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APRIL

2017 | CONSTITUTIONAL LAW

WHAT'S INSIDE

FALI S. NARIMAN ON IMPORTANCE OF RIGHTS

RIGHT TO EQUALITY- RESERVATION + PERSONAL LAWS

RIGHT TO FREEDOM - CENSORSHIP + SEX DETERMINATION

DPSP - COW SLAUGHTER

SUPREME COURT- APPOINTMENT + JPI + POWER TO DO COMPLETE JUSTICE

MORE...

TABLE OF CONTENTS

FUNDAMENTAL RIGHTS

SYLLABUS : Fundamental rights - Public interest litigation; Legal Aid; Legal services authority

IMPORTANCE OF RIGHTS

We are fortunate to have a charter of rights in the Constitution **of India -** the right to life, liberty, equality, freedom of expression, association, religion, education, and rights against various forms of exploitation.[1] **Why is this so?**

Rights- based morality helps build a free and equal society. How so?

EXAMPLE : Imagine two tracts of land equal in size, bisected by a fence, one belonging to me, an ordinary man with modest means, and the other to a very rich and powerful man, say, a local politician. Over a period of time, I detect that the entire fence has shifted towards my side of the land, substantially reducing its size and, correspondingly, increasing the size of the politician's land.

OPTIONS TO RECLAIM MY LAND :

- **OPTION 1 : Recognising the asymmetry of power between us, the first is to plead with him to restore the status quo. I request, I urge, I implore, but I dare not challenge him. He is mighty strong, and if he resolves to usurp the entire land, nothing can stop him.**
- **OPTION 2 : The second is to demand that he returns the land to me because I have a right over it. I do not ask him for a favour nor prostrate before him. I go to him as an equal, with dignity and self-respect, and demand what is rightfully mine. Moreover, since my right over the land is justiciable, I may seek the court's intervention in restoring the fence to its original position.**

IMPORTANCE : Main functions of rights is to underline *our moral equality* — that **no one is intrinsically superior or more powerful than me and my moral worth is the same as that of anyone**.

"Rights are protective guarantees when all else fails"

[1] Recently (APRIL 2017) Fali Nariman remarked.

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- The discourse of rights is a part of an egalitarian ethic, substantially different from the ethics of hierarchical societies.
- Rights assist the **vulnerable, the powerless**. By empowering them, they help overcome their vulnerabilities. And not only the poor and the powerless.
- Rights help not only those who experience permanent vulnerability but also those who are sporadically threatened by it.

INTERPERSONAL RELATIONS : Rights have another advantage: they are grounded directly in ordinary interpersonal relations.

- The idea that human killing is wrong is part of virtually every ethic, god-dependent or not.
- What then is the difference between someone refusing to kill a person because god commands him not to and someone who refuses to do so because the person has a right not to be killed?
- It is this: in the first ethic, we don't kill primarily because of our obligation to god. **The moral value of the demands of others is secondary.**
- In the other, we are constrained primarily **because of what we owe directly to another person**.

We tell ourselves that regardless of whether god exists or not, we recognise that to be alive is such a significant interest of all humans that we have a duty not to deprive them of it.

"A mother does not have to be told that she needs to feed her child because god commands so, and must respond instantly to the cries of her child; analogously, humans must respond to the impersonal demands made on each other in formal settings, to each other's rights"

Once people learn the culture of rights, they understand directly, without intervention from an external force, what they owe each other.

- If a child has a right to education, the state must respond to this demand and fulfil it.
- If a person has a right to express her views, then all others must respond to her demand not to be prevented from doing so.

CONCLUSION : Rights are important. They give voice to the powerless, address the vulnerabilities of all, help us meet demands we legitimately make on one another — which is why we are grateful to those who bequeathed them to us.

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ARTICLE 15 – TELEGANA RESERVATION TO MUSLIMS

NEWS : The Telangana assembly passed a law increasing the reservation for OBC Muslims in jobs and education from *4% to 12%.*

- It asked the Centre to include the 62% reservation in the state in the Constitution's Ninth Schedule — on the pattern of Tamil Nadu, which has 69% reservation.

WHY SHOULD THIS LAW BE INCLUDED IN 9TH SCHEDULE ? As per Supreme court decision - *Indra Sawhney case*, the reservation cannot exceed 50% in any state. But any law which is included in 9th schedule is beyond the Judicial review of the courts.

ARGUMENT OF TELEGANA: 90% of Telangana's population is SC/ST and OBC and so the **50% limit is irrational in the state's case.**

This reservation is only for some Muslim castes such as butchers, carpenters, gardeners and barbers. **Similar occupational castes among the Hindus enjoy the benefits of reservation.** The legislation passed by the Telangana assembly will thus benefit certain classes identified on the basis of social and educational backwardness.

This will not be against Article 15(1) of the Constitution which prohibits discrimination "only on the basis of religion".

WAY FORWARD :

- The Backward Classes Commission headed by **B.S. Ramulu** approved the findings of the G. *Sudhir Commission (2016)* which rightly found the 11 yardsticks for determining backwardness laid down by the Mandal Commission, and approved by the Supreme Court in the **Indra Sawhney case, outdated**.
- The parameters for reservation laid down in the *Indra Sawhney* case need to be reviewed.

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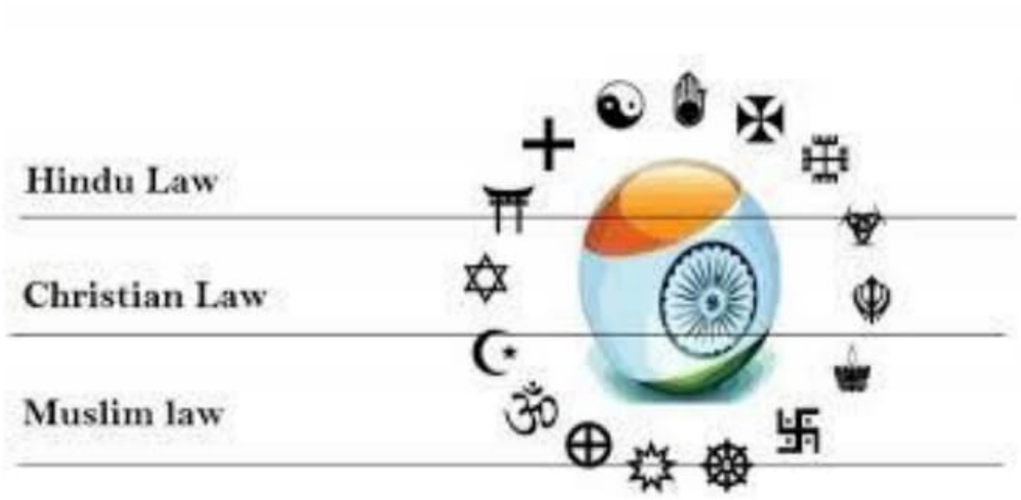
" RIGHT TO EQUALITY AND PERSONAL LAWS "

NEWS : Supreme Court will hear petitions challenging whether personal law practices like triple talaq and polygamy violate the constitutional rights of Muslim women.

"Can what is sinful in the eyes of God be lawful? If God considers it a sin, it can't be legal. Can it be?" Chief Justice of India J.S. Khehar's question on the second day of the Supreme Court (SC) case regarding the constitutional validity of triple talaq sums up the difficulties surrounding the contentious issue.

BASICS> As per Article 13, any laws which are inconsistent or in derogation of the fundamental rights of the Constitution = are void.



ISSUE 1 : Therefore, now the question is **whether personal laws can be brought under the ambit of Article 13 ?**

OUTCOME : If the Supreme Court agrees that personal laws are to be included under **Article 13,** then an aggrieved person can challenge a particular personal law of a religion as violative of the fundamental rights and make it void.

ISSUE 2 : Whether the triple talaq, nikah halala and polygamy are protected under the **freedom of religion under Article 25 ?**

The Centre has argued that polygamy and triple talaq are not religious practices but social norms and customs which can be intervened on by the State if they are found to be violative of constitutional rights.

EARLIER :

- The Bombay High Court held that personal law is not 'law' under Article 13. *State Of Bombay v. Narasu Appa*
- Supreme Court rejected to consider if unilateral divorce by talaq and polygamy were violative of Articles 14 and 15, saying it was for the legislature to determine.
- In December 2016, the Allahabad High Court had observed in a case that triple talaq was "cruel" and judicial conscience was "disturbed.
- *A. Yousuf Rawther v. Sowramma, 1970*, Kerala high court and *Shamim Ara v. State Of UP And Ors, 2002*, Supreme Court, for example—the courts have ruled against triple talaq as it is practised today. The All India Muslim Personal Law Board, on the other hand, defends triple talaq as an integral part of Islamic law and, therefore, beyond the realm of the judiciary. If it concludes in the triple talaq case

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that the former holds and the practice is indeed an essential part of the religion in India, its hands are tied.

ARTICLE 19 : " RIGHT TO FREEDOM OF EXPRESSION " AND FILM CENSORSHIP

LEFT :

Cinema as an art form has always drawn a *disproportionate interest* from the Indian state and the judiciary.

- *S. Rangarajan v P. Jagjivan Ram* case: "*Movie motivates thought and action and assures a high degree of attention and retention.* It makes its impact simultaneously arousing the visual and aural senses... The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The **combination of act and speech, sight and sound** in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators." (Paragraph 10)

- The Supreme Court went on to cite an academic study according to which "continual exposure to films of a similar character" would **significantly affect the attitude of an individual or a group**. On this basis, the Supreme Court deemed pre-censorship necessary.

- **Colonial hangover :** The Cinematograph Act of 1952 was derived from colonial censorship laws. The state considers **every citizen rational enough to make serious, life-affecting decisions like who to vote for (at 18), who to marry (at 21), what career to choose, investments to make** etc

- Yes, India is a diverse society. Yes, there will always be grievances from some section of civil society. And yes, we need an arbitration mechanism to address a wide range of concerns.

- We need a **multi-layered solution to the absurd censorship regime in India.**

SOLUTION :

- The CBFC's scope must be **limited to certification, with no powers to maim, mutilate or ban any film.** For any film it finds 'objectionable', the CBFC should refer it to the **Film Certification Tribunal.**

- COMPOSITION : The tribunal comprising retired judges, lawyers, filmmakers, writers and artists must become the sole forum for a considered dialogue with the filmmaker concerning any 'censorship' of their work.

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- The final recommendations of the **Shyam Benegal Committee** are disappointing as they chose not to examine any of the "reasonable restrictions", directly borrowed from Article 19(2) into the Cinematograph Act.

- Censorship has **no space in a mature democracy**.

RIGHT: India is a very vast and complex country and the same freedom enshrined in the Constitution applies to cinema as well. Neither **cinema nor the press are separately listed in the Constitution**, though they are derived from Article 19 (1)A, which lists the freedom of speech and expression.

- Citizens of the country as complex as ours have varying needs, requirements and sensibilities and one has to strike a balance. And this balance has been elaborated in the form of restrictions to freedom of expression under Article 19 (2) and these have to do with the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

- In the sense, there will be reasonable restrictions to free speech which affects the country's integrity and disturbs public order, decency and so on and so forth.

- CBFC, which is a statutory body, **should have the last word on a film**, on whether to allow it for public exhibition without changes or release it with certain deletions and modifications.

WHY>

- The idea behind vetting is to ensure that **people do not get exposed to potentially psychologically dangerous material.**

- It carries with it the **potential to instil violent modes of behaviour** and cannot be equated with other modes of communication.

- Censorship and reasonable restrictions are required because of the **impact that cinema can have on the minds of the viewing public**.

- Films as a medium of entertainment require a different treatment from books or newspaper and **are to be exhibited in a public place** according to age as Unrestricted, Adult or Under Parental Guidance or Special category.

- Certification is a dynamic process and one which is likely to change as society changes and evolves. For now, **the government is in the process of examining the recommendations of the Shyam Benegal Committee**, a demand of the Indian film industry, and which, to my mind, is the right step forward.

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CENTRE : The name of the Central Board of Film Censors was changed to the **Central Board of Film Certification in 1983** and that pretty much explains the responsibility of the CBFC, which is to certify films according to age.

- The certification should make it clear that UA means **watching films under parental guidance.** It is the responsibility of the parent to ensure that he or she accompanies the child.
- *Movies certified Adult should not be censored at all*. The ratings are meant to indicate the category under which the films are certified as U, UA, S, and A.
- If you cut out a dialogue or a scene from such a film, **viewing it becomes meaningless.**

If we don't engage, how will we critique anything? This nervousness with examining issues has created a strange situation where we censor rather than examine the context.

ARTICLE 19 : PRE –NATAL SEX DETERMINATION

NEWS : In February, the court ordered Google, Microsoft and Yahoo to immediately set up their own in-house expert bodies to keep tabs and delete prohibited online prenatal sex determination ads.

HELD : The Supreme Court observed that a **general ban on all online content about prenatal sex determination will curtail the fundamental right** under **Article 19 (1) (a)** of the Constitution **to know of a genuine information-seeker who is driven by curiosity**.

REASONING : Right to access the Internet to gain information, wisdom and knowledge **cannot be curtailed** unless it encroaches into the **boundary of illegality**.

SCOPE OF ARTICLE 19 : Fundamental right of expression, under Art.19(1)(a), includes "the right to be informed and the right to know and the feeling of protection of expansive connectivity", the Internet offers this on the click of a button.

WHY NOT GENERAL PROHIBITION> A general prohibition on all online content about pre-natal sex determination will curtail the fundamental right to know of a genuine information-seeker.

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ARTICLE 21 : RIGHT TO LIFE AND EUTHANASIA

EUTHANASIA : Efforts to allow **assisted suicide** have gained traction around the world in the recent past, with Albania, Colombia and Germany having legalised it in various forms including India.

WHAT IS EUTHANAISA

a) It is the practice of **intentionally ending a life** in order to relieve pain and suffering.

b) Active : use of lethal substances or forces v. Passive : **withholding /stopping o**f common treatments, such as antibiotics, necessary for the continuance of life.

HOW >Ethical implications of these acts *have already been debated* but we need to debate how such a law would be operationalized.

WHY? This will help to ensure the constitutionally guaranteed right to bodily integrity and autonomy, and to minimise misuse of the law.

WHAT DID SUPREME COURT SAY>

In its judgments in the Aruna Shanbaug and Gian Kaur cases, the Supreme Court has stated that the law currently only permits passive euthanasia.

WHY NOT ACTIVE> The administration of active euthanasia or assisted suicide would **constitute attempts to commit or abet suicide** under the Indian Penal Code, 1860. However, in both these judgments, the court stated explicitly that assisted suicide was only illegal in the absence of a law permitting it. Therefore, assisted suicide could be legalised if legislation was passed by Parliament to that effect.

THE LAW : **The Treatment of Terminally Ill Patients Bill, 2016**

DRAFT BILL – WHAT DOES IT SAY> It is a good move to ONLY *legalise passive euthanasia,* as discussed in the judgement pertaining to Aruna Shanbaug.

1. A terminally ill patient above the age of 16 years **can decide** on whether to continue further treatment or allow nature to take its own course.

2. The Bill **provides protection to patients and doctors** from any liability for withholding or withdrawing medical treatment and states that palliative care (pain management) can continue.

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3. When a patient communicates her or his decision to the medical practitioner, such decision is binding on the medical practitioner.

4. However, the draft also notes that the medical practitioner must be "satisfied" that the patient is "competent" and that the decision has been taken on free will.

SAFEGUARDS :

- There will be a panel of medical experts to decide on case by case basis.
- The draft also lays down the process for seeking euthanasia, right from the composition of the medical team to moving the high court for permission.

GOOD THINGS	BAD THINGS
1. This Bill is a bold and welcome step in many respects, and is a significant improvement over the draft Ministry Bill that it is based on. 2. It moves away from decision-making based on the 'best interests' of the patient and recognises the right to die with dignity. 3. It does not permit active euthanasia. 4. Once the practitioner is satisfied that the patient is competent and has taken an informed decision, the decision will be confirmed by a panel of three independent medical practitioners. 5. However, there is need to clearly think through some of the provisions in this Bill and the procedures it sets out.	1. Like the draft Bill, it defines "terminal illness" as a **persistent and irreversible vegetative condition** under which it is not possible for the patient to lead a "meaningful life". 2. The use of this **subjective phrase** would require second parties to decide whether a person in a permanent vegetative state is living a meaningful life. 3. Persons with disabilities, in particular, are likely to be disadvantaged by such an understanding of "terminal illness". 4. It also gives rise to the practical question of how a person in a permanent vegetative state will be able to self-administer the lethal dosage to commit suicide. 5. In the case of incompetent patients, or competent patients who have not taken an informed decision about their medical treatment, the Bill lays down a **lengthy and cumbersome process** like asking permission from High Court and getting clearance from MCI, before any action can be taken for the cessation of life. Such a procedure is advisable for an act like assisted suicide which might be

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	prone to abuse. 6. However, it would be a **violation of patient autonomy** if it were applied to instances of merely withholding or withdrawing medical treatment. Decisions on such withdrawal must not tie up the medical practitioner and family of the patient in litigation. 7. Further, given that the *MCI has been plagued by corruption and incompetence*, it is not advisable to place complete reliance on it. Rather, its role should ideally be limited to framing guidelines and providing guidance when requested.

SC for broad anti-torture legislation

Supreme Court: India may be finding it tough to secure extraditions because there is a fear within the international community that the accused persons would be subject to torture here

CONSTITUTION OF INDIA: It is a matter of both Article 21 (fundamental right to life and dignity) and of international reputation that the government must consider promulgating a standalone, comprehensive law to define and punish torture as an instrument of "human degradation" by state authorities

- ❖ The court referred to the setback suffered by the CBI in its efforts to get Kim Davy — a Danish citizen and prime accused in the Purulia arms drop case of 1995 — extradited from Denmark
- ❖ A Danish court had rejected the plea on the ground that he would risk "torture or other inhuman treatment" in India

UN CONVENTION AGAINST TORTURE> India has signed the UN Convention against torture way back in 1997, but has still not ratified it. The Convention defines torture as a criminal offence

INDIA :

- ✓ No steps have been taken to implement the Prevention of Torture Bill 2010 even six years after it was passed by the Lok Sabha on May 6, 2010 and recommended by a Select Committee of the Rajya Sabha

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- ✓ Centre has also avoided an independent legislation on torture, saying that some States were not in favour of such a law and the Indian Penal Code and the Criminal Procedure Code were more than sufficient

- ✓ A standalone legislation will certainly go a long way in creating the necessary environment to prevent abuse of custodial torture and human dignity of citizen

- ✓ **Support from States:** 90% of the States had no objection for a special law on torture and the NHRC itself had strongly supported the need for such a law

- ✓ The Indian Penal Code does not specifically and comprehensively address the various aspects of custodial torture and was grossly inadequate in addressing the spiralling situation of custodial violence across the country

- ✓ NHRC kept count: The NHRC kept count of incidents of custodial torture only if the inhuman treatment led to death and not otherwise. So a majority of cases simply went unreported.

- ✓ Unlike custodial deaths, the police are not required to report cases of torture which do not result in deaths to the NHRC

LIQUOR BAN ON HIGHWAYS – LEGAL EYE.

CONCEPT OF PP : "Polycentric problems" means that when a social issue involves a complex set of interdependent relationships, then if you change one feature – others will have unforeseen and far-reaching changes. This is the problem which judiciary faces right now.

- SUPREME COURT ORDER ON LIQUOR PROHIBITION : The Supreme Court's order on December 15, 2016 — which it modified and expanded on *March 31, 2017* — prohibiting the sale of alcohol within 500 metres of national and State highways highlights the perils of polycentric adjudication.

- SEPARATION OF POWERS IN INDIAN CONSTITUTION : Separation of powers, in Indian constitution - between the *executive, the legislature, and the judiciary,* and places policymaking firmly in the domain of the executive. But this order a is a classic example of policymaking, and that the Supreme Court has indulged in "judicial overreach".

- WHAT DID SC REPLY > It held that this is an "Public Interest Litigation"

- In both orders, **SC** referred - number of government policy documents that drew a correlation between alcohol consumption and road accidents. It held that liquor licences should NOT be granted on national and state highways at the cost of endangering human lives and safety. Court came to this conclusion based *on the expert determination of the Union government.*

NOW : QUESTION IS : what should be done about a problem, and who should do it.

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- Irrespective of whether the government should grant liquor licences in the proximity of highways – This is **not something which court should answer. T**he Supreme Court's reference to the "expert determination" of the Union government does not help, because the question is not whether the government's determination is correct or incorrect, but which body is authorised to act upon that determination.

The court observed that it was "not fashion[ing] its own policy but enforc[ing] the right to life under Article 21 of the Constitution based on the considered view of expert bodies".

ARGUMENT OF THE COURT : Road deaths could be prevented if the state was to refuse to grant liquor licences in the proximity of highways. The state's failure to do so is a breach of its obligations under Article 21, and the court's order merely enforced a fundamental right by requiring the state to act.

CRUCIAL ISSUES :

1. MISSED THE DEGREE OF PROXIMITY : The court ought to have provided a test for the degree of proximity between state (in)action and loss of life, for a finding that Article 21 had been breached. Say an for an example, a person may suffer heart attack after eating junk foods, can the court do the same here?

2. DOES NOT REST ON FIRM EVIDENCE : The court's conclusion ought to have rested on firmer evidentiary foundations than it did.

3. POWER TO DO COMPLETE JUSTICE : The court concluded by clarifying that it was passing orders under Article 142 of the Constitution. Article 142 empowers the Supreme Court to do "complete justice" in any case before it. However, this power is bounded by the further requirement that the court act "within its jurisdiction". Article 142, therefore, is not a carte blanche for the Supreme Court to implement its vision of justice, without regard to issues of institutional competence and legitimacy.

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DIRECTIVE PRINCIPLES OF STATE POLICY

PROHIBITION ON COW SLAUGTHER

ARTICLE 48 : The State shall endeavour to …….. prohibiting the slaughter of cows and calves and other milch and draught cattle.

CONSTITUTENT ASSEMBLY :

- In February 1948, the first draft of the Constitution was placed before the Assembly. It contained no reference to cow slaughter.
- *The cow protection brigade within the Assembly pushed for an amendment seeking for cow protection as a fundamental right.* Ambedkar and his team of draftsmen came up with a **constitutional compromise**.

- A directive principle, seemingly based on economic and scientific grounds, was allowed to be introduced by *Pandit Thakurdas Bhargava*, a prosperous Brahmin lawyer from Hisar. It read: "The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the **breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."**

- Another cow proponent, Seth Govind Das, amplified Ambedkar's lawyerly thinking in the matter. "I had then stated that just as *the practice of untouchability was going to be declared an offence* so also **we should declare the slaughter of cows to be an offence….."**

The economic backdoor :

- Protection ostensibly was restricted to cows and calves, milch cattle and those cattle capable of pulling heavy loads.

- A bench of five judges of the Supreme Court in the 1959 case of *Mohammed Hanif Quareshi v the State of Bihar* strengthened the compromise when it did not uphold a complete ban on slaughter.

HELD : The court finally concluded: "

(i) a total ban on the slaughter of cows of all age and calves of cows and calves of she-buffaloes, male and female, **is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48**;

(ii) a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid; and

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(iii) a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals **cannot be supported as reasonable in the interest of the general public."**

SUPREME COURT OF INDIA – WORKING

SYLLABUS : Supreme Court and High Courts: (a) Appointments and transfer. (b) Powers, functions and jurisdiction.

APPOINTMENT OF SC JUDGES - HOW THEY SHOULD BE>

APRIL 16TH : The Supreme Court collegium has recently cleared a record 51 names for high court judge posts. Of these, 20 are judicial officers and 31 are advocates.

- Other than this, not much information is available in the public domain about the expertise of the selected individuals.
- In the rush to fill judicial vacancies, there should be no compromise in the quality of judicial decisions and ensure judges are capable of dealing with increasingly complex issues interlinking **law, economics, technology, intellectual property, competition and allied fields.**

ECONOMICALLY RESPONSIBLE JUSTICE : An inability or unwillingness to take into account economic considerations in judicial decisions is putting a significant number of jobs at risk, and a substantial amount of investment in peril.

- Knowledge about the interfaces between law, economics, technology, cybersecurity, intellectual property and allied fields—and their overlaps—is increasingly becoming relevant for the higher judiciary in order for them **to adjudicate fairly.**
- The higher judiciary is increasingly dealing with issues which have large-scale economic and commercial impact. These include allocation of natural resources such as spectrum, coal blocks, allowing mining of sand and sandstone, use of the Aadhaar card to access essential services, data privacy and security and waiver of farm loans.
- A lack of economic analysis while passing judgement has the potential to create an adverse impact on employment, growth of infrastructure, hospitality, tourism, real estate and other economically relevant sectors, revenue of state and Central governments, and balance sheets of banks and financial institutions, without having the desired positive impact on social behaviour.

EXAMPLE : The Supreme Court's recent order banning the sale of liquor near highways could **adversely affect the tourism sector and result in the loss of a great many jobs.**

- Alcohol consumption is not a social ill but irresponsible drinking is.

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EARLIER :

- The Indian judiciary has dealt with socially significant issues such as health, education, reservations in education and employment, priority sector lending, bank nationalization, bank branch licensing in remote locations, etc.
- While such issues have direct and indirect economic impact, the need for conducting economic analysis of judicial decisions was not felt, perhaps owing to our limited understanding of the linkages between judicial decisions and economic governance.
- Efforts in the past to undertake economic analysis of judicial decisions have remained half-baked. For instance, in *M.L. Sharma v. Principal Secretary And Ors*, the Supreme Court heard parties on the potential economic impact of cancellation of coal blocks, but was persuaded by Central government submissions that it was fully prepared to deal with the impact of cancellation and levy of additional penalty on coal block allottees
- Thus, while the economic impact of decisions may often be recognized, **the depth of economic analysis and the significance given to it while decision making seem to be inadequate.**
- A comprehensive economic analysis not only aids in sound decision making, but also promotes transparency and improves the quality of decision making.
- It needs to be recognized that the economic impact of judicial orders could be direct, indirect, patent or latent, and different stakeholder groups could be differently affected.
- The economic impact assessment of judicial decisions will aid in upholding the credibility of the judiciary and the quality of judicial decision making, which is increasingly coming under scrutiny. Judges need to understand the complex linkages between various areas of governance and economic and legal activity today to ensure delivery of economically responsible justice.

Judicial performance index proposed

NEWS : The NITI Aayog has proposed the introduction of a judicial performance index.

FOR WHAT > In a bid to fix justice system that is in 'dire need of reform.'

- ✓ to reduce delays and
- ✓ the outsourcing of non-core functions of the police to private agencies or other government departments.

SPECIFIC OBJECTIVES :

A. FOR REDUCING DELAYS :

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1. Changes in criminal justice and procedural laws - a repeal of all irrelevant legislation by March 2019 and reforms in land ownership laws — which account for 67% of litigants in civil suits.

2. This index could help High Courts and their chief justices keep track of the performance and processes at district courts and subordinate levels for reducing delay.

3. This will entail fixing of 'non-mandatory time frames for different types of cases to benchmark when a case has been delayed.'

B. OUTSOURCING OF NON-CORE FUNCTIONS : "Functions such as serving court summons and antecedents and address verification for passport applications or job verifications can be outsourced…" the Aayog said in a chapter on improving the rule of law.

C. OTHER : Citing inordinate delays in India's judicial system and its low rank on enforcing contracts in the World Bank's ease of doing business report for 2017, the think tank has also called for streamlining judicial appointments on the basis of online real-time statistics on the workload of pending cases.

POWER TO DO COMPLETE JUSTICE

With the power of judicial review, the expanse of our Supreme Court's jurisdiction is unmatched compared to other judicial forums around the world. The greater the power, the greater the responsibility in its exercise.

PUBLIC INTEREST LITIGATION : The genesis of Public Interest Litigation in listening to the voice of the voiceless and giving access to the poor, the marginalised and the weak is a unique experiment to be lauded. It has also effectively, on occasion, dealt with the corroding effect of corruption.

But for the Supreme Court's proactive role, it would have taken many more years for Compressed Natural Gas (CNG) to be the fuel of preference in the transportation sector. Dealing with bonded labour, neglected children, the non-payment of minimum wages to workers, violations of labour laws, sexual harassment at the work place, harassment while in police custody, are a few examples where the court has constructively intervened.

These are positives, which earned the institution kudos. But in some areas, the Supreme Court is ill-equipped to make judicial pronouncements.

ARTICLE 142 :

- The underlying basis of the Article is the Latin maxim *fiat justitia ruat caelum* (let justice be done though the heavens fall).

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- So far it has been used for : failures of the Uttar Pradesh government and the Central Bureau of Investigation (CBI), and the judiciary's own tardy processes

The recent decision invoking Article 142 of the Constitution of India, prohibiting the sale of liquor in establishments, restaurants, vends, etc., within 500 metres of national and state highways makes one question the role of the Supreme Court.

COMMENT : Recognising the desire of the court to save lives lost due to drunken driving, such judicial diktats are not the outcome of a legal suit between parties. The location of hotels, restaurants or vends, selling liquor is a pure policy decision, best left to governments to take.

  - If public interest becomes the raison-d'être of decision-making, then the contours of the constitutional concept of the separation of powers will be blurred. The judiciary might then be persuaded to deal with every ill that confronts this country.
- On occasion, while exercising this power, personal liberty is at stake and the rule of law in jeopardy. Sometimes, the use of Article 142 has economic consequences that tend to destabilise the economy.
- The cancellation of all telecom licenses to serve the cause of public interest without individual culpability jeopardised the survival of entities.
- Rising non-performing assets (NPAs) are, to some extent, the result of judicial decisions. Courts may not, or may choose not to, consider their impact on the economy. The telecom sector is, till today, reeling under the after-effects of the Supreme Court judgment.
- The consequences of cancellation of all allocations of coal mines have adversely impacted the balance-sheets of public sector banks. One of the consequences of such omnibus cancellations is defaults on bank loans. The consequent NPAs impact the economy.
- The decision to ban the sale of diesel cars with an engine capacity of 2000 cc and above is yet another instance of judicial overreach. This, in fact, jeopardised possible foreign investment. The decision was later reviewed. In the long term, such decisions dampen the spirits of foreign investors.

CONCLUSION :

- Judges are not superhuman. They, too, are mortals. This is why they have to be exceptionally careful in rendering decisions, which cause unintended consequences.
- Several judgments of the court reiterate the principle that recourse to Article 142 of the Constitution is inappropriate, wherever a statutory remedy is available. This has not deterred the Supreme Court from taking the cover of Article 142 in its desire to do justice. **The problem is that there is no court above the Supreme Court**.
- Lawyers, who practise in the Supreme Court, day in and day out, are seldom willing to stand up and question this practice. It is time to stand up and for judges to be more circumspect when taking decisions beyond the apparent contours of their jurisdiction.

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123RD AMENDMENT TO CONSTITUTION OF INDIA

1. Whether the special protections and privileges to *Scheduled Castes (SCs)* and *Scheduled Tribes (STs)* applicable to backward class of citizens ?

T.T. Krishnamachari in the Constituent Assembly on November 30, 1948 said that "It does not apply to a backward caste"

2. Whether **National Commission for Backward Classes (NCBC)** is a *statutory body or constitutional Body*?

The current NCBC was created under an Act of Parliament in 1993 i.e., it is a statutory body. But **123rd amendment** to the Constitution ,**passed by Lok Sabha on april 10th**, will add article **338-B** and give the status of "constitutional body"

3. SO WHAT?

- This will make BCs in league with the SC/STs as victims of discrimination, exclusion and violence.
- It not only is **illogical and lacks historical justification**, but is fraught with several challenges to the way India runs its welfare system.

4. What about Art.340? Article 340 which deals with the need to identify *those "socially and educationally backward classes*", understand the conditions of their backwardness, and make recommendations to remove the difficulties they face.

Steps taken as per the spirit of this Article 340:

- ✓ Kaka Kalelkar commission in the 1950s and
- ✓ B.P. Mandal commission in the 1970s
- ✓ 1993 NCBC Act.

5. Once the 123rd amendment becomes law :

- ✓ **Article 340 will be dead** without being accorded the dignity of a repeal.
- ✓ Negates Constituent Assembly's understanding on this matter that - there are classes, not castes, which suffer from social and educational backwardness, and the state has the burden of allocating adequate funds to ameliorate their conditions

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- ✓ NCBC will treat the developmental issues related to BCs on a par with caste discrimination and untouchability suffered by SCs and even by STs.

- ✓ The new NCBC will hear grievances, inquire into complaints, summon officials given its powers as a civil court, issue directions and have the right to be consulted by both Union and the States on policy matters related to BCs.

6. ISSUE : In fact, the new NCBC is a solution in search of the problem. It is bound to create more problems than it is capable of solving.

What will happen if **two 'constitutional' national commissions** will clash, each defending its wards.

Example : SC V.BC.

WAITING FOR LOKPAL - COMPREHENSIVE ANALYSIS

SYLLABUS : Ombudsman: Lokayukta, Lokpal etc

INSTITUTION OF OMDUDSMAN : The idea of an anti-corruption body and an ombudsman to look into corruption allegations against administrators, including legislators, has been floating around for over five decades now.

- It finally got shape with the passing of the Lokpal and Lokayuktas Bill, 2013 after Anna Hazare movement.

HISTORY OF LOKPAL AND LOK-AYUKTA
1963: The idea of an ombudsman first came up in parliament during a discussion on budget allocation for the Law Ministry.
1966: The *First Administrative Reforms Commission* recommended the setting up of two independent authorities- at the central and state level, to look into complaints against public functionaries, including MPs.
1968: The Lokpal Bill was introduced in parliament but was not passed. Eight attempts were made till 2011 to pass the Bill, but in vain.
2002: The Commission to Review the Working of the Constitution headed by M.N. Venkatachiliah recommended the appointment of the Lokpal and Lokayuktas; also recommended that the PM be kept out of the ambit of the authority.

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2005: The second Administrative Reforms Commission chaired by *Veerappa Moily* recommended that office of Lokpal be established without delay.
2011: The government formed a Group of Ministers, chaired by Pranab Mukherjee to suggest measures to tackle corruption and examine the proposal of a Lokpal Bill.
2013: Lokpal and Lokayuktas Bill, 2013, was passed in both Houses of Parliament.
2016: Lok Sabha agreed to amend the Lokpal Act and Bill was sent to Standing Committee for review.

SALIENT FEATURES OF LOKPAL :

- The Act allows setting up of anti-corruption ombudsman called *Lokpal* at the Centre and *Lokayukta* at the State-level.
- The Lokpal will consist of a chairperson and a maximum of **eight members**.
- The Lokpal will cover all categories of public servants, including the Prime Minister. But the armed forces do not come under the ambit of Lokpal.
- The Act also incorporates provisions for **attachment and confiscation of property acquired by corrupt means,** even while the prosecution is pending.
- The States will have to institute Lokayukta within one year of the commencement of the Act.
- It has been made mandatory for public servants to declare their assets and liabilities along with that of their spouse and dependent children.
- The Act also ensures that public servants who act as whistleblowers are protected. A separate Whistle Blowers Protection Act was passed for this purpose.

POWERS OF LOKPAL :

- The Lokpal will have the power of superintendence and direction over any investigation agency including CBI for cases referred to them by the ombudsman.
- As per the Act, the Lokpal can summon or question any public servant if there exists a prima facie case against the person, even before an investigation agency (such as vigilance or CBI) has begun the probe. A
- Any officer of the CBI investigating a case referred to it by the Lokpal, shall not be transferred without the approval of the Lokpal.

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- An investigation must be completed within six months. However, the Lokpal or Lokayukta may allow extensions of six months at a time provided the reasons for the need of such extensions are given in writing.
- Special courts will be instituted to conduct trials on cases referred by Lokpal.
- The Lokpal can award fine up to Rs. 2 lakh for "false, frivolous or vexatious" complaints.

APPOINTMENT OF LOKPAL : A five-member panel comprising the *Prime Minister, the Lok Sabha Speaker, the Leader of the Opposition, the Chief Justice of India and an eminent jurist nominated by the President,* selects the Lokpal.

WHY IS LOKPAL HAS NOT BEEN APPOINTED YET> The current Lok Sabha does not have a Leader of Opposition to sit on the selection panel. For an opposition party to get the Leader of the Opposition post, it should have a strength of at least 10% of the total members in the House and none of the parties managed to cross this mark. This unique situation called for an amendment to the existing Lokpal Act to change the Leader of Opposition to Leader of the largest Opposition party.

While the amendment was moved and the Standing Committee approved it, it is yet to be tabled in the Parliament. With the next Parliament session expected to begin in July, the Lokpal is unlikely to see the light till then.

CURRENT ISSUES :

ISSUE 1 : Lokpal and Lokayuktas Act is still not put into operation.

WHY> As per the **Lokpal and Lokayuktas Act of 2013,** the Leader of Opposition in the Lok Sabha will be part of the *Lokpal selection panel*. At present, there is no Leader of Opposition in the Lok Sabha.

- GOVERNMENT ARGUMENT 1 : "Unless the proposed amendment making Leader of the Largest Opposition party as Leader of Opposition is passed by Parliament, the Lokpal can't be appointed"

ISSUE 2 : Now Supreme Court asked to Implement Lok pal as soon as possible.

GOVERNMENT ARGUMENT 2 : Court has no powers to direct the government on when and how the law should be enforced.

ANALYSIS :

- A lack of will on the part of the government to implement the anti-corruption law can be inferred from its various actions and inactions in the last three years.
- Instead of just altering composition of the selection committee, the government introduced a 10-page Bill which proposed to fundamentally dilute the original law.

DILUTION OF LOK PAL -

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1. NOT REQUIRED TO DISCLOSE THE ASSETS :

- Section 44 related to **disclosure of assets of public servants** was to be operationalised irrespective of appointment of the Lokpal.
- To prevent the asset disclosure provision from taking effect, **the government introduced another amendment Bill** ; but this did not modify the composition of the selection committee which was needed to appoint the Lokpal.

2. NOT REQUIRED TO DISCLOSE THE ASSETS OF THEIR SPOUSES AND DEPENDENT CHILDREN :

- EARLIER :Public servants should disclose the assets of their spouses and dependent children
- NOW : This requirement is dispensed with and empowered the Central government to prescribe the form and manner of asset disclosure.
- ANALYSIS : This was a critical blow as the Lokpal was established to act on complaints under the Prevention of Corruption Act (PCA); one of the grounds of criminal misconduct under the PCA relates to a *public servant or any person on his/her behalf being in possession of pecuniary resources or property disproportionate to known sources of income*. Since illegally amassed assets are **often handed over to family members**, public declaration of assets of the spouse and dependent children of the public servants was necessary to enable people to make informed complaints to the Lokpal.

3. PRIOR SANCTION OF GOVERNMENT :

- EARLIER : Power of granting sanction for prosecution of corrupt public servants was in the independent institution of the Lokpal.
- NOW : Lokpal needs to seek permission from the government before it can prosecute officials in cases of corruption, the proposed PCA amendments make a mockery of the independent institution and render the entire exercise of demanding an empowered Lokpal futile.
- ANALYSIS : Experience in India has shown that the requirement for seeking prior sanction from the government for prosecuting government officials is a critical bottleneck and results not only in huge delays but also, and often, in the accused never being prosecuted.

CONCLUSION : So when can the people of India reasonably expect the Modi government to operationalise the Lokpal law, even in its diluted form?

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BEING A CITIZEN OF INDIA – WITH MENTAL ILLNESS?

NEWS : In the *suo moto contempt* petition against Justice C.S. Karnan before a seven-judge bench of the Supreme Court, with the court concluding that the Calcutta high court judge **may not be medically fit to defend** himself in the contempt proceedings, based on his press briefings and orders.

WHAT IS AN UNSOUND MIND>

- Indian contract Act of 1872 : A person is of sound mind if at the time of making a contract, he is "capable of understanding it and forming a rational judgment as to its effects upon his interests".
- *Hari Singh Gond vs State of MP : Supreme court Of India treated unsound mind* a term used to describe varying degrees of mental disorder.

COMMENT : It did great disservice to persons with mental illness in India.

WHY SHOULD CONCERNED ABOUT THIS> The National Mental Health Survey in 2016 said that 150 million people in India have mental illness of a severity that needs treatment.

If we use the Supreme Court's definition, all these people are of unsound mind.

So this would mean that - you can have a guardian imposed, you are not allowed to manage your financial affairs (e.g. operate your bank account), the Hindu Marriage Act gives your spouse the right to divorce you on grounds of unsound mind and the Constitution of India bars you from voting or standing for election i.e., **you stand to lose all your citizenship rights.**

INSTITUTIONAL DISCRIMINATION :

Mental illness is a medical condition while unsoundness of mind is a legal finding

- Equating 'unsound mind' with mental illness is an example of institutional discrimination against persons with mental illness who are denied civil, political, economic, social and cultural rights.
- It also increases **stigma against mental illness** because the law itself affirms the incompetence of persons with mental illness.

UNCRPD : The United Nations Convention on Rights of Persons with Disabilities, ratified by India and applicable to persons with mental illness, says that 'unsoundness of mind' and other such discriminatory labels **are not legitimate reasons for the denial of legal capacity to persons with mental illness.**

WAY FORWARD :

- Parliament or the Supreme Court needs to rectify this situation and rescue the citizenship rights of a large minority in this country with mental illness.

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- They need to properly define legal incapacity (discarding the term 'unsound mind') and ensuring it is not equated with mental incapacity (mental illness).

RIGHT TO RECALL

1. CONCEPT : Ancient Athenians, under their unique democracy, held an referendum to ostracize people, everyone writes whoever they want to leave/ostracize – they will be banned for 10 years. Eventhough this lacked due process + justice – it will still give chance to people to remove corrupt.

2. RIGHT TO RECALL : The modern-day right to recall is a direct successor of such methods. A recall election is typically a process by which voters seek to remove *elected officials* through a direct vote before their term is completed. This was followed in Canada and U.S..

3. IN INDIA : The concept of "Rajdharma", wherein the lack of effective governance was a cause for removal of a king, has been spoken about since the Vedic times

a) J.P. Narayan + M.N.ROY –asked for similar methods to recall elected officials due to non-performance.

b) LOGIC : In a first-past-the-post system in a democracy, unfortunately, not every elected representative truly enjoys the mandate of the people. Logic and justice necessitate that if the people have the power to elect their representatives, they should also have the power to *remove these representatives when they engage in misdeeds or fail to fulfil their duties.*

WHY DO NEED RIGHT TO RECALL>A free and fair election is a right of the citizens of the country. When their elected representatives no longer enjoy the confidence of the people, the people must have a right to remove them.

c) EXISTING LAW : The Representation of the People Act, 1951, only provides for "vacation of office upon the commission of certain offences and does not account for general incompetence of the representatives or dissatisfaction of the electorate as a ground for vacation".

d) IT SHOULD NOT BE MISUSED – SAFEGUARDS :

- Any petition of right to recall should not be frivolous + should not be a source of harassment to elected representatives.

- SAFEGUARDS :

  a) Initial recall petition to kick-start the process and electronic-based voting to finally decide its outcome.

  b) To ensure transparency and independence, chief petition officers from within the Election Commission should be designated to supervise and execute the process

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MISCELLANEOUS - CONSTITUTIONAL LAW

ELECTION COMMISSION - WORKING

NEWS : The Election Commission's proposal to have the **Representation of People Act (RPA)** amended *to disqualify legislators charge-sheeted for bribing voters* is well-intentioned but bad in principle. It attempts to turn the dictum of any justice system — that a person is innocent until proven guilty — on its head.

- The EC has drawn its recommendation from a proposal the **Law Commission mooted in 2014**. The Commission had called for including a new section in the RPA to expand the ambit of the disqualification provision to include a person against whom "a charge has been framed by a competent court for an offence punishable by at least five years imprisonment" for a period of six years or "till the date of quashing of charge or acquittal, whichever is earlier".
- The call for such a drastic measure evidently stems from the failure to curb corruption in elections. Indeed, democracy needs to be cleansed of **electoral malpractices,** but that must be done by the patient labour of improving processes and reforming institutions.

TAMILNADU :

- In the past one year, the EC has countermanded three assembly elections in Tamil Nadu — in the R.K. Nagar seat most recently — after it found evidence that **voters were being offered bribes by candidates**.
- In the Aruvakurichi and Thanjavur seats, where the EC **rescinded elections** in 2016 after finding evidence of cash distribution by candidates, the parties renominated the same persons.

RPA :

- The RPA, indeed, has a provision to disqualify and bar a legislator if convicted for poll graft. The keyword here, however, is conviction.
- It is said that the RPA provisions have failed **to act as a deterrent against electoral malpractices** since trials extend for years and rarely result in convictions.

JUDICIAL REFORM : The way out is to reform the judicial process and ensure early and time-bound trial and closure in cases. Surely, there must be effective deterrence to prevent the subversion of due process, but the onus for ensuring that must to be on institutions.

- The EC has also sought to make bribery a cognisable offence under the Code of Criminal Procedure (CrPC), which would bestow on the police the authority to arrest an accused without a warrant. These are draconian measures, which violate the principles of natural justice.

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- The EC had used provisions of the existing legal framework in the past to end violent acts like **booth capturing.**

It is surely capable of inventive, but fair, methods to curtail the use of money in elections.

Redefining citizenship - The Hindu

- ISSUE: In March, the Supreme Court requested the **government's views on a PIL s**eeking to impose a **lifetime ban** on contesting elections for those sentenced to imprisonment for more than two years. Currently, the ban *extends to six years after the completion of a sentence.*

- *EC REPONSE:* The proposed change, which is **supported by the Election Commission,** would effectively end the electoral career of many prominent political leaders.

SC ON ELECTIONS :

The court has held that

- citizens are entitled to cast a 'none of the above' vote,
- **that prisoners are disqualified f**rom standing for election during periods of incarceration,
- that the concealment of criminal antecedents constitutes a corrupt practice under the law, and
- that electoral appeals to caste and religion are impermissible.

Around the turn of the century, the court increasingly began making decisions addressing the **'criminalisation of politics'**.

- Yet, it was left to the wisdom of the electorate to decide whom to vote for.

Disquieting developments : : More recently, however, the court has gone further; it has attempted to gradually reshape the ballot. .

First, the court has increasingly used the **regrettable, caste-based taxonomy of 'purity' and 'pollution' in its decisions.**

- For example, in 2013, it endorsed the decision of the Patna High Court observing that candidates with criminal records pollute the electoral process, affect the sanctity of elections and taint democracy.

- The court's language is symptomatic of its conception of its own role — **as a sentinel of democracy seeking to 'disinfect' the electoral process.** This is more than a poor choice of

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words. The court has the power to frame debate and influence the language of argument in ways that perhaps no other institution does.

Second, the court's recent decisions have meant that whether the right to vote is a constitutional right or merely a statutory privilege is still a matter of contestation.

- Article 326 of the Constitution provides for universal adult suffrage, but does not specifically mention the right to vote.
- Rights that are not explicitly set out in the Constitution, such as the right to privacy, have routinely been impliedly read into the text. But the court has refused to categorically recognise the right to vote as an inalienable constitutional right, frequently holding that it is a privilege that can be taken away as easily as it is granted.

It is disconcerting that the court still does not clearly acknowledge a constitutional right to vote. Participation in the electoral process is often seen as a gateway right, or a 'right of rights'.

The absence of a constitutional right to vote has real consequences, for it makes it easier to impose wide restrictions on who can exercise that right, and the circumstances in which they may do so. Blanket prohibitions on voting are the surest way of alienating a political community. The embargo is particularly draconian, for all prisoners, regardless of the seriousness of their offences or the length of their sentences, are denied the vote. Moreover, **prisoners awaiting trial are also denied this 'privilege'.**

CONCLUSION : The right to vote and the right to contest elections are fundamental markers of citizenship in a constitutional democracy. Incrementally yet decisively, the court is changing what it means to be a citizen of this country. It may soon take another step in that perilous direction.

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