

OUR VIEW



A Tata-Mistry divorce deal may prove thorny

Mistry's family selling its stake in Tata Sons to the conglomerate could end a long corporate battle. Divergences over legal rights and the firm's valuation, though, might prove vexatious

Now that India's biggest ever business battle seems headed for record books as our most expensive corporate divorce, it may be tempting to expect a truce between the Tata Group led by Ratan Tata and the Shapoorji Pallonji (SP) camp under Cyrus Mistry. Sighs of relief, though, seem premature. There are signs that their acrimony will extend to a settlement deal. On Tuesday, Mistry's team declared SP's readiness to part ways with Tata, a parting that is expected to entail the sale back to the Group of his family's 18.4% stake in Tata Sons, the shareholding company from which he was ousted in 2016 as chairman, sparking off a bitter dispute that has involved legal wrangles, mud-slinging and ungainly allegations. That stake has been a big bone of contention all along, and could stay so for a while. At one level, SP's offer appears to be a victory for the Tata Group. The \$110 billion conglomerate controls four-fifths of Tata Sons, has been especially keen to prevent those shares from being sold to a third party, and had moved the Supreme Court to stop the cash-strapped SP group from pawning them for money. Notably, it was only after the apex court restrained SP from pledging its Tata shares that a buy-back deal began to take shape. How it will pan out is still unclear. Had Mistry's own businesses not been so hard up, however, it might have held out for a better deal (possibly with another buyer). Even now, Mistry may opt to drive a hard bargain on how much his group's 18.4% stake is worth.

The SP group has asked for an "early, fair and equitable" way out at a price that reflects the value of Tata Sons' "underlying tangible and

intangible assets". While the value of Tata's listed companies is easy to calculate, and that of its unlisted entities can be estimated on business parameters, what the Tata brand—owned by Tata Sons—is worth could be hard to settle. Reports suggest that SP places Tata Sons' overall value at over ₹9.7 trillion, a figure that includes ₹1.46 trillion for the brand. But a recent court filing by Tata estimates SP's 18.4% stake to be worth some ₹1.5 trillion, which would translate to under ₹8.2 trillion for the whole company. Even if brand value experts are called in, the gap between the two sides' calculations could cause disharmony.

The relative strength of their bargaining positions could play a role in the negotiations that ensue. While SP has been weakened by its dire finances, these talks could be inflected by the legal status of Article 75 under Tata Sons' Articles of Association, which restricts SP's leeway to dispose of its stake without Tata's nod. This acts as a clamp on those shares, but its validity has been challenged by the Mistry camp, arguing that its invocation would amount to oppression of a minority shareholder. While some legal experts take a dim view of this clause, others consider it a valid tool for a principal owner to retain control. The top court is yet to rule on this issue. If time runs out for Mistry before that happens, he may simply have to take what's on the table. The Tata Group, though, is debt-laden and not cash-rich enough to buy SP's stake, even at a low price, without a scramble to raise funds. The Group may need to offload a chunk of its 72% holding in Tata Consultancy Services. If so, a tighter hold on Tata Sons would leave it with a looser grip on its cash cow.

MY VIEW | OTHER SPHERE

The pandemic could help us all recognize what real education is

Covid disruptions have highlighted the invaluable role of true learning in fulfilling aspirations



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The pandemic cuts to the core of our character. Of our society, our institutions, and our very selves. But that is, if we care to look. Instead of wallowing in the delusion that India is doing very well, or living with lead-blinders of apathy. The core of education too is revealed by this wound on the body of our nation. What all is in this basic character of education?

First is the brutal inequity, fragility and injustice that most children live with. A tiny sliver of students have such resources that it doesn't matter that schools are shut; such children will also be back in school the very day they open up. But for the vast majority of children, the shutting down of schools is potentially a change in the trajectory of their lives. It is not only a loss of education today, it's probably for much longer. And for too many, perhaps even permanently. They may never return to school or may return much later, caught in the tsunami of an economic upheaval. For millions of such children, deprivation arising from shut schools is more than that of education. It's also a loss of assured meals and withdrawal of an anchor of support in life. Innumerable girls face social pressure to drop out of school and get married. The miasma of uncertainty is also eroding the hard-won social consensus that sending children to school must be the norm. We truly face the prospect of losing decades

of gains in getting our children in to schools.

Second, education is a social-human endeavour. Physical presence, attention, thought and emotions, all must be sewn towards learning goals, step-by-step, often back-and-forth, and differently for each student. This requires intense verbal and non-verbal interactions amongst teachers and students, which is possible only in groups within proximity. Online education is ineffective because of this basic character of education, and not merely because of lack of access to the net and online resources. Any harried parent who has gone through months of watching over online classes will bear testimony to this. Ask the teachers; their frustrations will burst forth. No wonder state after state that was enthusiastic about online education in May this year has backtracked and tried to implement other modes of student engagement. Such as teachers systematically going to the communities where students live and organizing classes with small groups, usually out in the open. The widespread struggle across the world to open schools at the earliest is energized by a deep realization of the social-human nature of education.

Third, education is effective only when it is truly animated by the spirit of public service. Most private schools are bothered about making money and not about education or people. Unconcerned about the dire situation of their students, they have pushed every lever to squeeze money. Demanding fees for "re-admission", insisting on parents buying net-access devices, lobbying for the charade of online education, and more. They have exploited their teachers even more than usual, cutting or not paying their salaries arbitrarily while making them toil. This usurious farce has been forced out in the open by the pandemic. Public (government) school systems, in the same troubled times, have attempted a range of things to keep their students

engaged. Some have been more effective than others, but they have tried over and over. And that is because their goal is public service. As is that of a small percentage of schools run and owned by private bodies, which are truly public spirited. Unfortunately, these are few.

Fourth, teachers are central to education. Without them, there is no education. With them, education can happen anywhere, even under a tree without any other resource, as thousands of dedicated public-school teachers have shown. Parents trying to play teacher have learnt how complex and demanding the role is. It is about subject knowledge and pedagogy, but also a lot more. It is about patience and dedication, about empathy and judgment, and also about balancing all this in the service of the overall development of the child. Ultimately, it is a matter of deep human relationships and bonds. Even if unstated, these circumstances have also made many realize how poorly we do for our teachers.

Fifth, an education system is the most precious of things for any society. It shapes the future of a society and keeps it going. At the most basic level, the education system is also a vast child-care system too. The disruptions in our rhythms of social and economic life, in the here and now, have made that clear. It has also made it clear that for the aspirations and promises of our society to be fulfilled, education is the fundamental social process. Perhaps even more so than parenting.

We did not need a once-in-a-century pandemic with its devastating human toll to reveal all this about education. Our gaze would have encountered the same basic character of education anytime if we had opened our eyes and paid attention. But the lacerating wound of the pandemic will possibly let the light finally enter, to paraphrase Rumi. And perhaps the light will enter us as a people, making us more, and more, together. We need that desperately.

10 YEARS AGO



JUST A THOUGHT

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

JAMES MADISON

THEIR VIEW

Fraenkel's theory of the dual state may need an update

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In *The Dual State: A contribution to the Theory of Dictatorship*, first published in 1941 after its author fled Germany, Ernst Fraenkel developed a theory based on his experience as an attorney in the Berlin Court of Appeals in Nazi Germany between 1933 and 1938. He was a witness to the decay of the German legal system after the passage of the Reichstag Fire Decree and Enabling Act, which gave the "prerogative state" powers that were used to override the "normative State", as the usual rights were denied to those defined by the state as its enemies, such as communists, liberals, even conservatives, and of course Jews. The latter's personal status was restricted under the Nuremberg laws. This was after they were left a limited sphere in the country's economic system. By 1936, the Reich Supreme Court had declared them "legally dead".

The major difference between dictatorships and democracies is the latter's inflexible implementation of the rule of law. In a democracy, everybody is equal in the eyes of

the law. The law is codified and not arbitrary, applied equally in each case, without exception, and has the mandate of the governed. This is usually in the form of a constitution, with laws enacted by democratically-elected legislatures consistent with it. There are institutions at arm's length from the state, most notably the judiciary, to uphold laws.

Distinguishing dictatorships from democracies in the 20th century was easy. The latter had constitutions in place based on Enlightenment principles such as individual liberty, equality before the law, humanism, reason, and secularism informed by religious universalism. Periodic elections were held based on universal franchise, and the laws made in compliance with the constitution were enforced by the state, with anomalies and disputes resolved through an independent judicial system. Dictators overthrew such constitutions and imposed draconian laws without the sanction of popular will, centralizing power in their own hands. Several right- and left-wing dictatorships, including that in the former Soviet Union, used such means. Yet, dictators could also be elected through the ballot box, which they subsequently suspended, abolished or subordinated to their will. The Emergency of the 1970s in India bore some characteristics

of this, though Adolf Hitler's power-grab was by far the most egregious example; he never intended to adhere to the Weimar Constitution at all.

Does that mean that there is no place for the rule of law in dictatorships?

It is extremely difficult to organize society or a production process where there is no underlying consensus and trust among stakeholders on the predictability of outcomes if these vary from case to case. It would be impossible to run a capitalist system in such circumstances, or to maintain social order, if there are no rules for private and intangible property, entrepreneurial freedom, sanctity of contracts, unfair competition, labour employment, etc. The special provisions or new laws brought in by 20th century dictators curtailed individual liberties in the political domain. The laws relating to civil society remained mostly in place, with arbitrary exceptions in a few cases where the state used its specially acquired overriding powers.

Fraenkel's theory of dictatorships and the dual state has resonance in current times. According to him, there existed a dual state under dictatorships, comprising both a normative and prerogative state. Germany had one of the best legal systems in Europe, and the normative state continued to function in day-to-day transactions even under Nazi rule.

The prerogative state, on the other hand, "was that governmental system that exercises unlimited arbitrariness and violence unchecked by any legal guarantees". Both existed simultaneously.

In the 21st century, it has technically become harder to tell democracies apart from populist dictatorships. Having learnt the 20th century lesson that overthrowing constitutional and legal structures loses the regime legitimacy, with their power proving pyrrhic and short-lived, the latter have kept formal legal structures in place, including constitutions, laws, extant institutions, universal adult franchise and the judiciary. Instead, they use the popular

mandate and their cult status to buttress their power, even though they might surreptitiously tamper with electoral processes. They are akin to what another political theorist, Carl Schmitt, described as "sovereign dictators" in his 1921 classic *Die Diktator*. Since the state and its allied pressure groups are able to bend institutions, even though they do not always get their way, the picture gets muddled. A straightforward application of Fraenkel's theory falls short, as there are no special prerogative provisions.

Modern dictatorships solidify their hold on power not through special laws, but by leveraging their executive authority under extant laws to capture legal and other civil society institutions. They appoint minions to key positions, and through them use legitimate institutions to enforce the will of the prerogative state. The normative state functions normally in most cases. But by controlling the outcomes of only a few cases, the prerogative state captures all state power. Populist dictatorships have proliferated across the world's democracies, from Latin America to Eastern Europe and Asia, even as cult-based rightist parties have gained sway in the US and Western Europe. Whether they will prove more durable than dictatorships of 20th century remains to be seen.