Civil Liberties and Courts' Role - J&K Case

What is the issue?

- Following the Centre's move to downgrade J&K's 'special status' under Article 370 of the Constitution, there have been strict limitations to civil liberties.
- In this context, here is an overview on the principles behind rights suspension and the crucial role of Courts in this.

What was SC's rationale behind rights suspension?

- 'Ultimately, the object of depriving a few of their liberty for a temporary period has to be to give to many the perennial fruits of freedom.'
- It was this idea that made Supreme Court held that the fundamental rights to life and liberty stood suspended during Indira Gandhi's Emergency.
- It also held that the judiciary was to 'act on the presumption that powers [of preventive detention] are not being abused'.
- The court's verdict in this popular 'habeas corpus judgment' was based upon the principle of 'executive supremacy'.
- This principle holds that in 'times of peril', civil liberties must be subordinated to the interests of the state.
- In such case, it is the government that will decide -
    i. What these 'times of peril' are
    ii. Whose rights will be curtailed
    iii. How the rights will be curtailed
    iv. When the freedoms will be restored

What were the drawbacks in this?

- India's republican Constitution is based upon a system of checks and balances.
- So, even the government must always be held accountable for its actions.
- When these actions infringe fundamental rights, accountability must be sought in a court of law.
- The habeas corpus judgment betrayed that principle.
- The government committed excesses under the cover of the habeas corpus judgment, that included the torture and murder of dissidents.
- All these came to light after the end of the Emergency.

- The whole episode highlighted just one basic principle - 'absolute power corrupts absolutely'.

What was the alternative principle?

- In 2017, the judiciary formally overruled the principle behind the habeas corpus judgment.
- In its place, the court erected the principle of proportionality.
- By this, the state could infringe peoples' rights in service of a larger goal.
- But, it must demonstrate that the measures it is adopting bear some rational relationship with the goal.
- More importantly, it must show that rights are being infringed to the minimum possible extent.
- Also, the constitutionality of the state's actions is to be tested by the courts.

How is liberty at present in J&K?

- From August 5, 2019, the State of J&K has been placed under a 'communications lockdown'.
- A communications shutdown
    i. violates the freedom of speech and expression
    ii. prevents those outside the State from being in touch with their families
    iii. provides cover for civil rights violations that cannot come to light
    iv. damages an entire infrastructure, of health, food, and transport
- In addition to this, political leaders along with an unknown number of other individuals have been detained.
- Detention self-evidently violates personal liberty.
- The government argues that communication was cut off to hamper terrorists' plots.
- Also, it says that political leaders would remain in custody until 'the environment is created for democracy to function'.
- However, both moves - communication lockdown and detention - certainly violate crucial fundamental rights.
- A few days earlier, rights experts from the United Nations had called the communication lockdown a form of "collective punishment".
- Under the guise of 'prevention', an entire population's rights were taken away for the actions of a few.

Are the courts playing its role rightly?

- Unlike during the Emergency period, the courts have not outrightly upheld the government's actions, so far.
- However, they have not condemned the moves either.

- Instead, the courts are delaying, evading and adjourning the case.
- E.g. Political leader Shah Faesal's petition challenging his detention has been twice adjourned by the Delhi High Court
- At the Supreme Court too, petitions challenging the lockdown have been repeatedly adjourned.
- But, most worryingly, the court has engaged in perversion of the right to habeas corpus.
- On petitions challenging detentions, the Supreme Court has 'authorised' the petitioners to go to Kashmir and 'meet' the individuals under detention.
- In other words, the court did not call upon the government to justify itself.
- It has merely sought to show ad hoc compromises in individual cases, without discharging its constitutional obligation to adjudicate the legality of the lockdown and the detentions.
- [But, under India's constitutional scheme, no citizen needs a certificate of permission from a court to travel through the country.]

What are the key concerns now?

- By not ruling upon the cases before it, the courts have allowed the infringements of civil liberties to continue.
- The courts, in effect, have -
    i. exempted the government from its constitutional obligation to explain itself
    ii. exempted the courts themselves from their obligation to hold the government to account
- All these merely give place for executive supremacy, which the courts should urgently address by breaking its silence.

Source: The Hindu

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