

JUDICIAL LEGISLATION

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Quotes:

1. Soli Sorabjee - "Judicial activism should not become judicial authoritarianism"

Why in news?

Recently in the Arun Gopal v. Union of India case, SC fixed timings for bursting Diwali fireworks and prohibited the use of non-green fireworks, although there are no laws to that effect.

Background:

1. The three branches of government are the Legislature to make laws, Executive to implement them and Judiciary to interpret these laws. No one branch can control all power in a democratic system. This is referred to as the Separation of Powers.
2. There are three roles for the judicial arm of Government:
 - a. Review the constitutionality of government action and legislation
 - b. Interpret legislation and resulting action
 - c. Adjudicate other disputes not necessarily involving Government action or legislation
3. But over the years, through several judgements, the Supreme Court has become hyper-activist in making laws; which is the domain of Legislature.
4. While Judicial review is the power of judiciary to examine the constitutional validity of legislative enactments and executive orders of the government;
5. Judicial activism is the proactive role played by the judiciary in protection of rights of citizen and promotion of justice in society.

Constitution:

1. Article 50 of the Indian Constitution calls for separation of judiciary from the executive. The state shall take steps to separate the judiciary from the executive in the public services of the State.

SC Judgements:

1. Union of India v. Deoki Nandan Aggarwal case : The power to legislate has not been conferred on the courts.
2. Suresh Seth v. Commissioner, Indore Municipal Corporation : Under our Constitutional scheme, Parliament and Legislative Assemblies exercise sovereign power to enact laws
3. Ram Jawaya v. The State of Punjab : Our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another

Public Interest Litigation:

1. Judicial activism began when access to courts was opened up to the poor and disadvantaged sections by Justice P N Bhagwati and Krishna Iyer.
2. The PIL is a unique and powerful tool to seek justice for the weakest sections.
3. It has now degenerated. The recent example of one having been filed seeking segregated seats for vegetarian and non-vegetarian passengers in trains.

Instances of judicial legislation:

1. In M.C. Mehta v. Union of India case, court annulled the Rule 115(21) of Central Motor Vehicle Rules, 1989 and directed that no BS-4 vehicle should be sold after March 30, 2020, and that only BS-6 vehicles can be sold after that date.
2. In Subhash Kashinath Mahajan v. State of Maharashtra case, court amended Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, by annulling Section 18 which said that no anticipatory bail will be granted to persons accused under the Act; by requiring a preliminary enquiry; and by prohibiting arrest under the Act except with permission in writing by the appropriate authority.
3. In Rajesh Sharma v. The State of Uttar Pradesh (2017) case, court Section 498A of IPC by requiring complaints under that provision to be sent to a Family Welfare Committee constituted by the District Legal Services Authority, although there is no such requirement in Section 498A.
4. National Green Tribunal (NGT) ordered that no 15-year-old petrol-driven or 10-year-old diesel-driven vehicle will ply in Delhi, and the Supreme Court has directed impounding such vehicles.

Case for judicial legislation:

1. Failure of the legislative and executive wings to provide 'good governance' makes judicial activism an imperative.
 - a. Duration of parliamentary working days have been reduced from 127 in 1950s to 57 in 15th Lok Sabha.
 - b. Number parliamentary bills passed had reduced from 72 in post independence period to only 40 on an average in current parliamentary session.
 - c. Budget discussions have drastically reduced-only 1% utilization of time allotted to 2017-18 budget.
2. Social reform : the recent verdicts by Supreme Court on Triple Talaq, Adultery, Section 377 and Sabarimala Temple show the significant role it can play in taking socially tough and unacceptable decisions towards social reform. Parliament is incapable of challenging barbaric social/religious practices enforced by dominant interests. That is why it took 70 years for Section 377 to be partially struck down.
3. Electoral reforms: Proactive interpretation of laws by the Supreme court has been the reason behind groundbreaking electoral reforms in the country which the legislatures wouldn't have bought.
4. We don't have a very rigid system of separation of powers. Judiciary can review legislative and executive processes. Under Art 123, president can promulgate an ordinance which is a law that has same effect as an act of parliament. Judges are also empowered to make a law in the sense that they can interpret the law and can fill the gaps if that is very necessary to do full justice to the issue.
5. It led to expanded Fundamental Rights of citizens and protection from abuse of these rights due to legislative and executive inaction.
6. Liberalists' argue that the Living Constitution philosophy endorses any ruling, so long as the judge can argue that his ruling helps the constitution to grow and evolve.
7. Failure of executive to check on the inefficiency of Legislature. Often the posts of governor are extension of the political party in power and they are failing to preserve constitutional principles.

Case against judicial legislation:

1. *Separation of powers* : There should be a broad separation of powers among the three organs of the state and one organ should not encroach into the domain of another. Else, it upsets the delicate balance in the Constitution.
2. The independence of judiciary does not imply that judges can make decisions based on their personal preferences or impose their agenda of right or wrong on the country. This could lead to uncertainty in the law and chaos as every judge will start drafting his own laws according to his whims and fancies.
3. Since judiciary is a non -elective body, it does not enjoy popular will to make laws.
4. Courts do not possess the expertise to make decisions and they cannot be held accountable for the consequences of their decisions as they are appointed and not elected.

5. Unrestrained judicial activism damages economic growth prospects as seen in the sudden decision of court to ban BS IV vehicle sales without due debate and also the cancellation of 122 spectrum licenses.
6. Judicial pendency: A law commission report highlighted that India has just 15 judges per 10 lakh people, much lower than world average of 50 per 10 lakh people.
7. Judicial accountability: Judicial accountability is still not institutionally established fully; the Judicial accountability bill and NJAC couldn't get materialised and judiciary remains resistant to RTI.
8. Issues plaguing judiciary:
 - a. Delays in judicial appointments delay justice to innocents as witnessed in high number of undertrials.
 - b. Lack of infrastructure and manpower is affecting the efficiency and proper functioning of judiciary.
9. There is dichotomy between social morality and judicial morality (constitutional morality).
10. We cannot be sure of the independence of judiciary since the appointment process is shrouded in secrecy and judges appoint judges in India.

Best practice:

The constitutional device used in South Africa is "suspended declaration of invalidity" where constitutional court of South Africa can declare a legal provision unconstitutional but also give the legislature breathing space to remedy before judgement comes into force.

Way ahead:

1. Courts should exercise judicial restraint which should be limited to interpretation of law and should leave the law-making business to the legislature and the executive.
2. Strengthening the legislature and executive organs of government.
3. Reform cannot be left to the judiciary; it must be through social and political struggles from the bottom, and not through judicial diktats from above.
4. Judiciary can step in only when the fundamental rights of the citizens are violated.
5. Instead of deciding for itself, courts can adopt an activist approach and issue directions to the governmental organs and agencies at all levels to enforce the fundamental rights of citizens.
6. Courts must intervene to enforce the rule of law and cannot remain mute spectators to the callousness of the executive class.
7. As Delhi high court observed on a petition against odd even policy, 'the law is well settled that on matters affecting policy, this court will not interfere unless the policy is unconstitutional or contrary to statutory provisions or arbitrary ... since the policy decisions are taken based on expert knowledge and the courts are normally not equipped to question the correctness of the same'.

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