Source : www.thehindu.com Date : 2019-05-16

THE NEED FOR JUDICIAL RESTRAINT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

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.

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.

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.

Markandey Katju is a former Judge, Supreme Court of India. Aditya Manubarwala is Law Clerk-cum-Research Assistant at the Supreme Court