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Is Judiciary Supporting Centralising Tendencies of the Government?

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(The editorial is based on the article “The imperial cabinet and an acquiescent court” which appeared in The Hindu for 8th March 2019. In this article, we will discuss two major judgments of the Supreme Court.)

In the last six months, the Supreme Court has frequently been seen in the headlines.

In September, it handed down four landmark judgments on fundamental rights: decriminalizing same-sex relations and adultery, opening up Sabarimala to women of all ages, and (partially) upholding Aadhaar.

Recent two decisions have attracted less attention. **These are the court’s findings on**

- the legal status of “money bills” (a part of its Aadhaar judgment), and
- its judgment on the distribution of power between the Central government and the government of Delhi.

Importance of These Two Judgements

- People always think that their rights and freedoms depend upon the Constitution’s fundamental rights chapter, and the judiciary’s willingness to enforce it against the state. There are other important ways as well, in which a Constitution guarantees freedom.
- It does by dividing and distributing political power between state organs in order to avoid concentration of authority and to ensure that these different organs act as checks and balances upon each other.
- The check against totalitarianism is to guarantee that no one stream of authority becomes powerful enough to sweep away everything else in the time of a flood.
- These two decisions were about constitutional structure: about the balance of power between the different organs of the state, the federal character of the Republic, and fundamental questions of democratic accountability.

Legal status of “money bills” (a part of its Aadhaar judgment)

- Despite strong protests, the Aadhaar Act was passed as a money bill. This affected a crucial element of our constitutional structure: bicameralism.
- Bicameralism, in our parliamentary democracy, requires that a bill must be scrutinized and passed by both Houses of Parliament before it becomes law.
- A money bill takes the Rajya Sabha out of the equation: it only needs Lok Sabha approval. In combination with the anti-defection law, this places absolute power in the hands of the executive and skews the democratic process. Hence, its use must be restricted to the most limited of circumstances.
- This was what was argued in the Aadhaar case: that the terms of the Constitution (Article 110) mandated that money bills be narrowly limited to those that fell exclusively within the categories set out in Article 110.
- The Lok Sabha represents the voice of the democratic majority. The Rajya Sabha represents the interests of the States, as well as perspectives free of immediate, electoral interests. The basic idea is that law-making is a balanced and deliberative process, not an exercise in pure majoritarianism. **The crucial purpose of the Rajya Sabha is to act as a check and a balance upon the Lok Sabha, by scrutinizing bills in a more deliberative and reflective manner, and raising concerns that may have been glossed over or evaded in the Lower House.**
- **The Aadhaar Act, which established a biometric database and set up an authority (the UIDAI) to administer it, could not in any sense be called a “money bill” simply because the funds for the Authority came from the Consolidated Fund of India.**
- **The majority judgment in the Aadhaar case, however, allowed the Act to stand as a money bill (after taking out a provision allowing private party use), and thus, effectively, gutted the Rajya Sabha’s role in the democratic process.**
- **After the court’s judgment, governments wanting to bypass Rajya Sabha scrutiny on a range of important issues can simply insert a provision specifying that money for a project is to come from the Consolidated Fund.**

Federalism

- The Supreme Court has also considered another issue of democratic structure: the dispute between the central government (acting through the Lt Governor) and the government of Delhi.
- This dispute effectively turned upon the text of Article 239AA of the Constitution.
- **In July 2018, while considering the overall constitutional position, a five-judge bench of the Supreme Court made it clear that, wherever the constitutional text was capable of more than one interpretation, the court would favor a reading that increased democratic accountability: that is, in case of doubt, power would lie with the government that had been directly elected by the people (in this**

case, the Delhi government).

- When it came to applying this principle to the specific disputes between the two entities, however, a two-judge bench of the Supreme Court seemed to resile from this fundamental democratic principle.
- Recent judgment on February 2019 judgment bears very little evidence of democratic concerns: the heart of the dispute was about control over the civil services, which directly impacted day-to-day governance.
- While the constitutional provisions themselves were ambiguous, one judge held that the Delhi government had no control over civil servants above a certain rank, while another judge held that the Delhi government had no control over civil servants at all.
- The Supreme Court ruled that the control of the anti-corruption branch (ACB) will rest with the Central government.

On land, the court said that matter comes under the purview of the Delhi government but Lieutenant Governor can refer the matter to President.

Way Forward

- **Over the last few decades, many scholars have noticed this drift towards the increased powers of the political executive, across liberal democracies. The Supreme Court's decisions on Articles 110 (money bills) and 239AA (status of the federal unit of Delhi) have concentrated greater power in the hands of the executive.**
 - **By expanding the scope of what counts as money bills, the court has set the cabinet down the road of transforming itself into a Roman-style imperator.**
 - And by privileging the centralizing tendencies of the Constitution over its federalizing ones, the court has squandered the chance to develop a strong jurisprudence on the federal structure, that could have been of use in future disputes between the Central government and various federal units.
 - **The impact of these decisions will not be felt immediately, but in the long run, unless set right, one enduring legacy of the recent court might be the judicial facilitation of an imperial executive.**
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