A six-pack judiciary

timesofindia.indiatimes.com/home/sunday-times/deep-focus/a-six-pack-judiciary/articleshow/9169376.cms

Tarunabh Khaitan / TNN / Updated: Jul 10, 2011, 06:47 IST

This story is from July 10, 2011

A Supreme Court bench comprising Justices Sudershan Reddy and Surinder Singh Nijjar passed orders in two politically sensitive cases this week.These orders have caused much controversy over the role of judiciary in constitutional cases.

In the first of the two cases, Nandini Sundar v State of Chattisgarh, the judges held that the armed deployment of ill-trained, uneducated and poor tribal youths in combat operations against Naxals by appointing them as Special Police Officers (SPOs)was unconstitutional.It also prohibited the state of Chattisgarh from supporting the Salwa Judum or any other private militia.

The other case, Ram Jethmalani v Union of India, dealt with the complex issue of untaxed black money that some Indian citizens have allegedly hoarded in foreign banks.In this case, the judges reconstituted the governments highlevel committee (composed of secretaries of several finance and security departments) as a Special Investigation Team (SIT).They mandated that it include two former Supreme Court judges (who will also head the team) and entrusted it with wide-ranging functions.
Both cases were brought before the court by concerned citizens as public interest litigation (PIL).Both cases are marred by unnecessary rhetorical diatribe against neoliberal globalization.Naxal insurgency, the judges tell us in Sundar, is caused by social inequalities exacerbated by neoliberalism.In Jethmalani, the court attributes endemic corruption to the limitless greed spawned by neoliberalism.Even if one agrees with these claims, their irrelevance in adjudicating these cases renders them unhelpful, even counterproductive.

By launching a tirade against neoliberalism, the court provides unnecessary ammunition to critics who accuse it of judicial overreach.The irony is that, at least in Sundar, the court performed a very traditional judicial role.When governments claim uncontrolled power in the name of national security, brave judges around the democratic world have stood up for civil liberties.In Sundar, the court shows how the system of appointing illtrained and ill-paid young tribals as SPOs (or, less charitably, as cannon-fodder) was violating their right to equality and right to life.It also noted that once discharged from these temporary appointments, these armed and battle-scarred young men could spell disaster for their communities, not to mention the risk of Naxal reprisals.Contrary to what some news reports have suggested, the court has not outlawed the policing of Naxal activities.All it has insisted upon is that only properly trained regular police officers must bear arms and engage in combat duties.By

insisting that laws cannot remain silent when the cannons roar, the court must have had Benjamin Franklins warning in mind: They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.

In contrast to the Supreme Courts meek capitulation to Indira Gandhis authoritarianism in 1976, the judges in Sundar valiantly perform the countermajoritarian duty the Constitution expects of them.B R Ambedkar would have been proud (although he would have disapproved of some of the embarrassingly paternalistic, if well-intentioned, language used by the court to describe illiterate tribals).

The judgment in the Jethmalani case is more problematic, not only for its rhetoric but also for its substantive implications.Unlike in Sundar, the court does not even attempt to explain which constitutional provisions have been violated or how its jurisdiction under Article 32 is triggered.PILs were designed to relax standing rules which determine who can bring a case before a court.Standing rules cannot confer jurisdiction on a court where none exists.Contrary to the constitutional scheme of separation of powers, the court now assumes jurisdiction merely on the basis that a case involves public interest.

The order of the court in Jethmalani is also quite remarkable.Nowhere in the case does the court feel the need to explain why the inclusion of retired judges in the SIT will improve its efficiency.More surprisingly, the SIT is tasked not only with the investigation and prosecution of cases of unaccounted money stashed abroad, but also with preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the countrys battle against unaccounted money.This is a very wide power to frame extremely complex policy and design a highly important institutional framework, entrusted to a completely unelected and fairly untransparent body comprising bureaucrats and judges.Has the contempt for democratic politics reached such a nadir that elected politicians will play no role whatsoever in evolving a comprehensive policy to deal with unaccounted money Is the middle-class fantasy of an enlightened oligarchy taking over the country finally being realized

A constitutional courts relationship to policy is a complicated one.It is a misconception to think that the separation of powers immunises all questions of policy from judicial review.If the policy violates the Constitution, it is the duty of the court to read or strike it down.This is exactly what the Sundar bench has done.

But when the Constitution requires positive action, the position of a court becomes tricky.A court is better off denoting what is bad (unconstitutional) policy than framing what will be a good policy.Indian courts, when faced with a policy vacuum, tend to either frame the policy themselves or appoint (often unelected) bodies like the SIT in Jethmalani to do so.South African courts, also enforcing positive constitutional duties, have been far more respectful of representative institutions.Instead of undertaking the task themselves or entrusting it to an appointed body, they usually require the elected organs of the state to reframe the policy within constitutional parameters.Indian courts must acknowledge that their expertise is limited to matters of law and the Constitution, and leave the drafting of complex policy to an

open, consultative and accountable process undertaken by the peoples representatives.If they get it wrong, the court must say so, but let these representatives have another go.