

The need for judicial restraint

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"Lawmaking is not the job of the judges, but of the legislature."

The recent trend in the Supreme Court is to rely more on the sociological school of jurisprudence and less on the positivist school. In other words, the court is resorting more to judicial activism rather than judicial restraint, which is problematic. This is seen in its recent judgment on ordering time limits to burst firecrackers on Diwali, which is a function of the legislature; its judgment on linking rivers, for which there is no parliamentary legislation; and in its unpredictable decisions in cases relating to freedom of speech and expression, such as the recent one in which a BJP Yuva Morcha leader was asked in the bail order to apologise for sharing a meme, despite the guarantee in Article 19(1)(a) of the Constitution.

Types of jurisprudence

According to the positivist theory laid down by jurists such as Jeremy Bentham and John Austin in the 18th and 19th centuries, and continued by H.L.A Hart, Hans Kelsen and others in the 20th century, law is to be distinguished from morality and religion. However bad a particular legislation is, it is law at the end of the day, provided it emanated from a competent legislature (according to the earlier natural law theory, bad law was not law at all).

In positivist jurisprudence, the centre of gravity of the legal system is statutory law, i.e., law made by the legislature. It holds that lawmaking is not the job of the judges, but of the legislature. Hence, judges should be restrained and not activist in their approach. In view of the well-established principle of separation of powers of the three organs of the state, judges should not perform legislative or executive functions, and each organ of the state should remain within its own domain, in order to avoid chaos.

On the other hand, sociological jurisprudence, as developed in Europe and the U.S. by jurists such as Rudolph Ritter von Jhering, Eugen Ehrlich, Léon Duguit, François Geny, Roscoe Pound and Jerome New Frank, shifts the centre of gravity of the legal system from statute to laws made by judges. It gives wide discretionary powers to judges to make laws.

Sociological jurisprudence and natural law have the same problem. Kelsen argued that with natural law, one can prove everything and nothing, and Bentham regarded natural law as metaphysical nonsense. Similar criticisms can be made of sociological jurisprudence, which the Supreme Court seems to be relying

on. In other words, the court can lay down anything as law according to its own subjective notions.

Positivist jurisprudence places heavy reliance on the literal rule of construction, because departing from it would give a free handle to each judge to declare the law according to his own notions, and this would result in legal anarchy. For example, the Second Judges Case (1993) and Third Judges Case (1998), which created the collegium system of appointment of judges, were not based on any provision in the Constitution. Article 124, which prescribes how Supreme Court judges are to be appointed, does not talk of any collegium system. Yet, it is the collegium which decides the appointment of judges, despite the founding fathers of the Constitution not envisaging the same anywhere. In fact, despite the unanimous will of Parliament in favour of the National Judicial Appointments Commission (NJAC), the Supreme Court declared the NJAC Act to be unconstitutional on the grounds that it would affect the judiciary's independence.

In recent times, the Supreme Court has increasingly adopted the sociological school of jurisprudence in an aggressive manner. In a parliamentary democracy, the buck ultimately stops with the citizens, who are represented by Members of Parliament. The Supreme Court was never envisaged to perform the role of an unelected, third legislative chamber. Yet it is performing this role not in exceptional circumstances, but in its everyday functioning. Of all the three organs of the state, it is only the judiciary that can define the limits of all the three organs. This great power must therefore be exercised with humility and self-restraint.

In rare circumstances

The usage of sociological jurisprudence can be justified in very rare circumstances, such as in the Supreme Court's decision to strike down Section 377 of the Indian Penal Code.

In *Griswold v. Connecticut*, Justice Hugo Black of the U.S. Supreme Court warned that "unbounded judicial creativity would make this Court into a day-to-day Constitutional Convention". In his book, *Nature of the Judicial Process*, Justice Cardozo of the U.S. Supreme Court wrote, "The Judge is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness". And as Chief Justice Neely of the West Virginia State Supreme Court observed: "I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect judges to intelligently review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a judge to sit as a super board or with the zeal of a pedantic schoolmaster substituting his own judgment for that of an administrator."

The Supreme Court should limit its usage of the sociological school of jurisprudence to only the most exceptional situations, and employ the positivist school as far as possible.

Collegium System

What is it?

- The system of appointment of judges in the courts of the country is called the collegium system.
- This arrangement was made after two Supreme Court judgments in 1990. Under the Collegium system, the committee of senior judges, headed by the Chief Justice of the Supreme Court, decides the names and the appointment of the judges.
- The Collegium also decides the appointment and transfers of judges in the Supreme Court and in the High Court.
- Which judge of the High Court will be promoted to the Supreme Court is also decided by Collegium.
- The Collegium system is neither mentioned in the Original Constitution nor in its Amendment Provision.

Background

- This system came into effect on October 28, 1998, through the decisions of the Supreme Court which came in the case of 3 judges.
- In the Collegial system, a forum of the Supreme Court Chief Justice and 4 senior judges of the Supreme Court recommends the appointment and transfer of the judges.
- The recommendation of the Collegium is binding to the government.
- The UPA government had formed the NJAC (National Judicial Appointment Commission) instead of the Collegium system on August 15, 2014, but the Supreme Court on October 16, 2015, declared the National Judicial Appointment Commission (NJAC) law as unconstitutional.
- In this way, the appointment of judges and transfer of decisions is at present done by the Collegium system of the Supreme Court.
- NJAC was to be formed with 6 members, which was to be headed by Chief Justice of the Supreme Court, it was to include two senior judges, Law Minister and two famous persons associated with different areas as members.
- The 2 persons to be included in the NJAC, was to be selected by the chief justice of the Supreme Court, the Prime Minister and leader of the Opposition in the Lok Sabha or the leader of the biggest party in the Lok Sabha. On this, the Supreme Court had the highest objection.

- What is the difference between Collegium System and NJAC?
- NJAC (National Judicial Appointment Commission) is a constitutional body proposed by the government, which was created to replace the collegium system for the appointment of judges. At the same time, the judges are being appointed for the last 22 years through the Collegium system.
- There was a proposal of 6 members in NJAC. The Chief Justice of the country was to be the head of this commission. It was to include two senior judges of Supreme Court, Law Minister and two famous persons associated with different areas as members.
- In the Collegial system, a forum of four senior judges and the Chief Justice of the Supreme Court recommends the appointment and transfer of the judges.
- There is no mention of the collegium system in the Constitution. This system came into effect on October 28, 1998, through the decisions of the Supreme Court which came in the case of 3 judges.
- The two persons, who were told to be included in the NJAC, were to be elected by a committee of the Chief Justice, Prime Minister and Leader of the Opposition or Leader of the biggest party of the Lok Sabha.
- On this, the Supreme Court had the highest objection. The people challenging the NJAC had argued that the judges' selection and the new law of appointment are unconstitutional.
- This will affect the independence of the judiciary. The Centre, while defending it, had said that there were many flaws in the Collegium system of more than 20 years old.
- Arguments of experts
- The present collegium system persists to make 'the son of judge a judge' inline of 'a son of strong man being a strongman'.
- Regardless of more qualified judges are present in the courts than these judges. This practice is not healthy for a democratic country like India.
- There is no constitutional status of the collegium system, so the government should bring a law to reverse it so that the monopoly of some of the houses occupied in the judicial system of India be ended.

Expected Questions (Prelims Exams)

1. Consider the following statements-

1. The number of members in collegium is 5.
2. The Parliament can increase the number of judges.
3. The collegium system is mentioned neither in the original constitution nor in its amendments .

Which of the above statements is/are correct?

- (a) 1 and 3
- (b) Only 2
- (c) 2 and 3
- (d) 1, 2 and 3

Expected Questions (Mains Exams)

- Q. 'What do you mean by Judicial activism? Judicial activism has benefited the Indian Democracy. Critically analyse the Statement. (250Words)
- Q. The independence and credibility of judiciary can only persist through collegium system. The unnecessary interference of government in it can influence its independence. Critically analyse. (250Words)

Note: Answer of Prelims Expected Question given on 15 May. is 1 (d)

