Role of Judiciary in Improving Lawmaking

This article is based on **The judicial role in improving lawmaking** which was published in The Hindu on 06/09/2021. It talks about the issues faced by the current process of lawmaking and how judicial intervention can provide a way forward.

The **deterioration in the quality of deliberation** in Parliament over time has prompted calls for reform from different stakeholders. Recently, **Chief Justice of India (CJI)** of India also highlighted this problem, noting that the ambiguities and gaps in laws passed without meaningful deliberation trigger avoidable litigation.

While the CJI suggested that lawyers and intellectuals enter public life to improve deliberation, the judiciary can also play a crucial role in improving the lawmaking process.

Issues With the Legislative Process

- **Issues With Measure of Efficiency:** Many rely on the volume of Bills passed by Parliament in a session as a measure of its efficiency. However, this measure is flawed as it does not account for what is lost when efficiency is achieved by passing laws without adequate notice and deliberation.
    - Most of these laws create burdensome obligations on persons and often affect their fundamental rights.
- **Priority to Party Politics than Voters:** Legislators, as representatives of the people, are expected to exercise a duty of care before casting their vote for a legislation.
    - This entails due deliberation about the implications of the law, posing amendments and questions to the concerned Minister, and requiring expert evidence through standing committees.
    - However, the priority of representatives is more towards their party rather than their electors.
- **Lack of Effective Participation:** It is in the legislative organ that diverse interest groups find representation. Deliberation in such a forum ensures that the views of persons who are adversely affected by a law are heard and actively engaged with.
- **Lack of Effective Functioning:** Rushed lawmaking, rendering Parliament a rubber stamp, sacrifices two core ideals of a constitutional democracy, namely, equal participation and respect for fundamental rights.
- **Constitutional Provisions are Undermined:** The Constitution contains certain detailed provisions laying out how laws are to be passed by Parliament and the State Legislative Assemblies. Unfortunately, these are often undermined.
    - For example, even when the result through voice votes are unclear, the exact number of “ayes” and “nays” are not always counted, suggesting that Bills may be passed without securing the majority vote required under **Article 100.**
    - This issue arose most recently when the controversial farm laws were reportedly rushed and passed by voice vote in the Rajya Sabha despite objections by Opposition members.
- **Misusing Money Bills Provision:** Bills are certified as **Money Bills** to bypass the Rajya Sabha

even where they do not meet the specific description of Money Bills provided under **Article 110.**

    - In the **Aadhaar case**, the Supreme Court recognised its power to check whether such procedural provisions had been complied with.
    - However, these provisions will only be taken seriously if the judiciary addresses their violations in a timely manner.
    - The longer a challenge is pending, the more ground the State has to argue that rights and obligations created under the law should not be disturbed for a "mere" procedural violation.

Role of Judiciary

- **Enforcing the Spirit of Constitutionalism:** The judiciary can play an important role in improving the lawmaking process and securing democratic ideals.
    - A straightforward way of doing this is by **enforcing the text and spirit** of the constitutional provisions governing legislative procedures.
- **Changing the Method of Evaluating:** One important method is for the judiciary to make deliberation a factor in evaluating the constitutional validity of laws.
- **Using the Power of Judicial Review:** In exercising judicial review, the court's role is to call on the State to provide justifications explaining why the law is reasonable and, therefore, valid.
    - While doing so, the court can also examine whether and to what extent the legislature deliberated the reasonableness of a measure.
    - The legislative inquiry would usually include **evaluating the factual basis** justifying the law, the suitability of the law to achieve its aim, and the necessity and proportionality of the law relative to its adverse impact on fundamental rights.
    - The Supreme Court, in fact, adopted this approach in the **Indian Hotel and Restaurants Association (2013) case.**
        - The court invalidated a law prohibiting dance performances only in hotels with less than three stars as rooted in class prejudice and, therefore, violative of equality.
        - While the State justified the classification on the ground that only such hotels were sites of trafficking, the court rejected this claim by examining the lawmaking process and found that the State did not have empirical data to support this claim.
- **Presumption of Constitutionality:** The judiciary can also **make deliberation a factor** in choosing whether to employ the doctrine of **"presumption of constitutionality".**
    - This doctrine requires the court to exercise restraint and defer to legislative judgments on the reasonableness of a law.
    - It is rooted in the fiction that the legislature is a widely representative, deliberative organ, and thus "understands and correctly appreciates the needs of its own people".
    - If the judiciary confines the doctrine only to cases where the State shows that laws and their consequences were carefully deliberated in Parliament, the judiciary can encourage legislative bodies to ensure a deliberative lawmaking process.
- **Legislature be Reformed From Within:** The CJI's suggestion that the legislature be reformed from within is admittedly the ideal solution to remedying legislative dysfunction without raising concerns of separation of powers.
    - However, legislative majorities have little incentive to cooperate for such reform, and significant public mobilisation on the issue would be necessary to change this.
    - The judiciary can and should employ the tools available to it to nudge legislative bodies to improve their lawmaking processes.

Conclusion

The Indian judiciary has often demonstrated that it is possible to enrich democracy by addressing dysfunctions in other institutions. By adopting a swift and systematic approach to reviewing the legislative process, the judiciary can help restore faith in the 'temples of democracy' and push us toward the culture

of justification the Constitution sought to create.

Drishti Mains Question

By adopting a swift and systematic approach to reviewing the legislative process, the judiciary can help restore faith in the 'temples of democracy. Discuss.
