Source : www.thehindu.com Date : 2019-05-22

THE PROBLEM WITH JUDICIAL LEGISLATION

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

Several southern states of the United States — Georgia, Alabama and Missouri — have passed pieces of legislation banning abortion, though with some differences. These laws are inconsistent with the judgments of the U.S. Supreme Court in *Roe v. Wade*, which laid down a trimester test, and *Planned Parenthood v. Casey*, which laid down the undue burden and viability tests. The constitutional validity of these legislations will almost certainly be challenged in the U.S. Supreme Court, which will have to examine whether *Roe* and *Casey* were correctly decided. It is our submission that they were not.

The right to choose

The sheet anchor of *Roe* (and of *Casey*, which followed *Roe* in invalidating the ban on abortion, though with different directions) is the decision in *Griswold v. Connecticut*, in which the U.S. Supreme Court created a new constitutional right — the right to privacy.

The Bill of Rights in the U.S. Constitution talks of freedom of speech and of the press, liberty and equality, but it nowhere mentions any right to privacy. So, by a judicial verdict, a right was created which in our submission was wrong, since according to the principle of separation of powers in the Constitution, only the legislature can create a right.

Trump ‘pro-life’ except in cases of rape and incest

We regret to say that both the U.S. as well as the Indian Supreme Courts have not been observing the judicial restraint expected of judges of superior courts and have been encroaching on to the domain of the other two organs of the state, the legislature and the executive. Some examples.

In *State of Tamilnadu v K. Balu*, the Supreme Court banned liquor shops within 500 m of highways, which was a legislative order. In *K. Puttaswamy v. Union of India*, it created a right to privacy, which is nowhere mentioned in the fundamental rights laid down in the Constitution. In *Subhash Kashinath Mahajan* it amended the SC/ST Act. In the NCT, Delhi, Sabarimala and LGBT cases it laid down the ‘constitutional morality’ test. In other decisions, the court fixed timings for bursting crackers on Deepavali, directed interlinking rivers and laid down regulations for the Board of Control for Cricket in India. In the Judges cases it created the collegium system for judicial appointments.

We submit that this judicial activism requires reconsideration, for it entails unpredictability in the law apart from violating the principle of separation of powers. It entitles each judge to lay down the law according to his own subjective notions. We submit that courts should be restrained and follow positivist jurisprudence, which advocates judicial restraint, and in which the centre of gravity of the legal system is statutory law, rather than sociological jurisprudence, which advocates judicial activism and shifts the centre of gravity in the legal system to judge-made law. In our view, judicial legislation is an oxymoron.

Markandey Katju is a former judge of the Supreme Court. Aditya Manubarwala is a law clerk and legal assistant in the Supreme Court

Please enter a valid email address.

It is horrific and undemocratic for a nation to be putting the onus on citizens to prove their Indianness

Join our online subscriber community

Experience an advertisement-free site with article recommendations tailored for you

Already a user? Sign In

To know more about Ad free news reading experience and subscription Click Here

or Please whitelist our website on your Adblocker

END