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Goals, Role and Mission of Courts: Constitutional Vision of Justice

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Separation of powers – Emphasis on the Judiciary

- ❖ The three foundational pillars of the Indian state are – the Legislature, the Executive and the Judiciary.
- ❖ Each organ is impliedly required to restrain their powers to the sphere which has been provided or set forth in the Constitution and to undertake steps that serves the purpose for which it is there.
- ❖ 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.
- ❖ The doctrine of ‘separation of powers’ has **practically** been implemented as a system of ‘**checks and balances**’ between the three wings with an emphasis on **independence of the judiciary**. Any act, inaction or abuse of such powers by one organ calls for interference of the other organ.
- ❖ Doctrine of Checks and Balances - Judiciary reviews the actions of the other two organs – the Legislature and the Executive as to whether they have exceeded the limits set by the constitution or whether they have encroached the rights of the people through arbitrary laws and arbitrary actions.
- ❖ ‘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 in the Constitution

- ❖ **Article 13(2)** of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.
- ❖ **Article 32** – Right of every individual to move directly to the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. It has been liberally interpreted to enforce fundamental rights even against private entities performing public functions.
- ❖ **Article 226** – Power to the High Court to issue any appropriate order or writ for the enforcement of fundamental right or other legal right – Jurisdiction of High Court u/A 226 is wider than that of Supreme Court u/A 32.
- ❖ Article 13 r/w 32 and 226 of Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution.
- ❖ **In the case of L. Chandra Kumar v. Union of India ((1997) 3 SCC 261), the Supreme Court held that the power of judicial review is a part of the basic structure of the Indian Constitution.**
- ❖ **Article 136** – Confers special discretionary power on the Supreme Court to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by any court or tribunal in those cases where gross injustice happens or substantial question of law is involved.

The Power of Judicial Legislation

- ❖ **Article 142** – Empowers the Supreme Court to pass any suitable decree or order for doing complete justice in any pending matter before it.
- ❖ Despite the fact that the law-making power lies primarily with the Parliament, the Supreme Court is able to play a vital role in making “judicial legislation” under Article 142 of the Constitution with respect to any vacuum in the law, which will be in force till the Parliament makes a proper legislation to that effect.
- ❖ In the case of **Vishaka v. State of Rajasthan (AIR 1997 SC 3011)**, the Court observed an absence of law to provide for the enforcement of guarantee against sexual harassment at work places, and thus laid down guidelines and norms to be observed at all workplaces or other institutions until a legislation was enacted for this purpose. This was done in exercise of the power available under Art 32 of the Constitution for enforcement of fundamental rights and it would be treated as law declared by the Court under Art 141 of the Constitution.
- ❖ The Parliament has the power to replace such directions with a legislation. For example, the **Sexual Harrassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013** replaced the *Vishakha* guidelines.
- ❖ At many instances, the Parliament has accused the judiciary on the ground of judicial intervention and has alleged that the judiciary overreaches its constitutional power.

Judicial Activism in Fundamental Right Jurisprudence

- ❖ Courts have played a vital role in shaping Fundamental Right jurisprudence
- ❖ The Constitutional validity of right to education was discussed by the Supreme Court in the case of **Bandhua Mukti Morcha v. Union of India**, AIR 1984 SC 802 and held that right to education is implicit in and flows from the right to life guaranteed under Article 21.
- ❖ In the case of **J.P. Unnikrishnan v. State of A.P.**, AIR 1993 SC 2178, the Court read Article 21 alone with the DPSPs enumerated in Part IV of the Constitution and held that every child/citizen of this country has a right to free education until he completes the age of fourteen years.
- ❖ By the Constitution (Eighty-sixth Amendment) Act of 2002, three new provisions were introduced as Article 21A, Article 45 and Article 51-A(k) and the **Right of Children to Free and Compulsory Education Act, 2009** was enacted. Now the right to free and compulsory education is a fundamental right of every child, explicitly mentioned in the Constitution.
- ❖ Moreover, the meaning of 'Right to Life and Liberty' under Article 21 has been expanded to include the following rights – Right to live with Human Dignity, Right to Livelihood, Right to Shelter, Right to Health and Medical Aid, Right to live in a Pollution Free Environment, Right to Privacy, amongst many others.



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Contemporary challenges: (1) *Triple Talaq*



- ❖ In the case of **Shayra Bano v. Union of India** the Hon'ble Supreme Court held that the customary practice to annulment of marriage in Shariat law by mere utterance of words "Talaq Talaq Talaq" by their husband, also known as the Triple Talaq, to be arbitrary and unconstitutional.
- ❖ Even though the bench had a clear majority in concluding Triple Talaq to be unconstitutional, the Bench was clearly divided over its reasoning in coming to this conclusion.
- ❖ **Majority judgement –**
 - Triple Talaq does not fall within the confines of Article 25 (**Freedom of conscience and free profession, practice and propagation of religion**) and is not an integral part of religion.
 - Triple Talaq is arbitrary and insofar as the *Muslim Personal Law (Shariat) Application Act, 1937* recognizes the same, it is unconstitutional and liable to be struck down. Merely because a practice has continued for long, that by itself cannot make it valid.
 - After the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice.
- ❖ **Minority judgement –**
 - Triple Talaq is integral to Islam in India and part of personal law, and Triple Talaq is an integral part of the religion.
 - Personal law, being a matter of religious faith, and not being State action, there was no question of its being violative of the provisions of the Constitution
 - Directed Union of India to frame an appropriate legislation, especially governing this issue of talaq-e-biddat keeping in mind advances in legislations over Shariat law in the rest of the world and and issued an injunction from exercising triple talaq for six months or till such time that the legislation comes into place.



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Contemporary challenges: (2) *Rights of Sexual Minorities*



Cases in point apropos rights of sexual minorities

- ❖ In ***Suresh Kumar Koushal v Naz Foundation**** (2014 1 SCC 1), SC overturned the Delhi High Court's judgment reading down section 377 of the Indian Penal Code 1860:
 - The Delhi High Court's decision rested on the claim that section 377, in the form that it was, violated Article 14, 15 and 21 of the Constitution, because it discriminated on the ground of sexual orientation, targeted homosexuals as a class, and was contrary to constitutional morality.
 - The Supreme Court seemed to impose numerical *de minimis* threshold for the enforcement of fundamental rights: *While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a **miniscule fraction of country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted** (as per the reported orders) for committing offence under Section 377 IPC; this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.*
 - Section 377, on the face of it, does not mention or classify any particular group or gender and hence is not violative of Article 14 and 15 and 21 respectively
 - Justice Singhvi also said that Section 377 is a pre-constitutional legislation and if it were violative of any of the rights guaranteed under Part III, then the Parliament would have noticed the same and repealed the section long ago
 - On Article 15, the Delhi Court had held that “*sexual orientation*” was a protected category, contained within the term “sex”. This has not been effectively rebutted by SC

* *It may be argued that the recent 'Right to Privacy' decision of the SC impliedly overrules this decision*

- ❖ **National Legal Services Authority (NALSA) V Union of India (2014 5 SCC 438)** - Whether right to equality required State recognition of **hijras and transgenders as a third gender** for the purposes of public health, welfare, reservations in education and employment, etc. The two opinions in the case adopted contrasting interpretive techniques to arrive at the conclusion:
 - **Radhakrishnan J:** approached the issue from a **textualist** perspective, noting that the fundamental rights at issue used the words 'person' or 'citizen', which were gender neutral and applied equally to transgenders. He also contradicted the *de minimis* notion for the enforcement of fundamental rights articulated in *Naz Foundation* case.
 - **Sikri J:** on the other hand, approached the case from a **dynamic, prudential perspective**, arguing that the Constitution would need to **stimulate changes in social attitudes by requiring the recognition of transgenders as a category** separate from males and females. The Constitution, in his view, is a living organism that is sensitive to social realities
- ❖ **Commentators point out that:**
 - The present position of law appears to be that although the criminal prohibition on unnatural intercourse (including transgender intercourse) is consistent with the fundamental rights, the State's failure to recognise a third gender violates those very same rights.
 - Transgenders can putatively claim a violation of constitutional guarantees when they are denied separate public toilets, but cannot do so if they are arrested or questioned for engaging in '*non-traditional sexual intercourse*'.
 - In *Naz Foundation*, the Supreme Court conceived of its role as a majoritarian court that deferred to the democratic will. This conception led the Court to ignore important counter-majoritarian considerations, including section 377's effect on sexual minorities. The Court's restricted readings of Articles 14, 15, and 21 stood in contrast with established precedent.



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Contemporary challenges: (3) *Jallikattu*



Jallikattu - setting the context

- ❖ 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

- ❖ 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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