

WHEN JUDGES LEGISLATE

Relevant for: Indian Polity & Constitution | Topic: Separation of powers between various organs

In many recent judgments, the Supreme Court has become hyper-activist in making laws. But can judges legislate?

When the courts legislate and execute

This question has already been answered in the past by the court. In *Ram Jawaya v. The State of Punjab* (1955), the court observed: "Our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another." This implies that there should be a broad separation of powers in the Constitution among the three organs of the state, and that one organ should not encroach into the domain of another. If this happens, the delicate balance in the Constitution will be upset and there will be chaos.

Making laws is the function of the legislature. As observed in *Union of India v. Deoki Nandan Aggarwal* (1991), "The power to legislate has not been conferred on the courts." In *Suresh Seth v. Commissioner, Indore Municipal Corporation* (2005), the court observed: "Under our Constitutional scheme, Parliament and Legislative Assemblies exercise sovereign power to enact laws." Is judicial discipline being observed? Let us examine some recent decisions of the court.

P.N. Bhagwati's legacy: a controversial inheritance

First, in *Arun Gopal v. Union of India* (2017), the Supreme Court fixed timings for bursting Diwali fireworks and prohibited the use of non-green fireworks, although there are no laws to that effect. Second, in *M.C. Mehta v. Union of India* (2018), the court annulled the statutory Rule 115(21) of the Central Motor Vehicle Rules, 1989, when it 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. Third, in *Subhash Kashinath Mahajan v. State of Maharashtra* (2018), the court amended the 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. Fourth, in *Rajesh Sharma v. The State of Uttar Pradesh* (2017), the court felt that Section 498A of the Indian Penal Code was being misused. So it amended that Section 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. Finally, the 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, though neither the NGT nor the Supreme Court are legislative bodies. If judges are free to make laws of their choices, not only would that go against the principle of separation of powers, it could also lead to uncertainty in the law and chaos as every judge will start drafting his own laws according to his whims and fancies.

The writer is a former judge of the Supreme Court

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