

1. The absentee Constitutional Court

Context:

- ▶▶ The state of Jammu and Kashmir has been placed under a 'communications lockdown'. The political leaders along with the other individuals have been detained. In these circumstances, Constitutional courts (Supreme courts and High courts) are not taking any action on the infringement of the Fundamental Rights of the people.

Background:

- ▶▶ On August 5, 2019, the Centre's decided to downgrade J&K's 'special status' under Article 370 of the Constitution, and eventually convert it into two separate Union Territories. From then, the State of Jammu and Kashmir has been placed under a 'communications lockdown'. In addition, political leaders along with an unknown number of other individuals have been detained.
- ▶▶ Both moves violate crucial fundamental rights. A communications shutdown violates the freedom of speech and expression, prevents those outside the State from being in touch with their families, and provides cover for civil rights violations. Detention self-evidently violates personal liberty.
- ▶▶ The Judiciary absenteeism: past instance
- ▶▶ The suspension of Fundamental Right to Life and Liberty during Emergency was upheld by the Judiciary.
- ▶▶ The Supreme court saying that, 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.' The court's verdict – popularly known as the 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. But what are these 'times of peril'? The government will decide. This leads to the executive supremacy. But after the end of the emergency, the hollowness of the Supreme Court position was revealed. The government excesses under the Habeas corpus judgement came to light.
- ▶▶ The episode was a stark reminder of one basic principle: absolute power corrupts absolutely.

- ▶▶ Our republican Constitution is, therefore, based upon a system of checks and balances, where 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. It has been condemned as the darkest hour in the Supreme Court's history.

Correcting the Past Mistakes:

- ▶▶ In 2017, a chastened court formally overruled it, stating that it should be 'buried ten fathom deep with no chance of resurrection'. In its place, the court erected the principle of proportionality: if the state wants to infringe peoples' rights in service of a larger goal, then 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. And the constitutionality of the state's actions is to be tested by the courts.

Habeas Corpus in 2019 and the Silence of Courts:

- ▶▶ Similarly, the recent episodes in the Jammu and Kashmir have led to the infringement of the Fundamental Rights of the people and the subsequent court inaction reminds the Courts action during the Emergency period. Rights experts from the United Nations had called the communication lockdown a form of "collective punishment", where, under the guise of 'prevention', an entire population's rights were taken away for the actions of a few. Collective punishment is an inherently disproportionate infringement of fundamental rights.
- ▶▶ Unlike the Emergency, the courts have not upheld the government's actions — so far. What they have done is dodged, ducked, evaded, and adjourned. Petitions challenging the lockdown have also been repeatedly adjourned without discharging its constitutional obligation to adjudicate the legality of the lockdown and the detentions. And so, through this judicial evasion, the status quo continues.

Conclusion:

- ▶▶ By not ruling upon the cases before it, in effect, the courts have allowed the infringements of civil liberties to continue.
- ▶▶ And they have done so in a particularly insidious manner: by exempting the government from its constitutional obligation to explain itself, and by exempting themselves from their obligation to hold the government to account.
- ▶▶ This is nothing other than executive supremacy by stealth: at the time at which the judiciary is most needed to defend civil liberties.