

# The need for judicial restraint

Lawmaking is not the job of the judges, but of the legislature



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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.

### Types of jurisprudence

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



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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.

### In rare circumstances

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.

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# The rise of the BJP in West Bengal

How it slowly gained strength to become the Trinamool's main opponent



SMITA GUPTA

The most vitriolic exchanges this election season have perhaps been between Prime Minister Narendra Modi and West Bengal Chief Minister Mamata Banerjee. The fierce contest in West Bengal is reflected in the voter turnout, which is the highest in the country in this election so far.

Indeed, just eight years after Ms. Banerjee's Trinamool Congress (TMC) brought the Left Front government's 34 years of uninterrupted rule to a dramatic end, a road journey through West Bengal makes it evident that there is a new rising star here, the Bharatiya Janata Party (BJP). In most constituencies, it is a direct fight between the TMC and the BJP, while in a handful, the Communist Party of India (Marxist) or the Congress is still in contention.

### No organisation, a lot of strength

This is remarkable for the BJP, which is still a work in progress in the State. The party does not have much of an organisation in West Bengal, nor sufficient candidates from its own ideological pool. For many constituencies, it has had to seek out disgruntled persons from other parties to be its nominees. Across the State, the party's offices are just coming up. In South 24 Parganas, for instance, a recently bought three-storey building overlooking a pond smells of fresh paint. The cubicles are being readied. Saffron-coloured chairs are stacked on shiny floors. One wall is painted saffron, and against it, fibre glass busts of Bharatiya Jana Sangh (BJS) founder Syama Prasad Mookerjee and Rashtriya Swayamsewak Sangh (RSS) ideologue Deen Dayal Upadhyaya flank a statue of Bharat Mata.

But what the BJP does have in plenty in West Bengal is money. This is a new element in West Bengal politics, where long years of Left rule ensured – and encouraged – financial austerity. The party also has a growing army of musclemen, a staple for successful political parties in the State for at least half a century. “The BJP has no *shongothon* (organisation) but it has the *shokti* (strength) to take on the Trinamool,” says a former Left supporter. “The Left parties still have a *shongothon* but no



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*shokti*. So, those who want to end Trinamool rule have to vote for the BJP. Only the BJP can protect their votes.” The Left Front's steady decline and the Congress's near annihilation has ensured that those disappointed with the TMC-promoted culture of violence as well as the State government's inability to tolerate dissent can look to the BJP now. If anger had been gradually building up against the TMC, it became apparent in the 2018 Panchayat elections. For the first time, non-ruling party candidates found themselves barred from even filing nominations in 34% of the seats. Not surprisingly, the BJP emerged second, even though it was distant from the TMC.

### Making inroads into the State

The BJP's entry into the State is not sudden, even if its 2014 victory in the general election widened its appeal in the State. Local RSS activists stress that RSS founder, K.B. Hedgewar, studied medicine in Calcutta, and that his early inspiration came from the State. They also stress that Syama Prasad Mookerjee was born in Calcutta. Senior RSS activist Dhanpat Ram Agarwal talks of attending a *shakha* in the early 1960s in Siliguri where he grew up. Conversations reveal that Hindu right-wing organisations have been working in West Bengal for more than six decades. They worked first with Marwari traders and migrants from eastern Uttar Pradesh and Bihar, in Kolkata's Burrabazar, in the State capital's industrial hinterland where the jute mills were situated, and in north Bengal. By the late 1960s, the RSS began to insist that its meetings be conducted in Bengali.

If long years of Left rule pushed the Hindutva agenda underground, Ms. Banerjee's overt wooing of Muslims, who constitute 28% of the population, through ill-advised measures such as providing a monthly stipend to *imams*,

most of whom are now Trinamool activists, awakened a sleeping giant. For the RSS-BJP combine that has been trying to sell the difference between Bangladeshi Hindus (“migrants”) and Muslims (“infiltrators”), especially in the border districts, and the dangers of what they call a “demographic imbalance that can affect social harmony”, this was a perfect moment for take-off.

It took Ms. Banerjee time to see that her party was being branded by the BJP. She had already been financing puja committees. Now she began to patronise Ram Navami processions and Hanuman Jayanti. One TMC candidate was found posing on a poster that had a flying Hanuman, and another was photographed campaigning with workers holding ‘Jai Sri Ram’ banners. A young TMC worker told me that he now had “Hindutva inside him”, indicating that he had made an ideological crossover.

### A belated realisation

Meanwhile, many Left supporters, brought up on years of bloody battles with the TMC and encouraged by their leaders who are still targeting Ms. Banerjee rather than the BJP, are openly saying that in this election they will vote for the BJP to rid the State of the TMC. Belatedly, some CPI(M) senior leaders have realised the ideological short-sightedness of a campaign that has described the TMC and the BJP as two sides of the same coin. Former Tripura Chief Minister Manik Sarkar, who lost last year's Assembly election to the BJP, said recently: “To gain freedom from the TMC, don't make the mistake of choosing the BJP. It will be a blunder.” Former West Bengal Chief Minister Buddhadeb Bhattacharya told the CPI (M) mouthpiece *Ganasakti*, “There is no use in leaping from a TMC frying pan into the BJP's fire. In some places, the danger is already present. Our task is to bring back the people from this self-destructive mode.” But the warnings have come too late.

Ms. Banerjee, fighting possibly the toughest battle of her political career, remains popular in rural Bengal, where people continue to make a distinction between her and her workers. Many of her welfare schemes have worked, and the people are grateful. Muslims stand rock solid behind her. But the danger to her rule from the BJP is real and present. Ms. Banerjee realises it and continues to fight hard.

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### SINGLE FILE

## Rhetoric over real issues

Nationalism and Hindutva are the talking points this election, not everyday matters like jobs

AKRITI BHATIA



This general election has largely been about optics, muscularity, glamour and positioning. After the attack in Pulwama, Kashmir, and the Indian air strikes in Balakot, Pakistan, the election campaign has been riding on a strong anti-Pakistan sentiment and politicisation of the armed forces. At the same time, the campaign across party lines has been more about actors, cricketers and other “non-political” personalities. As far as ideology is concerned, the BJP's campaign is more explicitly about Hindutva politics now than it was in 2014.

The inherent paradox in the 2019 election is that although each of the above has been used to appeal to the ordinary citizen, policy matters that affect citizens directly in their everyday life appear to have fallen by the wayside, including healthcare, education, employment, working conditions, water, farming, prices and nutrition. Contrarily, this campaign has sought to deepen majoritarian paranoia, by glorifying one community and demonising another, and through the negative politics of fear, anger and vendetta.

The focus on negative politics is all the more surprising given some of the positive work done by the incumbent government. This includes the reach of gas cylinders, toilets, roads, electricity and, to some extent, housing in rural areas, all of which have seen a considerable push in the Modi era. Why then has this election been ‘issueless’?

One can clearly witness the shift in the BJP's own issue-based slogans of of the past five years like ‘Sabka Saath, Sabka Vikas’, ‘Beti Bachao, Beti Padhao’, and ‘Make in India’ to more direction-less ones this time like ‘Main bhi chowkidar’ and ‘Modi hai toh mumkin hai’. Does this framing reflect an intent to evade questions around the agrarian and job crisis?

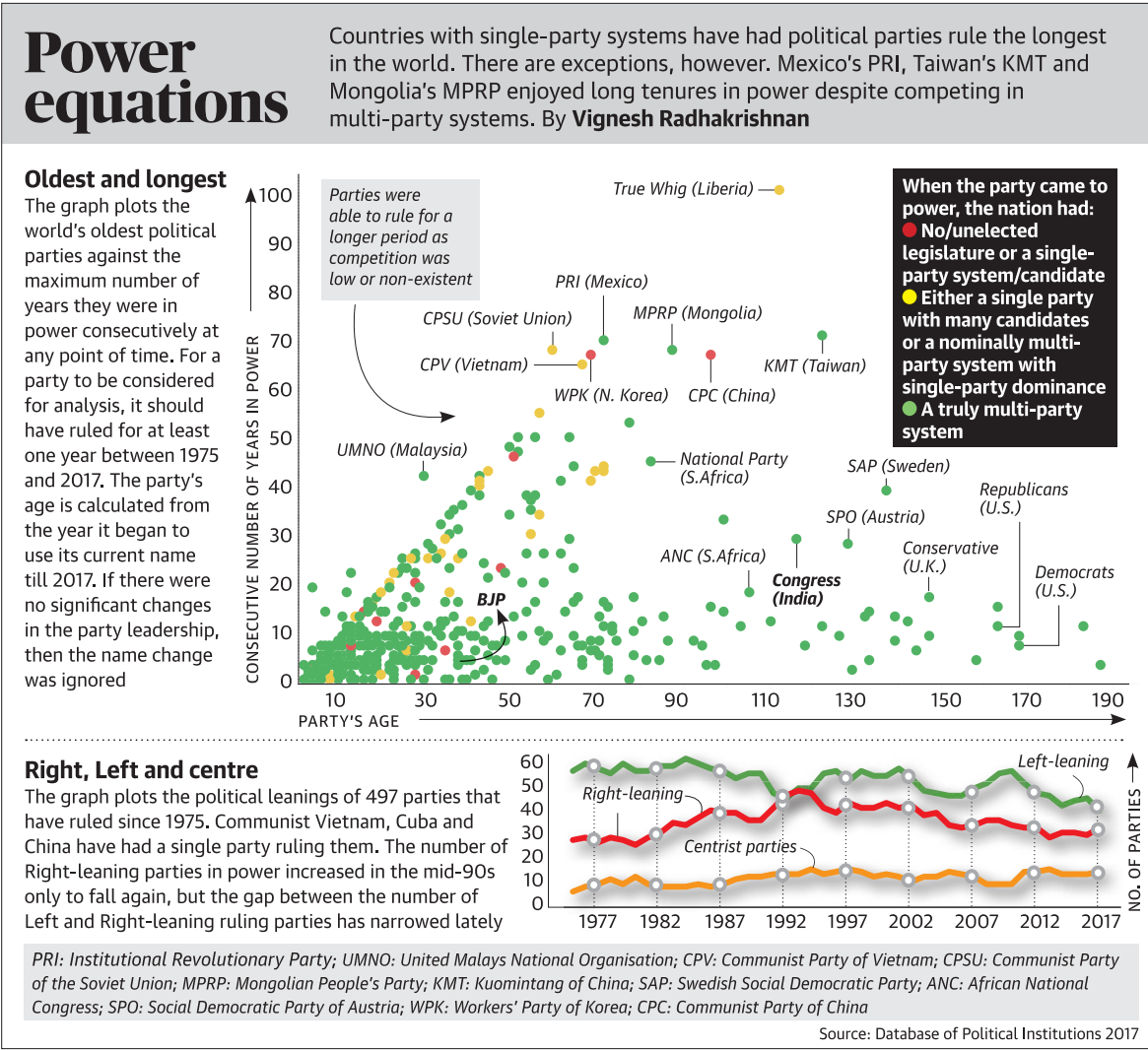
Yet, anecdotal evidence suggests that many believe in the TINA (There Is No Alternative) factor. This indicates distrust in the Opposition's leadership, in regional parties and ‘agenda-less’ grand alliances. However, the danger here is that collective beliefs of this sort might make elected authoritarianism possible, leading to the delegitimisation of the federal structure of our democracy.

This election is also not about party manifestos and local candidates. Otherwise, citizens, irrespective of the political party or ideology they support, would have objected more strongly and widely to, say, people with criminal backgrounds being given tickets. One thing is clear: this election is more about personality than ideology. According to a recent analysis of 35 speeches by Prime Minister Narendra Modi, the word he most often used was “Modi”. The real question and its answer then lie with the voters. What appeals to them the most this time: personality cults, charismatic dynasts and movie stars or issues and candidate qualifications?

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### DATA POINT



### FROM The Hindu. ARCHIVES

FIFTY YEARS AGO MAY 16, 1969

#### Nixon offers plan to end Viet Nam war

President Nixon offered last night [May 14, Washington] an 8-point plan to end the war in Viet Nam, and to determine its future political structure. Its basic terms called for mutual withdrawals, according to an agreed time-table, of all foreign forces – U.S. and its Allies, as well as North Viet Namese – and a free voice for all political groups, including the Viet Cong, in deciding the complexion of the country's post-war Government. An international supervisory body, acceptable to both sides, would verify the withdrawals, arrange the cease-fires and supervise the elections that would be held as soon as possible after the first two events have occurred. Both parties would agree to abide by the Geneva accords of 1954 and 1962 relating to Viet Nam and Cambodia, and Laos respectively. North and South Viet Nam would be free to negotiate reunification. Mr. Nixon's plan, which is understood to have been in the making for the last three months, was formally presented by the President in a special nationwide telecast.

A HUNDRED YEARS AGO MAY 16, 1919.

#### Victory March in England.

To-day's [May 3] victory march of the Dominions' troops is the theme of editorial special articles which dwell on their glorious record retelling the stories of the battles in which they were most prominent. As one writer says, “each Dominion contingent in its first action set itself to reach and reached highest standard of desperate disciplined courage and though the ranks were refilled time after time by newcomers the same superb level of achievement was maintained”. It is pointed out that Victoria Cross was never so hard to win as in the recent war, yet the number conferred was greater than the crosses gained by all arms in any previous campaign with the exception of the Indian Mutiny. A message from the King was handed to all members of the overseas forces on dispersal from parade expressing heartfelt pride and gratitude in taking the salute.

### POLL CALL Casual vacancy

When the seat of a member of the Lok Sabha or the Rajya Sabha or a State Legislative Assembly or a State Legislative Council becomes vacant, or when his or her election is declared void, the constituency from where the member was elected can vote for another person to fill up the vacancy. If the vacancy is in a seat reserved for Scheduled Castes or Scheduled Tribes, the person to fill that seat must also belong to a Scheduled Caste or Tribe, as the case may be. A by-election to fill up such a vacancy should be held within a period of six months from the date of the occurrence of the vacancy.

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