisonment of two years for first and upto 5 years for the second and beyond offences, and these offenses will be cognisable offences though bailable.

Cognisable offences are those offences in which a police officer may arrest without warrant. Some examples of cognisable offences are rape, theft, murder, stalking, trafficking of persons. Classification of offences as cognisable suggests that it is meant only for serious offences and for instances where the accused is a threat to judicial process and society. A general prerequisite for an offence to be cognisable is that the offence should be of a serious nature. It is difficult to believe that the offence of selling "loose cigarettes or tobacco" is an offence that is serious or grave and is an offence where the alleged offender-seller poses a grave threat to society and the judicial process. Thus, there is no reasonable basis for classifying the offence of selling loose cigarettes as cognisable, as the basic parameter of cognisable offences and the perceived threat of the alleged accused is not met.

Police harassment and brutalities is unfortunately a regular and common occurrence and it is usually the poor and underprivileged sections of society who bear the brunt of police brutality. Barring a few shops, most cigarette-sellers are roadside vendors, small sellers on bicycles, women running small shops in rural India or the ubiquitous paan shops across India. Further, it is common for cigarette vendors to sell loose cigarettes or bidis to their equally poor customers, i.e., selling cigarettes that are not in their original packaging as several consumers prefer to buy cigarettes less than what is normally sold in a box intact due to low purchasing power. By classifying selling loose cigarettes as an offence and that too a cognisable one, the police will be given wider and legitimate powers to harass, intimidate, and strongarm these vendors. The other retroactive change is in 'distance', where the radius of a 'no tobacco zone' from educational institutions, religious places, etc, has been fixed at 100 metres, as opposed to 100 yards in the current regime. This could make some of the current businesses illegal due to increase in the distance by, say, over 10% due to the conversion. In the process, precious police resources which could be utilised to tackle and address significant law & order issues, will be directed to deal with offences that are not grave enough to cause law & order problems.

Public health and safety are of paramount importance in any society, but these proposed amendments will end up keeping one section (we dare say undefined) safe, but will put a vast already-vulnerable section at grave risk by equating the offence of selling loose tobacco products with murder and rape. This is a clear travesty of law and needs to be evaluated for infirmities and potential for mischief. There is a crying need to create laws on the foundation of fairness and equity for all stakeholders while catering to the needs of public health and good.