

Judiciary: The Bulwark of Liberal Democracies

What is the issue?

\n\n

\n

- Currently, our judiciary is undergoing a crisis of sorts.
- In this context, this article comprehensively explores the various facets of the challenges that is staring our judiciary.

\n

\n\n

What is current crisis in our judiciary?

\n\n

\n

- India's judiciary is in the midst of a crisis that has partly arisen due to the prevailing extraordinary socio-political situation.
- The judiciary is being repeatedly accused of overreach lately, and it also presently facing unprecedented divisions among its ranks.
- Notably, four senior judges went public in early 2018 with grievances against the Chief Justice of India (CJI) and even seemed to question his neutrality.
- The issues substantively raised concerns about the CJI's alleged bias in allocating benches for cases autocratically and nefarious manner.
- Subsequently, a motion of impeachment was moved against the CJI and the integrity of the institution stood to critical scrutiny.
- Presently, a compromise is said to have reached and the CJI has apparently commissioned a more inclusive approach for allocation of cases to judges.

\n

\n\n

What is the tussle regarding the appointment of judges?

\n\n

- \n
- The collegium system was constituted to end government's control over appointments and insulate the institution from executive bias.
- \n
- Nonetheless, as collegium has been a very opaque, it isn't constitutionally prudent to demand that the acceptance of all judicially recommended names.
- \n
- The current system has hence inherently led to tensions between the government and the judges due to this structural flaw.
- \n
- But, the NJAC (National Judicial Appointments Commission), which was proposed to replace the collegium, was struck down by the Supreme Court.
- \n
- Notably, there was near unanimity in the political class that judges should not have absolute power to appoint other judges.
- \n
- A "Memorandum of Procedure" for appointments is now being drawn by the courts to replace collegium, but the delay is eroding the credibility of judges.
- \n

\n\n

How has judiciary-executive tussle fared in the initial years?

\n\n

- \n
- During the initial years of our republic, most of the MP's were freedom fighters and the government reposed faith in their intent and vision.
- \n
- But over the years, as there was a clear erosion of nobility in law making, the courts had to step in to protect constitutional values.
- \n
- **Tension** - In the Golaknath case in 1967, Supreme Court categorically stated that the parliament can't amend the fundamental rights.
- \n
- But the subsequent Sankari Prasad case and Sajjan Singh case restored parliament's right to alter any part of the constitution.
- \n
- These judgements stress the need for constitution to remain a dynamic document across ages, which can be changed as per the needs of the time.
- \n
- But nonetheless, as a consequence, this implicitly provided room for parliamentary dictatorship to emerge.
- \n

- **Compromise** - These tensions finally culminated in the evolution of a “basic structure doctrine”, which was a compromise between extremes.
\n
- The courts upheld the power of the parliament to amend anything in the constitution as long as it didn’t violate the Basic Values and Structures in it.
\n
- Interestingly, the Basic Structure was defined broadly by the judges, and has thus far proved robust to judge issues on a case by case basis.
\n
- In other words, it means, while adhering to the constitution (the letter), a government also needs adhere to constitutionalism (the spirit).
\n

\n\n

Why should judiciary be independent?

\n\n

- India has designed its polity as a federal democracy, with clear vertical division of power between the union government and states governments.
\n
- Additionally, there is also a horizontal division of power between different organs of the state like legislature, and executive.
\n
- In this context, disputes are bound to arise due to some overlapping domains and other aspects that are open to interpretation.
\n
- As these are disputes between constitutional authorities, there is an inherent need for a constitutionally protected independent judiciary to address them.
\n
- Also, people have some inherent rights and other constitutionally guaranteed rights, and the responsibility of protecting them is vested with the government.
\n
- An independent judiciary is also needed to ensure that people’s rights are protected and governments are held accountable for violations in this regard.
\n
- Independence of judiciary is vital for successful democracies and consequently, judges also need to be neutral and independent for the same.
\n

\n\n

Why should judiciary be empowered to block some policies and bills?

\n\n

\n

- Independent judiciary constrains the functionality of democratically elected governments and hence the latter tends to curtail the former's freedom.
- Even our first PM Nehru, had iterated that judiciary can point of certain mistakes made by the government/parliament, but can't dictate terms to it.
- The "Kesavananda Bharati Verdict" that propounded the "Basic Structure Doctrine" was a significant landmark in judicial independence.
- It sought to elevate judiciary's right to strike down even popularly voted legislations, if it violated the basic contours of the constitution.
- In essence, this safeguards minorities and politically under-represented and vulnerable sections from being subjected to authoritative majoritarianism.
- Notably, in our "First Past the Post" election, there is always the risk of even parties that aggregate 30% votes to possibly secure full majority.
- This being the case, it is important to force governments to build consensus (over and above mere numbers) for ensuring inclusive governance.
- It is also to be noted that our very constitution was built through consensus and not through majority in the houses.

\n

\n\n

Why is there a need for judiciary to be innovative?

\n\n

\n

- Governments of the 1970s and 80s (when tensions began) sought a conformist judiciary that would merely tow the constitution in letter.
- This implies, recognizing the right of the parliament to amend any part of the constitution at will and also to not interfere in government policy decisions.
- But innovative judges of the time held steadfast to ensure that constitution was protected in spirit, even if it meant tweaking it a little in letter.
- Their view was that, innovation in judiciary is indispensable for establishing a liberal social and democratic order in the Indian context.

\n

- Notably, in the aftermath of the national emergency in 1975, judiciary as an institution was strengthened greatly by enhancing its autonomy.
\n
- Importantly, the concept of “Public Interest Litigation” (PIL), which developed in the late 80s, was a vital judicial innovation that has helped further justice.
\n
- Nonetheless, it is vital to recognize the thin line between judicial activism (innovative outreach) and judicial adventurism.
\n
- Judicial adventurism would mean intruding into policy decisions of the government, and dictating legislative or executive action.
\n

\n\n

What are the other accessory issues?

\n\n

- \n
- There have been demands for multi-religious benches for matters related to religion and also separate boards for religious law related cases.
\n
- These demands are unfounded and there is considerable trust that our judges function independent of religious bias.
\n
- Post Retirement – The possibility of being appointed as Governors after retirement could possibly influence judges during their tenure in office.
\n
- This is a genuine risk and it would be good if judges are kept out from such enticing appointments.
\n
- On the contrary, the appointment process for the “National Human Rights Commission” (NHRC) or Lokpal is a more inclusive.
\n
- Hence, judges can be considered for such appointments alone.
\n

\n\n

\n\n

Source: Indian Express

\n\n

\n



SHANKAR
IAS PARLIAMENT
Information is Empowering