Judicial review: Activism and Overreach

Evolving jurisprudence through judicial pronouncements by the Supreme Court and High Courts

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1. Importance of judicial review

- "'Judicial review' is a **great weapon** in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power." (Lord Scarman in ***Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 251**)
- "[...] [W]hile exercising powers of judicial review, the Court is not concerned with the ultimate decision but the **decision-making process**." (***Punjab State Power Corp Ltd v. Emta Coal Ltd*, (2022) 2 SCC 1** at ¶33)

2. Standards of judicial review

Wednesbury unreasonableness

- "[...] [Irrationality] applies [for interfering with] *a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at [it].*" - ***Council of Civil Service Unions* v. *Minister for Civil Service*, [1985] 1 AC 374**

Wednesbury unreasonableness

- “The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have **taken into account matters which they ought not to have taken into account**, or conversely, have **refused to take into account or neglected to take into account matter which they ought to take into account**. […]

Wednesbury unreasonableness

- Once that question is answered in favour of the local authority, it may still be possible to say that although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a **conclusion so unreasonable that no reasonable authority could ever have come to it**. In such a case, again, I think the court can interfere."

- ***R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, 873**

From *Wednesbury* to proportionality

- In their application of the outrageous defiance of logic theory, the English courts asked the question: “Whether the decision taken was beyond the range of responses open to a reasonable decision maker?” ***R v Ministry of Defence, ex p Smith* [1996] QB 517, 554**

- Since then, the proportionality doctrine is being seen as a surer basis to test legislative and executive acts, primarily in cases involving violation of fundamental rights.

Proportionality - the four stages

- **Legitimate goal stage**: A measure restricting a right must serve a legitimate goal.
- **Suitability or rational connection stage**: The measure must be a suitable means of furthering the identified legitimate goal.
- **Necessity stage**: There must not be any less restrictive but equally effective alternative.
- **Balancing stage**: The measure must not have a disproportionate impact on the right-holder.

K. S. Puttaswamy (Aadhaar 5-J) v. Union of India, (2019) 1 SCC 1, 313 at ¶152) reiterating *Modern Dental College & Research Centre v. State of M.P.*, (2016) 7 SCC 353 ¶¶63

Contrasting approaches to proportionality

German approach

- **Any goal that is legitimate** is accepted.
- **Even a marginal contribution** to achievement of the goal **suffices** to meet the suitability test.
- Rarely, if ever, an alternative measure is found which is equally effective and does not suffer from some disadvantage
- **Most of the important issues are pushed into the 'balancing stage'**

Canadian approach ('Oakes test')

- Objective must be of **sufficient importance to warrant overriding** a constitutionally protected right or freedom.
- The means must impair the right ' **as little as possible**'.
- Effects of the measure must be **proportionate** to the sufficiently important objective.
- No requirement that less restrictive measure be equally effective.
- Thus, more issues are dealt with in earlier stages of the test.

The Indian way - necessity stage

In ***K. S. Puttaswamy (Aadhaar 5-J)*** **(supra)**, at ¶¶155 and 158, Sikri J endorses the following approach to the necessity stage, proposed by Dr. Bilchitz:

1. Identify a range of possible alternatives to the measure employed by the Government.
2. Determine the effectiveness of these measures individually - each alternative must realise the objective in a 'real and substantial manner'.
3. Determine impact of the respective measures on the right at stake.
4. Determine whether there is a 'preferable' alternative.

The Indian way - balancing stage

- Balancing act must not be carried out in an impressionistic fashion, unguided by principle and on the basis of subjective, arbitrary and unpredictable rationales.
- Act of balancing must be done on the basis of some established rule or by creating a ‘bright-line’ rule.
- Any ‘legitimate state interest’ fulfilled by the measure must be accorded due weight.

K. S. Puttaswamy (Aadhaar-5J) at ¶156

Proportionality in Aadhaar case

- ***K.S. Puttaswamy (Aadhaar-5J.) v. Union of India* (2019) 1 SCC 1, 491**
- "**511.9.1**. Whether, "legitimate State interest" ensures "reasonable tailoring"? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy, as claimed by the petitioners. This is the test we have applied in the instant case.

Proportionality in Aadhaar case

- **511.9.2.** There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?"

Proportionality in action

- In ***Internet & Mobile Assn. of India v. RBI*, (2020) 10 SCC 274**, Ramasubramaniam J held that RBI's Circular - preventing entities regulated by RBI from dealing with virtual currencies or providing services for facilitating any person or entity in dealing with the same - was disproportionate and liable to be struck down.
- Specifically, the measure taken by RBI was held to have failed the necessity or 'least restrictive' stage
    - Virtual currencies ('VCs') themselves had not been banned. **[¶218]**
    - RBI had not found the activities of VC exchanges to have adversely impacted the way that RBI-regulated entities functioned. [Id.]
    - RBI failed to lead empirical data of about the harm and degree of harm suffered by the regulated entities

Proportionality in action

- “**224.** It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the three enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But **the availability of power is different from the manner and extent to which it can be exercised**. […]

Proportionality in action

- […] While we have recognised elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which **RBI needs to show at least some semblance of any damage suffered by its regulated entities**. But **there is none**. When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft Bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate."

Strict scrutiny test

- "**36.** The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America [...] is not applied in the Indian courts. In any event, such a test may be applied in a case where a legislation *ex facie* is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy." - ***Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146**

Strict scrutiny test

- “**294.** Strict scrutiny test is a test conceptualised in the United States, only applied to “super suspect legislations”. This compulsion arises because the scope of reasonable restrictions not having been specified specifically in the US Constitution. That leaves the scrutiny of the legislations by the courts based on the Due Process Clause in the US Constitution. Such a test does not have applicability in India” - ***K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1**

3. Judicial review of legislative action

a. Validating Statutes

In *Madras Bar Association v. Union of India* 2021 SCC OnLine SC 463 at ¶44, the following principles were laid down:

"a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective. Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution.

a. Validating Statutes

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect pointed out should have been cured such that the basis of the judgement pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise. Even interim directions cannot be reversed by a legislative veto

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of Article 14 of the Constitution of India."

b. Ironing out creases - the principle

***Seaford Court Estates LD. v Asher*, [1949] 2 K.B. 481**

- "Whenever a statute comes up for consideration it must be remembered that **it is not within human powers to foresee the manifold sets of facts which may arise**, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. **The English language is not an instrument of mathematical precision**. [...]

b. Ironing out creases - the principle

- [W]hen a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the **constructive task of finding the intention of Parliament**, and he must do this not only from the language of the statute, but also from a consideration of the **social conditions** which gave rise to it, and of the **mischief** which it was passed to remedy, and then he must supplement the written word so as to **give "force and life" to the intention of the legislature**. [...]
- Put into homely metaphor it is this: A judge should ask himself the question: **If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.**

b. Ironing out creases: Domestic violence

- "**21.** When Section 3 of the Act defines "domestic violence", it is clear that such violence is gender neutral…Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral... If "respondent" is to be read as only an adult male person, it is clear that women who evict or exclude the aggrieved person are not within its coverage, and if that is so, the object of the Act can very easily be defeated by an adult male person not standing in the forefront, but putting forward female persons who can therefore evict or exclude the aggrieved person from the shared household. This again is an important indicator that the **object of the Act will not be subserved by reading "adult male person" as "respondent**"."

***Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165**

b. Ironing out creases: minor wife

- "**84.** There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married."

***Independent Thought v. Union of India*, (2017) 10 SCC 800**

b. Ironing out creases: minor wife

- "**107.** [...] [W]e are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

***Independent Thought v. Union of India*, (2017) 10 SCC 800**

b. Ironing out creases - land reform

***U.P. Bhoodan Yagna Samiti v. Braj Kishore*, (1988) 4 SCC 274**

- High Court had interpreted the phrase “landless persons” in accordance with plain ordinary meaning and allowed benefit of land reform legislation to well-off businesspersons.
- Tracing the history of the Bhoodhan Movement of Acharya Vinobha Bhave, the court construed “landless persons” to mean only those landless poor persons, whose main source of livelihood was agriculture.

b. Ironing out creases - land reform

***U.P. Bhoodan Yagna Samiti v. Braj Kishore*, (1988) 4 SCC 274**

- "**16.** [...] It is now well-settled that in order to interpret a law one must understand the background and the purpose for which the law was enacted. And in this context as indicated earlier if one has bothered to understand the common phrase used in the Bhoodan Movement as "Bhoomihin Kissan" which has been translated into English to mean "landless persons" there would have been no difficulty but apart from it even as contended by learned Counsel that it was clearly indicated by Section 15 that the allotments could only be made in accordance with the scheme of Bhoodan Yagna. [...]"

4. Judicial review in various contexts

a. Economic matters - policy questions

- "**8**. [...] [L]aws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. [...] in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. [...]

***R.K. Garg* v. *Union of India*, (1981) 4 SCC 675**

a. Economic matters - policy questions

- "**8**. Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. [...] The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions."

***R.K. Garg* v. *Union of India*, (1981) 4 SCC 675**

a. Economic matters - policy questions

- "**169.** As with anything in life, not only will imperfections stand out and mathematical nicety be flouted, a law may end up seemingly trampling upon the interests of a few or even many. Since, the [Insolvency and Bankruptcy Code, 2015] undoubtedly bears the brand of an economic measure upon its face, and in true spirit, being one of the most significant and dynamic economic experiments indulged in by the law giver, not by becoming servile to Parliament, but by way of time hallowed deference to the sovereign body experimenting in such matters, this Court will lean heavily in favour of such a law . [...]"

***Manish Kumar v. Union of India*, (2021) 5 SCC 1**

a. Economic matters - from ‘license raj’ to regulatory era

Prakash Gupta, 2021 SCC OnLine SC 485

- *"102. In a consistent line of precedent, this Court has been mindful of the public interest that guides the functioning of SEBI and has refrained from substituting its own wisdom over the actions of SEBI. Its wide regulatory and adjudicatory powers, coupled with its expertise and information gathering mechanisms, imprints its decisions with a degree of credibility. The powers of the SAT and the Court would necessarily have to align with SEBI's larger existential purpose.”**

a. Economic matters - tenders

- ***Uflex Ltd. v. State of T.N.*, (2022) 1 SCC 165**

- The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance. [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] [**¶2**]

a. Economic matters - tenders

- For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them. [**¶42**]

b. National Security

- “National security cannot be the bugbear that the judiciary shies away from, by virtue of its mere mentioning. Although this Court should be **circumspect in encroaching upon the domain of national security, no omnibus prohibition can be called for** against judicial review. [...] mere invocation of national security by the State does not render the Court a mute spectator.” ***M. L. Sharma v. Union of India*, 2021 SCC Online SC 985**

b. National Security – AK Kaul case

In ***A.K. Kaul v. Union of India*, (1995) 4 SCC 73 at ¶21**, the Hon'ble Supreme Court summarised the judgment in *S. R. Bommai v. Union of India* (1994) 3 SCC 1, thus -

i. the satisfaction of the President while making a Proclamation under Article 356(1) is **justiciable**;

ii. it would be open to challenge on the ground of **mala fides** or being based wholly on **extraneous and/or irrelevant grounds**;

iii. even if some of the materials on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is **some relevant material** sustaining the action;

iv. the **truth or correctness of the material cannot be questioned** by the court **nor will it go into the adequacy** of the material and **it will also not substitute its opinion** for that of the President;

b. National Security – AK Kaul case

v. the ground of **mala fides** takes in inter alia situations where the Proclamation is found to be a **clear case of abuse of power** or what is sometimes called **fraud on power**;

vi. the court **will not lightly presume abuse or misuse** of power and will make allowance for the fact that the President and the Union Council of Ministers are the **best judge** of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and

vii. this **does not mean** that the President and the Council of Ministers are the **final arbiters** in the matter or that their opinion is conclusive.

b. National Security - AK Kaul case

- "... Are the considerations involving the interests of the security of the State of such a nature as to exclude the satisfaction arrived at by the President or the Governor in respect of the matters from the field of justiciability? We do not think so. ...If the courts are competent to adjudicate on matters relating to the security of the State in respect of restrictions on the right to freedom of speech and expression under Article 19(2) there appears to be no reason why the courts should not be competent to go into the question whether the satisfaction of the President or the Governor for passing an order under Article 311(2)(*c*) is based on considerations having a bearing on the interests of the security of the State....

b. National Security - AK Kaul case

- We are, therefore, of the opinion that an order passed under clause (*c*) of the second proviso to Article 311(2) is subject to judicial review and its validity can be examined by the court on the ground that the satisfaction of the President or the Governor is vitiated by mala fides or is based on wholly extraneous or irrelevant grounds within the limits laid down in *S.R. Bommai* [*S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1."

c. Environmental matters

***Hanuman Laxman Aroskar v. Union of India*, (2019) 15 SCC 401**

- "**145.** Amartya Sen argues for a broadening of the notion of sustainable development which is the most dominant theme of environmental literature, from a need-based standard […] to **a standard based on freedom**s. Thus recharacterised, it encompasses the **preservation**, and when possible even the **expansion of the substantive freedoms and capabilities of people today without compromising the capability of future generations to have similar — or more — freedoms**. The intertwined concepts of environmental rule of law thus further **intragenerational as well as intergenerational equity**.

c. Environmental matters

- **“156**. The rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to the rule of law. Public access to information is, in similar terms, fundamental to the preservation of the rule of law. In a domestic context, environmental governance that is founded on the rule of law emerges from the values of our Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution. Proper structures for environmental decision making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution.”

c. Environmental matters

- **161**. In this view of the matter, neither the process of decision making nor the decision itself can pass legal muster. Equally, as an area requiring balance between development of infrastructure and the environment, we are of the view that appropriate directions should be issued by this Court, which would ensure that while the need for a public project as significant as an international airport is duly factored into the decision-making calculus, such development proceeds on a considered view of the importance of the prevailing state of the environment. Bearing in mind the need to bring about a wholesome balance between the development of infrastructure of an airport and the preservation of the environment, we have come to the conclusion that time-bound directions should be issued."

See also ***Citizens of Green Doon v. Union of India*, 2021 SCC OnLine SC 1243**

c. Environmental matters

- ***H.P. Bus-Stand Management & Development Authority v. Central Empowered Committee*, (2021) 4 SCC 309**
- "**52.** The need to adjudicate disputes over environmental harm within a rule of law framework is rooted in a principled commitment to ensure fidelity to the legal framework regulating environmental protection in a manner that transcends a case-by-case adjudication. Before this mode of analysis gained acceptance, we faced a situation in which, despite the existence of environmental legislation on the statute books, there was an absence of a set of overarching judicially recognised principles that could inform environmental adjudication in a manner that was stable, certain and predictable."

c. Environmental matters

- **54.** […] [T]he environmental rule of law calls on us, as Judges, to marshal the knowledge emerging from the record, limited though it may sometimes be, to respond in a stern and decisive fashion to violations of environmental law. We cannot be stupefied into inaction by not having access to complete details about the manner in which an environmental law violation has occurred or its full implications. Instead, the framework, acknowledging the imperfect world that we inhabit, provides a roadmap to deal with environmental law violations, an absence of clear evidence of consequences notwithstanding."

d. Elections

***Election Commission of India v. Ashok Kumar*, (2000) 8 SCC 216**

- "**28.** Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of overenthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes."

d. Elections

- **[¶32]** “[...] (1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

- (2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

d. Elections

- (3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fides or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

- (4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

d. Elections

- (5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

d. Elections

***Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405, ¶92**

- "(1)(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.
- (b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate. [...]

d. Elections

- (2)(a) the Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.
- (b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition.

d. Elections

- Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplayin-action in a most important area of the constitutional order viz. elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

d. Elections

- (3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.' "

d. Elections

- If, however, the assistance of a writ court is required in subserving the progress of the election and facilitating its completion, the writ court may issue orders provided that the election process, once begun, cannot be postponed or protracted in any manner.....the writ court must adopt a hands-off policy while the election process is on and interfere either before the process commences or after such process is completed.....The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under them can be questioned in courts provided the statute concerned does not give such orders the status of a statutory provision.

d. Elections

- The constitutional bar of Article 243-ZG(*a*) applies only to courts and not the State Election Commission, the result of which is that it is the duty of the SEC to countermand illegal orders made by any authority including the State Government which delimit constituencies or allot seats to such constituencies, as is provided in Proposition 68.4 above. This may be done by the SEC either before or during the electoral process, bearing in mind its constitutional duty as delineated in the said proposition

***State of Goa* v. *Fouziya Imtiaz Shaikh*, (2021) 8 SCC 401**

5. New modes of judicial review

a. Bounded-deliberative review

- “[...] [W]e would like to clarify that the jurisdiction exercised in this matter is merely to facilitate a dialogue of relevant stakeholders, the UOI, the States and this Court, in light of the pressing humanitarian crisis, and not with a view to usurp the role of the executive and the legislature. This bounded-deliberative approach is exercised so that the UOI and States can justify the rationale behind their policy approach which must be bound by the human rights framework which presently implicates the right to life under Article 21 and right to equality under Article 14 of the Constitution.”

***In re: Distribution of Essential Supplies and Services during Pandemic*, 2021 SCC OnLine SC 355**

b. Continuing mandamus

***Swaraj Abhiyan v. Union of India*, (2016) 7 SCC 498**

- “1. [...] The State cannot say that it is not bound to follow the law and cannot adhere to statutory provisions enacted by Parliament and create a smokescreen of a lack of finances or some other cover-up. The rule of law binds everyone, including the State.

- “52. Notwithstanding the absence of judicially manageable standards, the judiciary cannot give a totally hands-off response merely because such standards cannot be laid down for the declaration of a drought. However, the judiciary can and must, in view of Article 21 of the Constitution, consider issuing appropriate directions should a State Government or the Union of India fail to respond to a developing crisis or a crisis in the making. But **there is a Lakshman rekha that must be drawn**.

b. Continuing mandamus

***Swaraj Abhiyan v. Union of India*, (2016) 7 SCC 498**

- **207**. We are firmly of the view that the principle of continuing mandamus is now an integral part of our constitutional jurisprudence. There are any number of public interest petitions in which this Court has continued to monitor the implementation of its orders and on occasion monitor investigations into alleged offences where there has been some apparent stonewalling by the Government of India. [...]"

b. Continuing mandamus

"50. The principle of continuing mandamus forms part of our Constitutional jurisprudence and the term was used for the first time in *Vineet Narain* v. *Union of India*[16]. The practice of issuing continuing directions to ensure effective discharge of duties was labelled as a "continuing mandamus". We may note that unlike a writ remedy, a continuing mandamus is an innovative procedure not a substantive one which allows the Court an effective basis to ensure that the fruits of a judgment can be enjoyed by the right-bearers, and its realisation is not hindered by administrative and/or political recalcitrance. It is a means devised to ensure that the administration of justice translates into tangible benefits."

***Lok Prahari v. Union of India*, 2021 SCC OnLine SC 333**

6. Master of the roster and suo moto powers

a. Master of the Roster

Tribhuvandas Purshottamdas Thakur v. Ratilal Motilal Patel, (1968) 1 SCR 455

- **10.** ....When it appears to a Single Judge or a Division Bench that there are conflicting decisions of the same Court, or there are decisions of other High Courts in India which are strongly persuasive and take a view different from the view which prevails in his or their High Court, or that a question of law of importance arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with a request to form a Special or Full Bench to hear and dispose of the case or the questions raised in the case.

a. Master of the Roster

- For making such a request to the Chief Justice, no authority of the Constitution or of the Charter of the High Court is needed, and by making such a request a Judge does not assume to himself the powers of the Chief Justice. A Single Judge does not by himself refer the matter to the Full Bench: he only requests the Chief Justice to constitute a Full Bench for hearing the matter. Such a Bench is constituted by the Chief Justice. The Chief Justice of a Court may as a rule, out of deference to the views expressed by his colleague, refer the case: that does not mean, however, that the source of the authority is in the order of reference....

b. Suo Moto Cognizance

***Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490**

6. ..The jurisdiction enjoyed by this Court under Article 32 is very wide…

7. For the exercise of this jurisdiction, it is not necessary that the person who is the victim of violation of his fundamental right should personally approach the court as the court can itself take cognizance of the matter and proceed suo motu or on a petition of any public-spirited individual. This Court through its various decisions, has already given new dimensions, meaning and purpose to many of the fundamental rights especially the Right to Freedom and Liberty and Right to Life. The Directive Principles of State Policy have also been raised by this Court from their static and unenforceable concept to a level as high as that of the fundamental rights.

...the end.

Sincere thanks for your time and consideration!