

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.

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