Contemporary challenges for judicial review, policing governance within the separation of powers framework

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Separation of powers - concept

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- Concentration of power in one person or group results in tyranny. Decentralization of power necessary to check arbitrariness. Decentralization achieved by vesting governmental power in three different organs – the legislature, the executive and the judiciary

- The **principle of 'separation of powers' requires that each organ should be independent of the other** and no organ should perform functions that belong to the other

- **The doctrine of 'separation of powers' is a check against tyrannical rule**

- The term **'separation of powers' coined by** French political philosopher **Baron de Montesquieu** in his book *Esprit des Louis* ('The spirit of the laws') **in 1748**:

  - **According to Montesquieu:-** "*when the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty….**there is no liberty if the powers of judging is not separated from the legislative and executive**….there would be an end to everything, if the same man or the same body were to exercise those powers*"

  - Interestingly, **Montesquieu's formulation of this doctrine is couched in terms of independence of judiciary**

- Present in **rudimentary form** in **ancient Greece** and **Rome** too

- **The doctrine of 'separation of powers' has been adopted in almost all Constitutions of the World**

Separation of powers - not rigidly followed

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- **The doctrine of ‘separation of powers’ has not been rigidly followed in most of the Constitutions of the world.** For example, the **American Constitution** doesn’t speak of ‘separation of powers’ but the same can be inferred from the first three articles:
  - Article I vests the legislative power in the Congress (consisting of Senate and House of Representatives)
  - Article II vests the executive power in the President of the United States
  - Article III vests the judicial power in the Supreme Court of America and the courts below
- In **United Kingdom** too, ‘separation of powers’ was diluted – so much so, till 2009 when the Supreme Court of UK was established, the House of Lords (part of the legislature) acted as the final arbiter of disputes
- **In India, the blurring of the edges of ‘separation of powers’ is more pronounced:**
  - Indian Constitution expressly vests executive powers in the President and the Governor [vide articles 53(1) and 154(1)] – but **no corresponding vesting provision for legislature and judiciary**
  - **President/Governor exercise legislative functions** through ordinances, formulating law while proclamation of emergency is in force [Article 357(1)] and **judicial functions** through granting of pardons
  - **Parliament/State legislatures exercise judicial powers** for breach of privilege (contempt powers)
  - **Judiciary exercises administrative/executive** powers by making rules for Supreme Court appointments

Separation of powers - practically understood as....

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- The doctrine of 'separation of powers' has **practically** been implemented as a system of '**checks and balances**' between these three wings with an emphasis on **independence of the judiciary**

- **Interesting quote from US Jurist Alexander Bickel, equally relevant for India:**

  "***Our Government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it is often the sweaty intimacy of creatures locked in combat***"

- In India, there is **effectively a fusion of Government power** where all three organs are required to perform almost all the three functions – the **three organs need to work in close coordination and are interdependent on each other** due to the principle of 'checks and balances'

  - Parliament checks the actions of the president and the judiciary through the impeachment process [Articles 61 and article 124(4) and (5)]

  - **Judiciary scrutinizes the actions of the executive and the legislature through its power of judicial review**

- 'Separation of powers' (interpreted as above) held to be **part of the 'basic structure' of the Indian Constitution** in Keshavananda Bharati's case

Judicial review - emanating from 'separation of powers'

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- **Most modern legal systems allow the courts to review administrative acts** (individual decisions of a public body, such as a decision to grant a subsidy or to withdraw a residence permit). In most systems, this also includes review of secondary/delegated legislation (legally enforceable rules of general applicability adopted by administrative bodies)

- There are **three broad approaches** to judicial **review of the constitutionality of primary legislation** — ie., laws passed directly by an elected legislature

  - **No review by any courts**: Some countries do not permit a review of the validity of primary legislation. In the **United Kingdom, theoretically speaking, statutes cannot be set aside under the doctrine of parliamentary sovereignty**. *However, this aspect is increasingly getting diluted through creative interpretation of British courts (and European law, especially European Human Rights convention)*

  - **Review by general courts:** In the United States, federal and state courts (at all levels, both appellate and trial) are able to review and declare apropos "constitutionality" of legislation by a process of judicial interpretation that is relevant to any case properly within their jurisdiction.

  - **Review by specialized courts:** In 1920, Czechoslovakia adopted a system of judicial review by a specialized court, the 'Constitutional Court' (as envisaged by Hans Kelsen, a leading jurist of the time). This system was later adopted by Austria and now emulated by a number of other countries – **India has adopted this model vide its Constitutional courts namely High Courts and the Supreme Court**

Judicial review in India - key legal standards

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- Judicial review essentially provides a set of legal standards, enforced through writ petitions, to enable people to challenge the lawfulness of decisions made by public bodies/others exercising public functions.

- Such **legal standards**, as may be gleaned from various judicial precedents are encapsulated below:

  - **Public bodies must 'have legal authority for their actions.'** This may be derived from statute, the Constitution or some other valid source of law. Public bodies must act within the scope of that legal authority

  - Where a statue/the Constitution gives a public body a **discretionary power,** that power must be used to further the scope and object of the statute/Constitution – **not for an extraneous purpose. 'May' can be read as 'shall' in certain cases**

  - **Public bodies must take into account all legally relevant considerations** and avoid taking into account those that are irrelevant

  - Where a statue/the Constitution gives decision-making power to a public body, **that body (not another one) must exercise such discretion:** except in some recognized circumstances, delegation is unlawful.

  - **Fair procedures must be followed**: these may be derived from statute, the Constitution or some other valid source of law. They may, according to the context, include requirements to give notice of a proposed decision before making it; to consult and receive written representations; to disclose information before a final decision is reached; to provide oral hearings; and to give reasons for a decision

Judicial review in India - key legal standards (CONT.)

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- **Public bodies act unlawfully if they are actually biased.** They also act unlawfully if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias

- **A public body's decision is unlawful if it is "unreasonable" or "irrational".** This may involve giving manifestly inappropriate weight to a factor; being illogical, arbitrary, inconsistent or uncertain: giving inadequate or incomprehensible reasons; or making a decision based on inadequate or mistaken facts

- **A public body's decision is unlawful if it is disproportionate**. One test of proportionality is to assess whether the action pursues a legitimate aim recognized by the law, whether the action is capable of achieving that aim, and whether there a less restrictive alternative could have been employed. Generally, proportionality review is confined to situations where there are fundamental rights involved. However, proportionality can also engage when a decision-maker manifestly fails to attain a fair balance of (relevant) considerations, or where the impact of the decision is unduly oppressive

- **A public body acts unlawfully if it creates a legitimate expectation** (for example, by giving a clear and unambiguous assurance) that a particular procedure will be followed or a benefit conferred and later seeks to resile from it without an adequate justification

- **A public body acts unlawfully if it breaches a fundamental right**

- **A public body acts unlawfully if it breaches a benefit/obligation arising out of an international treaty, duly incorporated into Indian national law**

❖ **Concern expressed by jurists in USA,** relevant for India too: "*In the American mind, the principle of checks and balances often stops at the door of the Court*" - **Power of judicial review to be tempered with judicial restraint** – several Indian Supreme Court decisions

Judicial review in India - Limitations and exceptions thereto

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Following types of limitations merit analysis:

- **Limitations in the Constitution itself** – for example:

  - Clause (2) of Articles 100 and 189 bar the jurisdiction of the courts to invalidate the proceedings of a House of the Legislature on specified procedural irregularities. But there would be **no immunity if the proceedings are held in defiance of the mandatory provisions of the Constitution** by exercising powers which the legislature does not possess under the Constitution

  - **Non-justiciable directive principles**: However, non-Justiciability of Directive Principles has been diluted in practice by court decisions which have effectively enforced some of the directive principles in support of the fundamental rights. Since the illustrated case of *Maneka Gandhi V. Union of India*, Article 21 of the Constitution has been construed broadly and liberally in the light of directive principles

  - Article 71(4) provides that the **election of a person as President or Vice-President shall not be called in question** on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him

  - According to Article 74(1), the President of India shall act according to the advice tendered by his council of Ministers. Article 74(2) provides that - "*The **questions whether any and if so what, advice was tendered by Minister to the President shall not be inquired into in any court***."

  - The **provisions relating to delimitations of constituencies** are contained in Articles 81 and 82. These provisions are non-justiciable under Article 329(a): "*Notwithstanding anything in this Constitution -(a) The validity of any law relating to the delimitation of constituencies …, made or purporting to be made under Articles 327 and 328, **shall not be called in question in any court”***

Judicial review in India - Limitations and exceptions thereto

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- **Judicial restraint** :

  - **Court does not determine a hypothetical or academic question** and would not, accordingly, determine the question of Constitutionality of a statute until it is, or is about to be, given some practical application and effect. In order words, an assumed potential invasion of a right is not enough to invoke the power of judicial review. In order to challenge the Constitutionality of a statute, plaintiff must show either an actual or a threatened invasion of his rights

  - The court will **not allow a person who has availed of the benefits of a law to challenge its legality**

  - Effective **alternative remedies** should not exist

  - Adherence to the doctrine of ***Stare Decisis*** to avoid instability in the law

  - Court may defer to legislative or executive actions/decisions by classifying them as purely '***policy issues***' or ***political questions*** and refuse to decide them (unless such actions are *ex facie "absolutely capricious and non-informed by reasons, or totally arbitrary, offending the basic requirement of the Article 14 etc."*)

  - **Presumption in favour of the Constitutionality** of the impugned statute. Also, if the Court can decide an issue on grounds that aren't Constitutional it will prefer to do so. Further, if a part of the statue is unconstitutional, Court will try to apply the doctrine of severability to avoid striking down the entire statute

  - Court will **not attribute *mala fide*** to the legislature

The above are self-imposed boundaries and not 'cast in stone'

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Contemporary challenges: (1) Judicial review of ordinances

Ordinances - setting the context

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Article 123 and Article 213 – Power with the President/ Governor to promulgate Ordinances during recess of Parliament/ Legislature

- President must be satisfied that circumstances requiring **immediate action** exist
- An ordinance issued by the President or the Governor is akin to an Act of the Parliament and is subject to the same tests/boundaries
- Ordinance making power is a legislative power conferred upon the executive
  - To be used in **extra ordinary situations** or **exceptional circumstances;**
  - Power must not be used recklessly or by imagining a state of affairs to exist which did not exist;
  - Power must not be used *mala fide* or perverted to serve political ends
- Report published by the Lok Sabha, reveals that till October 2016, the President of India has promulgated 701 Ordinances, **averaging more than 10 per year - 22 ordinances between May 2014 - October 2016**
- **As per Prof. Shubhankar Dam (author of *Presidential Legislation in India: The Law and Practice of Ordinances*): This facility has often been used by governments to subvert Parliament" and with the exception of a single ordinance, every other ordinance could have waited for the next legislative session.** At least 214 were promulgated just 15 days before Parliament was supposed to be in session while 261 were promulgated within 15 days of Parliament finishing its session

Ordinances - setting the context

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- **Some examples of recent Ordinances which have been contentious**

  - **Specified Bank Notes Cessation of Liabilities Ordinance, 2016 – (‘*demonetization ordinance*’)**

    - Vide the Ordinance it was provided that the specified bank notes (old Rs 500 and Rs 1,000) will cease to be liabilities of the Reserve Bank of India (RBI) from December 31, 2016 onwards.

  - **Criminal Laws (Rajasthan Amendment) Ordinance, 2017**

    - The Ordinance proposed to provide immunity to judges or magistrates or public servants from any investigation by magistrate. Further, proposed to amend the Criminal Code of Procedure, 1973 and sought curbs on publishing and printing or publicising in any case the name, address, photograph, family details of the public servants.

    - The ordinance was challenged before the Rajasthan High Court on *inter alia* the grounds that *No immediate circumstances existed to justify the ordinance;*

    - As on date, the Ordinance has been withdrawn by the Rajasthan Government

Ordinances – judicial review

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Judicial Review *vis a vis Ordinances*

- **AK Roy v. Union of India (1982) 1 SCC 271 - Judicial review of the president's satisfaction regarding the necessity to issue a Ordinance is not totally excluded**

  Preconditions of Article 123 cannot be regarded as a purely political question and kept beyond judicial review – however, *prima facie* case must be established by Petitioners as to non-existence of the circumstances necessary for issuance of the ordinance before burden can be cast on the President to establish those circumstances.

- **T. Venkata Reddy v. State of Andhra Pradesh (1985) 3 SCC 198 – An ordinance cannot be questioned on grounds of motive or non-application of mind or on grounds of propriety, expediency and necessity, just like the exercise of legislative powers cannot be so questioned**

- **Amar Nath V Union of India 2004 (175) E.L.T. 51 (Cal.) - When the statement of object of the Ordinance specifies that President is satisfied - *prima facie* case that President has validly exercised his legislative power**

  "In the preamble of the said Ordinance it is mentioned that Parliament is not in session and the President is satisfied that circumstances exist which renders it necessary for him to take immediate action. ***Had there been no such statement this Ordinance would have been an invalid and unconstitutional one.****"*

Ordinances - judicial review

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Judicial Review *vis a vis* Ordinances (contd.)

- **Amar Nath Case (contd.) – Satisfaction of the Executive with the existence of circumstances necessitating making an Ordinance, is not justiciable**
  - The necessity of immediate action and of promulgating an Ordinance is a subject matter for the subjective satisfaction of the Executive which is the judge of the same and the same is not a justiciable matter
  - Thus, thought process for reaching satisfaction on a material for promulgating an Ordinance by the Executive cannot be questioned before a court of law. However, if the conditions as mentioned in Article 123 and Article 213 are not satisfied then such legislative action of the President or the Governor is rendered unconstitutional.
- **DC Wadhwa v State of Bihar 1987 AIR 579 – Situations where re-promulgation of ordinances may be unconstitutional**
  - *"The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, repromulgate the Ordinance as soon as the Legislature is prorogued. Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the Legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the Ordinance…….* *(continued in next slide)**….*

Ordinances – judicial review

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Judicial Review *vis a vis* Ordinances (contd.)

- **DC Wadhwa v State of Bihar 1987 AIR 579 – where re-promulgation may be unconstitutional….**

  "Where such is the case, re-promulgation of the Ordinance may not be open to attack. ***But otherwise, it would be a colourable exercise of power on the part of the Executive*** *to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation. It is settled law that a constitutional authority can-not do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an Act, such provision cannot be allowed to be defeated by adoption of any subterfuge.* ***That would be clearly a fraud on the constitutional provision****.*

- **Krishna Kumar Singh & Anthr. v. State of Bihar & Ors. (2017) 3 SCC 1**

  - **Facts** - Governor promulgated 7 ordinances allowing State Government to take over management and control of Sanskrit schools in the state. Governor promulgated a fresh ordinance with similar provisions (re-promulgate the ordinance), allowing the ordinance to continue in force for over two years, finally lapsing in April 1992. However, **even though Bihar State Legislature was in session over those years, ordinance was never placed before them**, nor any bill incorporating its provisions
  - **Held** - Legislation by ordinances is not an ordinary source of law-making; ordinances can only be promulgated **in emergency or exceptional situations**, and **only while the legislature is not in session**. Further, the Constitution requires that ordinances must be compulsorily presented before the legislature. The **repeated re-promulgation of an ordinance is evidence that the executive is trying to overstep its constitutional boundaries with the ordinance, and the court is permitted to strike down any such ordinance**

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Contemporary challenges: (2) Judicial review of certification as ‘money bill’

Judicial review of certification as 'money bill'

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- Enactment of *the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016* ('**Aadhaar Act, 2016**') - The Bill was certified as a 'money bill' by the Speaker amid stiff resistance by the opposition

- **Recent examples of use of 'money bills' in legislation making in India** – *Bank Notes (Cessation of Liabilities) Bill, 2017*, which was passed by the Lower House to fully implement the recent demonetisation scheme, was certified as a 'money bill' by the Speaker. *Finance Act, 2017*, which was enacted as a money bill, amended various statutes such as the *Payments and Settlements Act, 2007* and the *Reserve Bank of India Act, 1934* to change the composition of the Securities Appellate Tribunal

- **Whether the power of judicial review can be used as an institutional check to prevent potential abuses of money bills?**

  - Article 110(3) of the Indian Constitution provides that *"If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final"*

  - Current legal position in India appears to be that the **certification of a bill as 'money bill' by the Speaker is beyond the powers of judicial review on the basis of the following articles of the Constitution** (*judicial precedents are discussed subsequently*):-

    - Article 212 (*pari materia* with Article 122) which provides that the Courts cannot inquire into proceedings of the Legislature on the ground of any alleged irregularity of procedure

    - Art. 255 which provides that the requirements as to recommendation and previous sanction are to be regarded as matters of procedure only

Judicial review of certification as 'money bill'

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Judicial precedents - Certification as 'money bill' by the Speaker is beyond the powers of judicial review

❖ **Mangalore Ganesh Beedi Works v. State of Mysore AIR 1963 SC 589**

- **Facts**:- The appellant was liable to sales tax under the Coinage Act which was changed by the Indian Coinage (Amendment) Act, 1955, effectively imposing an additional tax burden on them
- **Issue** - Since it amounted to an enhancement of tax, the law should have been enacted as a 'money bill' and since no such 'money bill' was introduced or passed for the enhancement of tax, the tax should be held illegal and invalid
- **Decision** - The court held that the Indian Coinage (Amendment) Act, 1955 substituted an old coinage with a new coinage and was not a tax. However, by way of obiter dictum it was observed as follows:

  "Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it offends Arts. 197 to 199 and the procedure laid down in Art. 202 of the Constitution. ***Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Art. 255 lays down the requirements as to recommendation and previous sanction are to be regarded as matters of procedure only****."*

- Also followed in **Mohd. Saeed Siddiqui v. State of UP; AIR 2014 SC 2051**

Judicial review of certification as 'money bill'

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- **Arguments that may be explored in favour of the proposition that judicial review of certification of 'money bill' by the Speaker can be made in certain circumstances:-**

  - The Supreme Court has distinguished the phrase "irregularity of procedure" in Articles 122 and 212 from **"procedural illegality"** holding that **"procedural illegality" is subject to judicial review** while "procedural irregularity" is not

  - **Case-law**: ***Special Reference No. 1 of 1964*** (AIR 1965 SC 745) - One Keshav Singh was committed to prison for committing breach of privilege and contempt of the Uttar Pradesh Legislative Assembly. The High Court ordered that Keshav Singh should be released on bail whereby Uttar Pradesh Legislative Assembly passed a resolution ordering the arrest of the judges of the Uttar Pradesh High Court who granted the bail order, along with the advocate representing Keshav Singh. The matter finally came up before the Supreme Court where it was clarified that the scope of immunity from judicial review under Article 212 is not absolute in nature. It was held as follows:-

    "Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the legislative chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the Procedure is no more than this that the procedure was irregular"

  - **It may be argued that procedure does not refer to a procedure prescribed by the Constitution which has be followed by a House (as in the case of money bills) -** Therefore, the protection from judicial review granted by Article 122 cannot be stretched to protect non-compliance or breach of a constitutional procedure like the special procedure for money bills under Articles 109 and 110

Contemporary challenges: (3) *Jallikattu*

Jallikattu - setting the context

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- The Supreme Court, in *Animal Welfare Board of India v. A. Nagaraja* [(2014) 7 SCC 547] **struck down the *Tamil Nadu Regulation of Jallikattu Act*** mainly on account of the same being repugnant to the Central enactment *Prevention of Cruelty to Animals Act,1960* ("PCA") - Under India's constitutional structure, both the Central and State governments can make laws on animal cruelty. As per PCA, there exists a duty to protect welfare of animals and not to put them to avoidable pain and suffering **except for unavoidable necessary actions for human benefit** as envisaged under the exceptions in the PCA – ***Jallikattu* doesn't fall under such exceptions**

- ***Obiter*** - "*The Parliament, it is expected, would elevate rights of animals to that of constitutional rights, as done by many other countries, to protect their dignity and honour*"

- **Review petition against the above dismissed by SC in November 2016** – apart from reiterating earlier points, the SC rejected the new arguments based on Article 25 raised by Tamil Nadu in favour of *Jallikattu*

- In 2017, Tamil Nadu amended the PCA to discharge *Jallikattu* from the various rigours of the PCA Act. The same has been **challenged and following questions are pending before the Supreme Court's larger bench**:

  - Is the amendment an instance of colourable legislation?
  - Can the law be considered as a measure introduced in furtherance of a community's cultural right under Article 29?
  - Was Tamil Nadu's intention in making the amendment aimed at ensuring the survival of a native breed of bulls?
  - Does the exemption granted to *Jallikattu* run counter to some of the fundamental duties imposed by the Constitution, thereby impinging on rights guaranteed by Articles 14 and 21?
  - And, finally, has the amending law validly overcome the Supreme Court's 2014 judgment in *Animal Welfare Board of India v. A. Nagaraja*, where the practice of *Jallikattu* was found to offend the PCA Act?

Jallikattu - larger questions

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- It was probably easier to conclude that *Jallikattu* violated the PCA - But Tamil Nadu's amendment to the PCA last year offers a different challenge. What precise fundamental right of the petitioners does the new law violate?

- Given that the subject of preventing animal cruelty falls in the concurrent list of the Seventh Schedule to the Constitution, State governments possess an equal authority to determine what actions constitute cruelty to animals within their respective territories. It was on the basis of this power that the Tamil Nadu government legitimised *Jallikattu*, by amending the PCA Act, and by exempting the practice entirely from the statute's demands. Therefore, this **Tamil Nadu law, which also secured the President's assent, dubious as it might seem to us, may not be described as a colourable legislation**

- **SC may adopt one of the following approaches** (assuming it will uphold its earlier ban of *Jallikattu*):

  - SC can step forward from its decision in *A. Nagaraja* and **hold that animals too possess a right to live with dignity, and, therefore, enjoy a right to life under Article 21** - it would necessitate a finding from the court that animals are legal persons, which may open a Pandora's Box
  - Or, SC **could hold that right under Article 21 includes within its ambit a larger freedom to live in a society free of animal cruelty** - After all, the Supreme Court has previously held that the right to life under Article 21 partakes a right to a healthy environment. Perhaps, therefore, it might not be implausible for it to also hold that this right **includes a freedom to live in a society that respects and shows empathy towards other living beings and that Tamil Nadu's law, much as it strives to protect a community's cultural rights, offends this larger, more general guarantee**
  - SC **should not borrow generously from the list of fundamental duties contained in Article 51A** - These duties are non-justiciable by definition, and they should remain so; else **such borrowing may distort future interpretations of fundamental rights**

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Contemporary challenges: (4) Foreign Trade Policy related matters

Deemed export benefits under the Foreign Trade Policy – judicial review - backdrop

- In 2014, the Hon'ble Gujarat High Court in the matter of *Alstom India Limited 2014 (301) ELT 446 (Guj.)*, struck down/read down certain provisions of the Foreign Trade Policy ("FTP") and forms and procedures formulated thereunder –

  - Para 2.3 of the FTP has been read down and para 8.3.6 of the Hand Book of Procedures ("HoP") and para 7 of the self-declaration under the ANF-8 Form (the application form to be filed for claiming deemed export benefits) has been declared as ultra vires the Foreign Trade Development and Regulation Act, 1992 ("FTDR Act") and Articles 14, 19(1)(g), 246 and 265 of the Constitution of India

- **Facts**: Alstom was supplying imported as well as domestic plant and machinery for constructing non-mega power plants and claiming deemed export benefits in terms of the provisions of the FTP. Alstom's applications for deemed exports benefits were duly approved.

  - However, in March 2011, the DGFT through the Policy Interpretation Committee ("PIC") interpreted the policy and *inter alia* held that deemed export benefits are not available to supplies effected to non-mega power projects and thus such benefits should not have been given. Pursuant to this decision, instructions were issued to various authorities subordinate to the DGFT to effect recovery of deemed export benefits already paid vis-a-vis supplies to non-mega power projects, withdraw all formal approvals granted for such supplies in the past (as in the case of Alstom) and to reject all pending applications in this regard

  - Essentially, the interpretation of the various deemed export related provisions arrived at by the PIC was being used to re-open already closed proceedings and retrospectively undo the benefits availed vis a vis supplies to non-mega power projects. Under this proceeding, Alstom sought to challenge the very legal basis of the aforesaid actions by the DGFT and the subordinate authorities vis a vis deemed export benefits

Deemed export benefits under the Foreign Trade Policy – judicial review - backdrop

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- Key legal provisions:

    - Under Section 3 of the FTDR Act, the Central Government is empowered to make provisions for the development and regulation of foreign trade in India. Section 5 of the FTDR Act further empowers the government to formulate and announce the import and export policy of the country i.e. the FTP.

    - Sections 15, 16 and 19 provide for powers to the Central Government pertaining to functioning as an appellate authority, power to review and the rule making power. Section 6 talks about the constitution of the DGFT and lays down that the Central Government may appoint DGFT to aid and advise it in the formulation of the FTP. Under Section 6(3), the central government is restricted from delegating powers under sections 3, 5, 15, 16 and 19 of the FTDR Act, which are specifically conferred upon the Central Government.

- **Arguments against 'attempted incorporation of substantive legal provisions merely by reference':** Vide paragraph 8.3.6 of the Handbook of Procedures (“HoP”) under the FTP the DGFT had tried to incorporate the provisions of the Customs and Central Excise Duty Drawback Rules, 1995 (“DBK Rules”) merely through a reference to the DBK Rules. These DBK Rules contained powers to recover duty drawback erroneously granted.

    - Argument: In terms of para 2.4 of the FTP, power has been given to the DGFT to specify the procedure to be followed by the importer, exporter and the licensing authorities. In terms of the said power, DGFT has issued HoP. This implies that the HoP is procedural in nature. No legislative power has been granted to DGFT either under the FTDR Act or the FTP. **Incorporation by reference of the DBK Rules is nothing but colourable exercise of power by the DGFT** which is not permissible under the Constitution.

Deemed export benefits under the Foreign Trade Policy – judicial review - backdrop

- **Arguments against 'attempted assumption of quasi-judicial powers by an administrative authority':** Under paragraph 7 of the self-declaration under Form ANF 8, the applicant had to declare that it would "immediately refund the amount of drawback obtained" by them "in excess of any amount/rate which may be re-determined by Government as a result of post verification".

  - Argument: Requirement of filling this form emanates from para 8.3.1 of HoP which is in the nature of an administrative guideline. Under the FTDR Act no power has been granted to the DGFT or its subordinates to re-determine or re-verify the deemed export benefits already granted except by way of review under section 16. In absence of any other provision the **DGFT cannot assume a power to review under para 7 of the self-declaration under the ANF-8 form**. Further, **power to recover is a substantive power which should be provided in the statutory framework**; not through administrative guidelines.

- **Arguments against unbridled discretionary power:** Under para 2.3 of FTP, DGFT is entrusted with the power to interpret FTP provisions, HoP & ITC HS classification. The provision also lays down that the decision of the DGFT shall be final and binding with respect to the above interpretation. Pursuant to powers vested thereunder the DGFT had interpreted the provisions of the FTP through which it had clarified in March 2011.

  - Para 2.3 confers very wide powers on the DGFT with regard to interpretation of the FTP and is without any restrictive covenant. Thus, this **interferes with the quasi-judicial function of the subordinates of the DGFT** like grant of duty drawback etc. as it binds them with the interpretation accorded by the DGFT. The subordinates do not have the liberty to independently apply their mind and adjudge.

  - Further, under Section 15 of the FTDR Act, DGFT sits as an appellate authority against the orders passed by its subordinates under section 13. It is very unlikely that the DGFT will take a decision contrary to the interpretation placed by him. This **makes the entire appeal mechanism a sham** and vitiates fair play and justice

Deemed export benefits under the Foreign Trade Policy – judicial review

- The Alstom matter along with several other petitions (from various players in the power sector) from various High Courts are before the Supreme Court in a batch matter now

- Many similar disputes arising apropos various other benefits under the FTP

- This decision will go a long way in crystallizing the contours of judicial review of executive actions as under the FTP

- **The arguments put forth before Gujarat High Court (and now before the Supreme Court) will be relevant in many other cases in the coming years**

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Money Bill v. Finance Bill

ADVAITA LEGAL
ATTORNEYS AND ADVOCATES

Money Bill or Financial Bill	
Money Bill	**Financial Bill**
Article 110- Money Bill • Imposition, abolition, remission, alteration or regulation of any tax • Borrowing of money • Expenditure from or receipt to the Consolidated Fund etc. *Bills that only contain provisions that are incidental to these matters would also be regarded as Money Bills* **Money Bill shall not be introduced in the Council of States**	**Article 117- Financial Bill** Article 117(1)- Money bills referred to in Article 110 (category A) Article 117(3)- Bills which if enacted and brought into operation would involve expenditure from Consolidated Fund of India (category B) ***All money bills are financial bills but all financial bills are not money bill. Thus, financial bill is a bill which apart from being a money bill, may additionally contain provisions related to any other matter.*** . *Financial Bill Category A can only be introduced in the Lok Sabha on the recommendation of the President. However once it has been passed by the Lok Sabha, it is like an ordinary Bill and there is no restriction on the powers of the Rajya Sabha on such Bills.* ***Financial Bill Category B can be introduced in either House of Parliament but cannot be passed by either house of Parliament unless the President has recommended to that house the consideration of the bill***