UPSC

NCERT Summary

Political Debate – 2

Arguments Against Legislative Council

- In view of inherent weaknesses of Vidhan Parishads (Legislative Councils), some critics are of the view that these should be abolished. According to them, in case Parishad agrees with what is passed by the Assembly then it is simply a superfluous House. In case, it does not then it will be characterized as a mischievous. House and will be charged as citadel of reaction standing on the way of policies and programme of duly elected House.
- Another criticism levied against this House is that it is no check on the Assembly. A money bill can be delayed only for a period of 14 days, which is very insufficient period for the members to express their view point. Even in the case of non-money bills, it can only delay a bill for a period of 4 months and if the Assembly is bent upon passing a measure no efforts on the part of the Parishad can check it.
- The Council of Ministers also does not much fear from it because a vote of no confidence does not have any effect for the Ministry.
- It is also argued that the Parishads are usually not even progressive. These have no directly elected elements. Some of the members are nominated ones. Their composition is such that these are not supposed to know public sentiments. Thus, the House is characterised as reactionary and conservative.
- It is argued that in these Houses scholarly or literary or social workers are not nominated. Instead, this chamber is used for providing berth to defeated politicians or those active party workers who somehow or other could not be accommodated in the Assembly or dissidents in the party to avoid party frictions. In other words, the Upper Houses neither represent any caste, class or section of society but only vested interests. All elections or nominations are made on party basis and these chambers are only for increasing party interests and influences.
- A usual argument is that since these chambers do not serve much useful purpose, therefore, their maintenance is not worth the cost which the nation is required to pay for its upkeep and by way of salaries, allowances and other expenses of the members. In case Parishads are

abolished the tax payer will be much saved and the money saved can be used for other useful purposes, including economic development.

- The very fact that only six States have retained Vidhan Parishad proves that bicameralism is not a very popular institution in India in the states. Moreover, practical experience has shown that those states which have no Legislative Councils are in no way doing work less efficiently than the other states. In case, the Councils had been doing very useful work, then the other states must have gone for it.
- Then it is not clear to whom the Parishads represent. In case it is said that in it the teachers, and graduates are to be given representation, along with those who are engaged, in the promotion of co-operative work, then why only these vocations and why not other very important vocations and occupations.
- In case it is felt that in that those who have excelled in any walk of state life, should be given representation, then why nomination has been kept at only 1/6th. It should have been kept much higher.
- It is presumed that in this House there will be calm and serene atmosphere, where every problem will be discussed in a passionless atmosphere because the elders have held out no promises to the people at the time of their election.
- But again this is not true because in the Upper House also political considerations very much weigh with the members. Each member votes more or less on party lines and it is said that an Upper House is just extension of the Lower House, in so far as political parties are concerned. There is also no calm atmosphere in these Houses. The elders quite often quarrel with each other and do not provide much needed calmness.
- According to some thinkers, Upper Houses are necessary because these give sufficient time to the people to express their views. According to them when a bill is traveling from the Assembly to the Parishad, the people come to know what is going to be passed. Intervening time can be utilised for expressing opinion by the public and in case there are strong reservations, the bill can be modified as well.
- But again this is not correct because the time taken in passing each bill in one House and stages through which it passes are so many that the people have sufficient time to express themselves, through press and platform. On this ground also, the Upper Houses have no utility.

To conclude, the Upper Houses of State Legislatures are likely to remain under criticisms, in case these are used for providing berth to defeated politicians so that they can become Chief Ministers or Ministers by becoming a member of either

House of legislature. Politicians must take the responsibility to firmly establish the prestige of these constitutional institutions.

JUDICIAL ACTIVISM

Judicial activism is a political term used to describe judicial rulings that are suspected to be based upon personal and political considerations other than existing law. Judicial restraint is sometimes used as an antonym of judicial activism. The term may have more specific meaning in certain political contexts. Concerns of judicial activism are closely tied to constitutional interpretation, statutory construction, and separation of powers. The honorable Supreme Court issued a notice to the Union government seeking an explanation of the steps taken by it to ameliorate the plight of Indian students in Australia, who have been facing racially motivated attacks. Foreign policy is widely considered to be nonjusticiable, that is, courts cannot interfere. Yet, the interference by Indian courts has not wholly been condemned. The next, and almost equally striking, instance is a Supreme Court notice questioning the proliferation of Mayawati statues, allegedly worth crores of rupees, in Uttar Pradesh. Like foreign policy, budgetary allocations are non-justiciable. But judicial interference in this matter too has not been deprecated, nor is it worthy of serious censure. The Emergency of 1975 and its aftermath constituted defining moments for judicial activism in India. In the infamous decision in ADM Jabalpur v. Shukla (1976) the Supreme Court permitted civil liberties to be suspended during the Emergency. The very Constitution of India permitted the suspension of civil liberties in Part III, such as the right to personal liberty.

- The Constitution was also amended extensively to permit the excesses of the Emergency. In 1975, therefore, permitting civil liberties to be suspended during the Emergency would arguably have constituted deference both to the intent of the framers of the Constitution and to legislative wisdom - in other words “judicial restraint.”
- The Supreme Court’s decision in that case, however, despite being judicially restrained, struck a devastating blow to civil liberties in India, and was widely condemned thereafter. Justice H.R. Khanna’s eloquent dissent was activist, but celebrated.
- Judicial activism during the Emergency was clearly the need of the hour. Thus, “judicial activism” had a strong moral basis after the Emergency - after all, the Emergency judges ought to have been activist.
- Judicial activism has virtually been constitutionalised in South Africa. The Indian Supreme Court has enforced socio-economic rights, though they are not considered enforceable by the Constitution - the right against malnutrition and the right to shelter are examples. Despite the fact that the Constitution did not permit socioeconomic rights to be justiciable or

enforceable, the Emergency had taught Indian judges that express constitutional provisions may not necessarily translate into social legitimacy.

- Activist judges in India have consequently fashioned innovative remedies to enforce socio- economic rights. The traditional rule that courts will not issue injunctions requiring periodic supervision does not typically apply in socio-economic rights cases, where Indian courts periodically review the implementation of their orders almost in an administrative capacity.
- However, judicial activism in India has now taken on an interesting face. The courts in India pursue a form of review which can be described at best as 'dialogic' - a term used famously by Peter Hogg and Allison Bushell in the context of the Canadian Supreme Court's decisions.
- The Indian Supreme Court's gaze has now gone beyond the protection of the socially and economically downtrodden, and into the realm of public administration. However, its opinions often resemble aspirations rather than binding pronouncements.
- These opinions bear a strong resemblance to unenforceable, advisory opinions since it will be difficult to comprehensively enforce them as law. They nonetheless set the tone for public discourse and debate.
- Their greatest value lies in the creation of a dialogue with the other branches of government, in the consequent endeavor towards transparency in public administration, and in their giving a voice to the Indian citizen, albeit only the citizen who has the time and the resources to petition the courts.
- Attempts to petition the Supreme Court recently have demonstrated this trend towards dialogue and transparency. Following the Mumbai terror attacks of November 2008, a former Attorney General of India filed a petition before the Supreme Court seeking to better equip the Indian police. The public interest petition in the context of the attacks on Indian students in Australia tells a similar tale.
- However, a court which issues unenforceable (one should say enforceable with some difficulty) opinions, toys with the dangerous possibility of delegitimating its own existence. It also begs the question of institutional efficiency: of whether such functions can be better performed by another institution which does not have the Supreme Court's case load but one which matches its visibility - if such an institution were ever capable of being devised. However, whispers of corruption in the judiciary, and the act of withholding information regarding judges' assets, do not make the case for judicial activism any stronger.
- For the first time during the judgment of the majority in the Keshavananda Bharati case (the fundamental rights case) court held that a Constitutional Amendment duly passed by the legislature was invalid if it damages or

destroying its basic structure. This was a gigantic innovative judicial leap unknown to any legal system. The masterstroke was that the judgment could not be annulled by any amendment to be made by Parliament because the basic structure doctrine was vague and amorphous.

- Judicial activism earned a human face in India by liberalising access to justice and giving relief to disadvantaged groups and the have-nots under the leadership of Justices V.R. Krishna Iyer and P.N. Bhagwati. The Supreme Court gained in stature and legitimacy. Later, when the independence of the judiciary was threatened by punitive transfers, the court entered the arena of judicial appointments and transfers.
- With the increasing criminalisation and misgovernance and the complete apathy of the executive, the court (under the leadership of Chief Justice Verma and Justices Bharucha and Sen) took up the case of terrorist funding linked to political corruption through the 'hawala' route in the Vineet Narain Case (Jain hawala Case). A cover-up by the Central Bureau of Investigation to protect its political masters was exposed and the court monitored the investigation upholding the principle "Be you ever so high the law is above you."
- The courts on several occasions have issued directions in public interest litigation (PIL) covering a wide spectrum such as road safety, pollution, illegal structures in VIP zones, monkey menace, dog menace, unpaid dues by former and serving legislators, nursery admissions, and admissions in institutions of higher learning. There is no doubt that sometimes these orders are triggered by righteous indignation and emotional responses.
- The common citizens have discovered that the administration has become so apathetic and non-performing and corruption and criminality so widespread that they have no recourse except to move the courts through PIL, enlarging the field for judicial intervention.
- The great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach. Judicial activism has come to stay in India and will prosper as long as the judiciary is respected and is not undermined by negative perceptions, which has overtaken upon the executive and the legislature.
- There is concern among the public about lack of transparency in judicial appointments and a sense of increasing unease because of a lack of a credible mechanism to deal with serious complaints against the higher judiciary.

JUDICIAL REVIEW

- Law will not be in force until an amendment of the constitution relating to the same matter.
- In such situation the provision of that law will again come into force, if it is compatible with the constitution as amended. This is called the Theory of Eclipse.
- In a similar manner, laws made after adoption of the Constitution by the Constituent Assembly must be compatible with the constitution, otherwise the laws and amendments will be deemed to be void-ab-initio.
- Judicial review is actually adopted in the Indian constitution from the constitution of the United States of America. In the Indian constitution, Judicial Review is dealt under Article 13. Judicial Review actually refers that the Constitution is the supreme power of the nation and all laws are under its supremacy. Article 13 deals that
- All pre-constitutional laws, after the coming into force of constitution, if in conflict with it in all or some of its provisions then the provisions of constitution will prevail and the provisions of that pre-constitutional.

IMPACT OF THE 42ND AMENDMENT

The 42nd Amendment enacted during the Emergency made far-reaching changes to curtail the powers of the courts and to make the Parliament sovereign. Firstly, the 42nd Amendment stated that no amendment to the Constitution could be questioned in a Court of Law. And "for the removal of the doubts, it is hereby declared that there shall be no limitation what ever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this constitution." In this manner, through this Amendment the Supreme Court's power to judicial review of constitutional amendments was taken away to establish the complete and total sovereignty of Parliament. The Amendment stated that:

- A High Court cannot pronounce invalid any Central law,
- The Supreme Court shall not pronounce a State law as unconstitutional unless a Central law has also been challenged.

Further, the minimum number of judges of the Supreme Court who shall sit to determine the constitutional validity of any Central or State law shall be seven and in the case of High Court, five. It was also stated that a majority of not less than two-thirds of the judges hearing such a case must agree before a law is declared invalid. But after this the 43rd Amendment was passed which restored the pre-emergency position of the Supreme Court's power of judicial review over laws passed by state legislatures and Parliament.

- As far as Parliament's sovereignty with regard to amending the Constitution is concerned, there is no change. The power of Parliament to amend the Constitution exists as under the 42nd Amendment.
- The judgment of the Supreme Court in the Minerva Mills case in May 1980 was a setback to the position of unlimited powers claimed by the Parliament to amend any part of Constitution. This judgment recognized only limited powers of the Parliament to amend the Constitution without altering the basic structure.
- In such situations, the Supreme Court or High Court interprets the laws as if they are in conformity with the constitution. If such an interpretation is not possible because of inconsistency, and where a separation is possible, the provision that is inconsistent with constitution is considered to be void. In addition to article 13, articles 32, 124, 131, 219, 226 and 246 provide a constitutional bases to the Judicial review in India.
- The Indian Constitution has not recognized the doctrine of separation of powers in its absolute form but the functions of the different organs have been clearly differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ of the functions that essentially belongs to another.
- Though the Constitution has adopted the parliamentary form of government, where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.
- The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy.
- In such type of situations Supreme Court or High Court interprets the law as if they are in conformity with constitution or not. If find it not in conformity, they declare it either whole & if possible to separate, then only that much of provision to be void which are inconsistent with that of the Constitution.
- Judicial review in India comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The judges of the superior courts have beefy entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it.
- It is they who have to ensure that, the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress constitutional limitations. Thus, judicial review is a highly complex and developing subject.

- Judicial review has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution.
- The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.