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The Legal Gauge

The latest news and announcements

SVKM's NMIMS School of Law, Navi Mumbai

IN THIS ISSUE...

Dear Readers and Patrons,

We, the Publication Committee of School of Law welcome the new batch of 2026 to SOL with our third issue of "Thirty: The Legal Gauge" which brings the latest news and announcements to your NMIMS inboxes each month. We have been writing numerous articles on the legal goings-on in India and the World over the past two months, but this, our third issue, was set to be something special- a special issue on one of the most contentious socio-legal debates of our times: Marital Rape.

Please behold an edition that encompasses a condensed yet most far-reaching analysis of the strides India and the World have made in marital rape-related jurisprudence in the past century or two. Our researchers, writers, and designers have outdone themselves to bring to you this month's Thirty with a special theme alongside the most compelling legal news from the past month.

Wishing you a most enlightening read.
Niharika Ravi
Co-Editor

A REFLECTION ON THE HISTORY OF MARITAL RAPE LAWS IN INDIA

- Isha Singh & Hetavi Bari

A brief history of marital rape in India -a collection of the most profound judgments in this area.

1890s

The infamous case of Empress v. Hari Mohan Maiti *(1886 ILR 8 All 622)*: A ten-year-old girl named Phulmoni Dasi died of excessive bleeding due to sexual intercourse perpetrated by her husband who was in his mid-thirties at the time. The case triggered several legal reforms. Although the autopsy report indicated an injured vagina as the cause of death, the husband was convicted under Section 338 of the Indian Penal Code for "causing grievous hurt by act endangering life or personal safety of others". Under an exception clause in Section 375 of the Indian Penal Code, introduced in 1860, sex with one's wife was not considered rape. The Viceroy of India, Lord Lansdowne, presented the "Age of Consent" bill to the Council of India, which was then led by Andrew Scoble, on January 9th,1891. Previously, the age of consent had been set at 10 in 1860. After the bill was passed on 29th March 1891, Section 376 included sex with a girl under 12 even if the person is the wife of the perpetrator, as rape.

1998

In Sree Kumar vs. Pearly Karun *(1999 (2) ALT Cri 77, II (1999) DMC 174),* the Kerala High Court observed that an offense under Section 376A, IPC will not be pulled in as the spouse is not living independently from her husband under a declaration of partition or any custom or use. In this case, the spouse was subjected to sex against her will by her husband when she went to live with him for two days as part of the settlement of separation procedures between the two parties. Subsequently, the spouse was held not liable for raping his wife even though he had perpetrated forced sex.

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2005

The Protection of Women from Domestic Abuse Act of 2005 was approved in 2005, and while it did not deem marital rape a crime, it did consider it a type of domestic violence. Under this Act, if a woman has undergone sexual abuse by her husband, she can go to court and obtain judicial separation from her him. However, the same does not entirely protect the woman from the crime.

2013

The Justice Verma Committee Report recommended amendments to the criminal laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms in its report on January 23, 2013. The report is a painstaking work put in by individuals, activists, and human rights' groups across India within a nearly impossible deadline of a month. A married woman's right to sexual autonomy and bodily integrity are no less than her counterpart who is raped by a man she is not married to. The recommendations were drafted after extensive consultations with women and rights' groups in the country and incorporated suggestions from the public.

2016

In 2016, Kanimozhii. Member of Parliament from Tamil Nadu, questioned the government on the floor of Rajya Sabha whether they planned on discontinuing the exception given to married men in Section 375 of the IPC. The Minister of State for Home Affairs, Haribhai Parathibhai Chaudhary responded that the government has no such intentions since it believes in protecting the sacred institution of marriage. The minister also cited poverty, illiteracy, and current social customs as reasons for continuing with the exception. The panel set up to review the Verma Committee's suggestions opined that criminalizing marital rape would put the entire family “under stress” and can potentially destroy the institution of marriage. Furthermore, concerns regarding misuse often come up while discussing criminalization.

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2017

A PIL was filed by Independent Thought, an organization that works on child rights, to question the constitutionality of Exception 2 of Section 375. It was argued that the exception discriminated between a married girl child and an unmarried girl child as sex with the latter would be considered rape, but a married woman is not protected against rape from her husband. It is a failure to understand two very different concepts - 'consent to marriage' and consent to sexual intercourse. Thus, it is equally important to protect married women above 18 years of age against the crime of rape.

2021

In the case of Dilip Pandey vs. State of Chhattisgarh *(Cr. R. No. 177 of 2021),* the Chhattisgarh High Court quashed charges of rape against a man by his wife on August 31, 2021, saying it was unlawful under Indian law to commit marital rape. In his judgment, Justice NK Chandravanshi cited an exception in the Indian Penal Code Section 375, which notes that sexual intercourse by a man with his wife does not amount to rape as long as the woman is above 15 years. The court upheld charges against the husband under Indian Penal Code Sections 498A (cruelty against women) and 377 (unnatural offenses, carnal intercourse against the "order of nature"). The man's family members have also been charged under Section 498A of the IPC. A similar verdict was heard at the Mumbai Additional Session Court earlier in August in a separate case in which the wife had alleged forcible sex that led to waist-down paralysis.

However, a division bench of the Kerala High Court, comprising of Justice A Muhammad Mushtaq and Justice Kauser Edappagath, dismissed a husband's petition against divorce, ruling that marital rape is sufficient grounds for divorce. Treating a wife's body as something that is owed to the husband and committing sexual acts against her will is nothing but marital rape. "Right to respect for his or her physical and mental integrity encompasses bodily integrity, any disrespect or violation of bodily integrity is a violation of individual autonomy," said the bench in its order dated July 30.

Contextualising Marital Rape in International Law

- Simran Parmani

The concept of Marital rape has evolved over time. Countries were once hesitant to acknowledge marital rape as a criminal offence and disregarded that a husband could rape his wife. It was believed that when a woman got married, she was handing all rights over her body to her husband. So, the fact that a husband could rape his wife was considered absurd and unacceptable.

However, with time, the world witnessed various revolutionary changes and basic rights of women were introduced and taken into consideration. Marital rape was acknowledged as a heinous crime and was criminalized in several countries. Two of the most important international provisions addressing this issue are the United Nations DEVAW and Beijing Declaration. In 1993, it was declared that any violence against women, including marital rape, will be considered violative of the fundamental rights provided to women by the UN Declaration on Elimination of Violence Against Women (DEVAW).

Further, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has been ratified by various state parties. Article 1 of CEDAW defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status.” State parties to CEDAW are required to take reasonable steps to combat violence against women. This obligation is outlined in CEDAW's General Recommendation (GR) 19 which includes implementing legal measures and remedies.

These treaties and the countless efforts of human rights activists have helped in laying a foundation for laws on marital rape, because of which various countries have criminalised it. We have a long way to go before this issue is acknowledged in all the countries and the loopholes in the laws are addressed sincerely.

DOES FORCED SEXUAL INTERCOURSE AFTER MARRIAGE CONSTITUTE A VALID GROUND FOR DIVORCE?

Exception 2 to Section 375 of the Indian Penal Code (IPC) exempts forced sexual intercourse between a husband and an unwilling wife over fifteen years of age from the Section 375 definition of rape.

- Saumya Krishnakumar

The recent Kerala High Court judgement on marital rape and divorce has made it clear that forced sex after marriage would be considered as rape and as legal ground for the obtainment of divorce, and hence echoed a 2011 Supreme Court judgement. However, the comments recently provided by the judges of the Chhattisgarh and Bombay High Courts differ from the ideas put forth in the Kerala High Court judgement. The judgement given by the Chhattisgarh High Court was a literal interpretation of the Indian Penal Code, which makes it clear that sexual intercourse between a man and his wife, as long as the latter is not under the age of 18, is not considered as rape. The Bombay High Court reiterated the words of the Chhattisgarh High Court.

The right to live with dignity includes the right to personal autonomy and is essential in the pursuit of happiness. In a marriage, marital space is thus not only required, but also intrinsically connected to the personal autonomy of the parties to the marriage, and any incursion into such space would diminish privacy of the concerned parties and go against their fundamental rights. Marital rape is the disrespect of the body that could be considered as a violation of one's individual autonomy. Merely for the reason that the law does not recognise the act of marital rape does not impede the court from recognizing the same as a form of cruelty to grant divorce.

SUPREME COURT ORDERS THE DEMOLITION OF TWO SUPERTECH EMERALD COURT TOWERS

- SAUMYA KRISHNAKUMAR

Ending a legal battle that spanned over 10 years, the Supreme Court upheld an Allahabad High Court order for the demolition of illegal 40-storey towers and initiating criminal proceedings against the builder responsible.

The Supreme Court judgement in Supertech Ltd. v. Emerald Court Owner Resident Welfare Association, a case which has been doing rounds of the High Court since 2004 and then the Supreme Court, came out on 31st August, 2021.

In 2004, the New Okhla Industrial Development Authority (NOIDA) had allotted a plot of land to Supertech Limited (appellant) for developing a housing society by the name of Emerald Court. In June 2004, the Resident Welfare Association (respondent) made a complaint to NOIDA that the appellants have violated regulations and misrepresented facts to the buyers. Hence, they sought to cancel the layout plans of Towers 16 & 17, of which previously, the height was increased from 24 floors to 40 floors. When there was no response, they filed a Writ Petition in the Allahabad High Court under Article 226 for the demolition of the illegal constructions, i.e., Towers 16 and 17. The Resident Welfare Association sought to challenge the construction of Towers 16 and 17 because the triangular green area in front of Tower 1 came to be covered by these two towers.

The Allahabad High Court held that the construction was illegal and was in violation of the Uttar Pradesh Industrial Area Development Act, 1976 and the UP Apartments Act 2010. It ordered the demolition of Tower 16 & 17 and directed the appellants to bear the cost. It also ordered the appellants to refund the money received as consideration from the flat purchasers with 12% interest. In addition, the court believed that the appellant had connived with NOIDA to obtain permission for such construction. Hence, it further directed the competent authority to grant sanction for prosecuting the officials at NOIDA, within a period of three months as is required under the UPUD Act, 1973.

The aggrieved appellants then approached the Supreme Court and challenged the judgement of the High Court under Article 136. Consequently, the Supreme Court appointed the National Buildings Construction Corporation Limited as an expert agency for an unbiased view, which in turn submitted that the appellant had in fact violated the provisions of the State Acts and Regulations.

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A three-judge Division Bench consisting of Justice Dr D.Y. Chandrachud, Justice M.R. Shah, and Justice Ms. Kohli, upheld the decision of the Allahabad High Court that ordered the demolition of Towers 16 and 17 of Emerald Court constructed by Supertech Ltd. The Supreme Court found the construction to be illegal, and that the revised building plans sanctioned by NOIDA that allowed for the construction of the two towers were in violation of certain statutory regulations. The Court ordered Supertech to refund with interest the amounts invested by allottees of flats in these two towers. Supertech was also ordered to pay costs of Rs. 2 crore to the Resident Welfare Association of Emerald Court Group Housing Society, which had initiated proceedings by filing a writ petition in the Allahabad High Court in 2004.

The Supreme Court observed that the purpose of stipulating a minimum distance between buildings included safeguarding the privacy of occupants and their enjoyment of basic civic amenities including access to well-ventilated areas where air and light are not blocked by the presence of close towering constructions. The Supreme Court also further explained that prescription of a minimum distance also had a bearing on fire safety. In the event of a fire, there is a danger that the flames would rapidly spread from one structure to adjoining ones. Moreover, the presence of structures in close proximity poses serious hurdles to fire-fighting machinery which has to be deployed by the concerned civic body. Another observation made by the Supreme Court was that National Building Code of 2005 prescribed maintenance of open spaces for buildings above the height of 10 metres. Then according to this, open space around Tower 17 should have been 20.45 metres, as opposed to the 9 metres that was actually present. The last observation the Supreme Court made was that the case revealed a nefarious complicity of the planning authority in the violation by the developer of the provisions of law.

In conclusion, while the availability of housing stock, especially in metropolitan cities, is necessary to accommodate the constant influx of people, it has to be balanced with two crucial considerations - the protection of the environment and the safety as well as the well-being of those who occupy these constructions. The regulations present throughout the process are intended to ensure that constructions that may have a severe negative environmental impact are not sanctioned in the first place.

SUPREME COURT REITERATES FACTORS TO BE CONSIDERED IN CASES OF MEDICAL NEGLIGENCE

SC absolves doctor and hospital of liability for medical negligence

- Simran Parmani

The Supreme Court, while emphasising on the need to ensure that doctors do not face the brunt of false accusations under the garb of medical negligence, stated that failure of treatment cannot automatically make the medical professional liable for medical negligence. The apex court, in its judgement in the recent case of Harish Kumar Khurana v. Joginder Singh (*2021 SCC OnLine Sc 673)*, absolved a doctor and the hospital of liability for medical negligence. The division bench comprising of Justice Hemant Gupta and Justice A.S. Bopanna stated that, "Every death of a patient cannot on the face of it be considered as death due to medical negligence unless there is material on record to suggest to that effect."

In this aforementioned case, Jasbeer Kaur was admitted to Sun Flag Hospital, Faridabad, and was diagnosed with hydronephrosis, wherein her right kidney was already severely damaged and her left kidney was diagnosed with stones. She was suggested surgery for the same. On being deemed fit for the surgery, the patient and her husband were informed that it was not possible to perform the surgery on both the kidneys simultaneously and informed consent was taken by both of them. They were duly conveyed that this is a case of high-risk surgery. The surgery on the left kidney was successful and then she was taken for the second surgery. Here, Dr. Harish Kumar Khurana complied with the regular procedures that are followed in such a scenario. An endotracheal tube was inserted into the trachea to give nitrous oxide and oxygen. This standard procedure had been followed during the first operation as well. But this time, the condition of the patient deteriorated and despite various attempts to save her, she passed away due to cardiac arrest.

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The patient's husband and children filed a complaint alleging medical negligence before the National Consumer Dispute Redressal Commission. NCDRC declared Dr. Khurana guilty and directed him to pay a compensation of Rs. 17 Lakhs. Aggrieved by this, Dr. Khurana and his hospital approached the apex court.

The bench in its judgement said that the conclusion reached by NCDRC is based merely on assumptions and they have not backed it with medical evidence. Whether Dr. Khurana had been negligent in administering anaesthesia can only be judged if there is formal medical evidence on record. The court observed that Dr. Khurana was the anaesthetist during the first surgery as well and thus was well aware of the details of the patient and had not failed in taking any necessary steps or precautions during the second surgery. Further, they explained that such cases can have highly technical intricacies and medical complications attached to them, and mere legal principles or following the general standards that are used for the assessment cannot be sufficient.

Additionally, the Court assessed the applicability of the principle of res ipsa loquitor in cases of medical negligence. The bench was of the view that - "The negligence alleged should be so glaring, in which event the principle of res ipsa loquitur could be made applicable and not based on perception...Principle of res ipsa loquitur is invoked only in cases the negligence is so obvious." They observed that NCDRC had failed to take into account the doctor's version and had only weighed in the claimant's allegations.

The division bench stated that NCDRC had reached its conclusion that the appellants had failed to clear the Bolam Test solely by applying the legal principles, without any contra medical evidence on record. The Supreme Court, therefore, observed – "Mere legal principles and the general standard of assessment was not sufficient in a matter of the present nature when the very same patient in the same set up had undergone a successful operation conducted by the same team of doctors." The claimants had also filed a criminal complaint following which a magistral inquiry had been conducted. NCDRC had placed a lot of emphasis on this report, but according to the Supreme Court, this cannot be deemed as contra medical evidence as it lacks statutory flavour, and the civil surgeon who had tendered his opinion was unavailable for further cross-examination on his way of interrogation on the medical aspects.

Thus, the Supreme Court concluded that NCDRC's decision in this particular case cannot be sustained and the appeal was allowed accordingly.

PUNJAB & HARYANA HC ASKS IF AGE OF MAJORITY IN ALL MATTERS SHOULD BE REVISED

- Isha Singh

What is age? The term may mean a lot in legal parlance.. Those living in India inherit the status of majority from the Majority Act enacted in 1875, which stipulates that every person domiciled in India shall attain the age of majority on completion of 18 years. No person less than 18 years of age can make a valid agreement under the Indian Contract Act. Similarly, the Hindu Minority and Guardianship Act, 1956 defines 'minor' as a person who has not completed the age of 18 years. The age of majority for appointment of guardians for minors and their property, according to the Dissolution of Muslim Marriages Act, 1939, is also upon completion of 18 years. The age of majority has been fixed at 21 for men and 18 for women under the Child Marriage Restraint Act, 1929, and it entails punishment for parents and guardians who conduct or facilitate child marriages. No Indian can vote in an election or even drink before they attain the age of 18. Christians and Parsis also reach majority at 18 under their respective personal laws. This remains unchanged to date, barring the fact that the definition of adulthood was changed for the purpose of marriage and was set at 18 years for women and 21 years for men through amendment to the Child Marriage Restraint Act in 1978.

The Punjab and Haryana High Court, while hearing a protection petition moved by a live-in couple, issued notice to the Centre, Chandigarh, Punjab and Haryana on the issue of revising the age of majority. The High Court's latest move to seek review of the age of majority is rooted in the context of modern-day relationships and problems associated with them. For quite some time, the High Court has been dealing with a large number of petitions from young couples seeking police protection in wake of threats from their parents and relatives, who are strongly opposed to them marrying outside their castes and religion. This is creating a host of legal and social problems, forcing the couples to approach courts to seek a legal remedy in the context of their right to have a dignified life and liberty following coercion attempts by their parents and relatives to end their relationships.

The High Court has been liberal in granting police protection in cases where young couples are adults and well above the legal marriageable age. In several cases, the Court has even allowed pleas of adult couples in live-in relationships, citing their right to police protection under the Constitution.

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The single judge bench observed that the Majority Act of 1875 was 150-years-old and much had changed with time. "When the Act was passed, things were completely different. Live-in situations are becoming more common, and students in their 20s are starting to live together as couples," Justice Anmol Rattan Singh said.

There are divergent judicial orders by different benches in dealing with petitions from runaway couples who are minors or adults in few cases but yet to attain legal marriageable age. In one such case recently, a newly-wed couple, fearing a threat to their life from their relatives, moved a petition to seek police protection, but the High Court handed over the custody of the girl to the police and sent her to a government shelter house after finding that she was 17 at the time of marriage. On the other hand, the High Court granted police protection to a married couple despite the fact that the girl was a minor. It observed that just because the girl was not of marriageable age, it cannot be a reason to deprive her of her fundamental rights as envisaged under the Constitution.

In the present case in which the Court served notice to the central government on the question of age of majority, it was dealing with a couple who were in a live-in relationship. Both were above 18 years, but the boy was below the legal marriageable age, i.e., 21. The Court granted the couple police protection on the ground that with the age of majority being 18 as per the Indian Majority Act, 1875, obviously the petitioners have to be considered adults (whether mentally so or not is a separate issue altogether) and therefore, if they have chosen to live together and have at least not admitted any marriage between them, there would therefore be no question of invocation of the provisions of the Prohibition of Child Marriage Act, 2006," But at the same time, the bench opined that since these kinds of cases are on the rise these days, so the HC directed that an affidavit be filed by the Home Secretary/Additional Chief Secretary concerned, as to whether there is any proposal for tabling any amendment as regards an upward revision in the age of majority.

"Consequently, there remains nothing to be done by this court except to issue directions to police to continue to ensure that the life and liberty of the petitioners are protected," the HC held.

<u>Recommended Read</u>: The Hadiya Case (2018) 16 SCC 408 in which the Apex Court recognises rights of couples, especially women, in live-in relationships

OBC BILL: KEY THINGS TO KNOW ABOUT THE BILL THAT SEEKS TO UNDO THE SC'S QUOTA ORDER

- Hetavi Bari

On August 10, the Lok Sabha passed a landmark bill allowing states to decide who its Other Backward Classes (OBCs) are. This bill seeks to reverse a recent SC verdict and restore the power of states to identify socially and educationally backward classes (SEBCs), usually called OBCs.

The Maharashtra State Reservation for Socially and Educationally Backward Classes (SEBC) Act, 2018, has had a rollercoaster ride till it was held to be unconstitutional by the Supreme Court in its 5 May judgment. The first challenge to the quota was filed in the Bombay High Court right after the state government passed the legislation. Petitioners said that the quota violated the Supreme Court order in the Indira Sawhney case in 1992 that had ruled that reservation in any state should not exceed the 50 percent mark. In December 2018, the Bombay HC refused to put an interim stay on the quota law even as it was hearing the case. Eventually, in its judgment in June 2019, the high court upheld the Maratha quota but asked the state government to reduce it from 16 percent to 12 to 13 percent. On the question of breaching the 50 percent mark, the HC held that the ceiling imposed by the Supreme Court could be exceeded in exceptional circumstances.

However, the Constitution Bench of the apex court sought to differ on that reading. The Centre had held that the 102nd amendment took away states' power to notify SEBCs. A five-judge Constitution bench, on May 5, had unanimously set aside a Maharashtra law granting quota to Marathas.

"We have found that no extraordinary circumstances were made out in granting separate reservation of Maratha Community by exceeding the 50 percent ceiling limit of reservation. The Act, 2018 violates the principle of equality as enshrined in Article 16." the verdict said. The Supreme Court in its Maratha reservation ruling in May upheld the 102nd Constitutional Amendment Act but said the president, based on the recommendations of the National Commission for Backward Classes (NCBC), would determine which communities would be included on the state OBC list. "In the task of identification of SEBCs, the President shall be guided by the Commission set up under Article 338B; its advice shall also be sought by the state in regard to policies that might be framed by it.

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If the commission prepares a report concerning matters of identification, such a report has to be shared with the state government, which is bound to deal with it, in accordance with provisions of Article 338B. However, the final determination culminates in the exercise undertaken by the President " the judgment read.

The 127th Amendment was necessitated after this judgment in order to restore the powers of the state governments to maintain a state list of OBCs which was taken away by a Supreme Court interpretation. If the state list gets abolished, nearly 671 OBC communities would lose access to reservations in educational institutions and in appointments. This would adversely impact nearly one-fifth of the total OBC communities. The Bill seeks to set right a couple of 'mistakes' in Article 338B and make consequential amendments in articles 342A and 366 in order to preserve India's federal structure. These were inserted into the statutes by the 102nd Constitution Amendment Act, 2018, which deals with the NCBC and its powers and duties.

The Constitution (127th Amendment) Bill, 2021, was unanimously passed by both Houses. The Opposition on Monday said it will support 127th Constitution Amendment Bill which gives power to the states in identifying OBCs. "All Opposition parties will support 127th Constitution Amendment Bill 2021 being introduced in Parliament today," Mallikarjun Kharge, Leader of Opposition in Rajya Sabha, said.

The Bill has political ramifications as restoring powers of the states to identify backward classes has been a demand by many regional parties and even the ruling party's own OBC leaders. The Opposition's support to pass the Bill is significant as a constitutional amendment requires a two-thirds majority of lawmakers who are present during the proceedings, with at least 50 percent in attendance.

The 127th Constitution Amendment Bill will amend clauses 1 and 2 of Article 342A and also introduce a new clause 3. The Bill will also amend Articles 366 (26c) and 338B (9). The 127th Amendment Bill is designed to clarify that the states can maintain the "state list" of OBCs and it will be completely taken out of the ambit of the president.

The objective is to "adequately clarify that the states and Union territories are empowered to prepare and maintain their own lists of SEBCs (Socially and Educationally Backward Classes".

States and Union Territories will now be able to make their own lists of socially and educationally backward classes. This they will be able to do without consulting NCBC. Any electorally significant group can now become an OBC. Some experts say the Bill has the potential to cause socio-political turmoil as a large number of sub-castes are now likely to push for quotas.

The 127th amendment was adopted with the extraordinary support of both parties in both houses of parliament, without any opposition from any member. The law, which aims to restore the right of states to draw up their own lists of other backward classes (OBCs), will soon enter into force with the support of both parties. This new law gives governments the power to choose other backward classes and steer them to profit from quotas.

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