

JUDICIAL INTERFERENCE WITH THE LEGISLATURE AND EXECUTIVE

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Abstract: The Indian Constitution through its several provisions provides for three institutions that would maintain the law and order in the country. They are the judiciary, the executive and the legislature. Each organ of the state has specific function assigned to, broadly the legislature frames the law, the executive enforces the law and the judiciary adjudicates on any disputes. Although all organs are equally powerful according to the constitution. And for this purpose it has the power of judicial review. Through the mechanism of judicial review, the judiciary ensures that no organ goes beyond the ambit of the constitution and often judiciary while exercising this power oversteps in to the domain of the organ organ.

This article covers the power of each organ the state through the concept of separation of powers, and several judicial instances where the judiciary is overstepping and exercising what is called as 'judicial overreach' with a leading case laws and the validity of judicial legislation and finally the judiciary performing the executive function.

Index Terms: Separation of powers, Judicial review, Article 142, Powers of Judiciary.

1. INTRODUCTION

"This is a typical case of widespread malady which has infected the judicial system in India, namely the tendency in some courts of not exercising judicial restraint and crossing their limits by encroaching into the legislative and executive domain, contrary to broad. Separation of powers envisaged under our constitution".

-J MARKANDEY KATJU¹

In Indian federalism there is concrete separation of powers between different wings of government viz. legislature, executive and judiciary. The constitution of India has laid down in detail their functions and power. The main reason our founding fathers envisaged separation of power is to ensure that there is no centralization of powers in one particular wing and to prevent arbitrariness. The doctrine of separation of power was propounded by Montesquieu
The fifth and sixth part of the constitution of India specifically reflects on the mechanism of separation of power in India.

EXECUTIVE POWERS

In India the executive power is vested with president at central level and governor at state level respectively². In *Ram Jawaya Kapoor v State of Punjab*, the supreme court has observed "though it is not possible to give an exact definition of executive power, it means function which do not strictly fall within the legislative and judicial field". Thus the court has taken into the consideration the separation of powers while defining the powers of the executive.

LEGISLATIVE POWERS

Regarding the composition of the parliament, the Indian constitution adopts the British model. It uses a bicameral legislature consisting of Lok Sabha and Rajyasabha. The Indian parliament is derivative of the constitution, whose powers, rights, privileges and duties are stipulated by the constitution.

JUDICIAL POWERS

The supreme court of India is the apex court and is the final interpreter of the constitution and the laws. The law declared by the supreme court is binding on all courts within the territory of India.³

Though it is known that the separation of power exists in India and the same is enshrined in the constitution itself but it does not exist in the absolute form but it ensures the checks and balances. The judiciary in particular exercises judicial review over the other organs and it can be done in two ways:

¹ State of Uttar Pradesh v Jeet Bisht, (2007) 6 SCC 586

² Constitution of India Article 73

³ Constitution of India. Article 141

- Judicial review over the legislation to ensure that the constitutional mandates are followed
- Judicial review over the executive action of the government.

The issue arises when the judiciary while exercising the power, goes little beyond and performs what is supposed to be performed by the legislature and the executive. Judiciary is now blamed for its over activism and for using its power of judicial review to sidestep the doctrine of separation of powers and to disturb the system of checks and balances. This is causing rift between the organs of the government and disturbing the harmonious relations with other organs.

2. MEANING AND NATURE

Article 142 of the Indian constitution confers plenary powers on the supreme court to do complete justice. This power has given a new dimension to the concept judicial activism in India.

In the case of *S. Nagaraj v. State Of Karnataka*⁴ stated that “Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. This wide definition of justice ensures that the court can exercise its powers under Article 142 to do Complete justice in a range of cases each decided by the court based on its facts and circumstances. Article 142 also lays down no limitations regarding causes or the circumstances in which the power is to be exercised. The exercise of such power is left completely to the discretion of the highest court.”

3. PHASES:

ARTICLE 142 is basically divided into two parts. Part 1 deals with the courts full power to justice and the second part is article 142 granting the supreme court three powers a) ensuring the power of personnel to attend a job b) discovering and producing documents c) investigate and punish yourself.

In the first phase there was an extraordinary force which was rarely used by supreme court of India. It was a socio economic reform where parliaments and executives were very active. second phase was of authoritarian emergency of 1975-76 where the powers of supreme court were limited.

Third phase was judicial populism when judicial radicalism and public interest litigation emerged as a new judicial procedures.

The fourth phase is the era of new economic reforms, which brought tremendous changes in the national economy and political and social structures.

4. SCOPE OF THE POWER:

- Cannot be in violation of fundamental rights

The court held that as long as there was a conflict between articles 32 and 142, the court had the power to make a decision in order to achieve justice, but the decision must not violate the individuals basic rights, as described under part III of the Constitution⁵.

- Procedural and not Substantive:

In *Premchand Garg v Excise commissioner U.P Allahabad*⁶, the court held that “in this connection, it may be pertinent to point out that the wide powers which are given to this court for doing complete justice between the parties, can be used by this court”. It clearly indicated that the power under article 142 are purely procedural and not substantive.

- Premchand Garg’s case was overruled:

In *In Re Vinay Chandra Mishra*⁷ the court exercised substantive powers to punish person guilty under the contempt of court laws while declaring the observations made in the Premchand Garg’s case as a decision not good in law. The scope of Article 142 was expanded. The court must take the statutory provisions in consideration for regulating the matter in dispute. The tier need of “complete justice” in a cause or matter would depend on the facts and circumstances of each case while exercising that power that the court would take into consideration the express provisions of a substantive statute. Once this court has taken note of a case, cause or matter, it has power to pass any order or issue direction as may be necessary to do complete justice in the matter.”⁸ Thus the power of the article has expanded. this broad interpretation is needed because of changes in social, economic and political programs.

- Cannot go against the provisions of law:

The court observed that the power conferred by article 142(1) is very wide, any decision inconsistent with the express statutory provisions, cannot be made even under article 142(1). Similarly, it cannot be inconsistent with any constitutional provisions. Thus adopting restricted view court has held that though the power under this article is wide it cannot go against any provision of law or against provision of the constitution.

⁴ S. Nagaraj v. State of Karnataka 1993, 4 SCC(suppl) page 595.

⁵ Premchand Garg v Excise Commissioner U.P Allahabad, AIR 1963 SC 996.

⁶ AIR 1963 SC 996

⁷ AIR 1995 SC 2348

⁸ State of U.P v Pooisu(1976)3 SCC1; Gaug bishan v. Jai Harare(1986) 1 SCC 75; Navnit R. Kamani v. RJL Kamani 1988 supp.(3) 123.

- Cannot set precedence:

It is held frequently that the directions issued in exercise of power under article 142 of the constitution of India do not constitute a binding precedent.⁹ The order under article 142 is made in view of the peculiar facts and circumstances of each case so it can't be treated as a precedent in any other matter.¹⁰ This also indicates that the power under article 142 is of procedural in nature.

- No limitations of ordinary laws:

The power under article 142 is at an entirely at different level and of a different quality. Prohibitions on limitations on provisions contained in ordinary laws cannot, ipso-facto, act as prohibitions or limitations on the constitutional powers under article 142.¹¹

- Powers over other organs:

In *Union of India v Association for Democratic Reforms*¹² it was held that "if the field meant for legislature and executive is left unoccupied it will be detrimental to the public interest, this court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to sub-serve public interest." This is to declare that if the other wing of the government to exercise such a broad power, because when the government becomes oppressed, it is unfair or inactive, the uneasiness in society often reaches the point of revolution. The judiciary has immense power under article 142, and the ambit of the same has been widened by the judicial interpretation. This case has attracted the attention of maximum critics and the members of the other organs.

5. JUDICIARY AS A LAW MAKER

There has been a perpetual intellectual conflict, regarding the law making power of the judiciary. There are scholars who contended that the role of a judiciary is to interpret, declare, discover and apply the existing body of legal principles by a logical and a purely mechanical process¹³. On the other hand, there are a set of people who believe that judiciary drives economic and social changes and in order for change to happen, the judges often take laws to fill up the gaps that exists in the current legal framework. This conflict seems partially resolves through judicial decisions and it has now been established that judges have enacted laws by applying established rules to new situations and by changing the content of legal rules based on changes in the economic and social environment.

In order to fill the gaps, the court is issuing the directions in the nature of legislations. This is popularly known as 'judicial legislation'.

6. JUDICIAL INSTANCES

In *Prakash Singh v. Union Of India*,¹⁴ A petition under article 32 was submitted to the supreme court to issue instructions to the Union government to propose a new "police Act" in accordance with the proposed Model Act and to make recommendations by the National police Commission to ensure police accountability to the laws of the country. It has been argued that the current legislation Indian Police Act of 1861 is insufficient to meet the evolving needs of the system, as it has not been updated for many years. The court in addition to the committee's recommendations, issued time limit instructions, including the composition of the National Security Commission, the DGP's choice and minimum term, as well as the IG's investigation separation, the composition of the police establishment committee, the police complaints bureau and the National Security Commission. To comply with the above instructions, the court instructed the cabinet secretary to submit a statement to the Indian Government and the chief secretaries of the State Governments and the Union Territories stating the observance of the above instructions. This case be distinguished from the *Vishaka's case*¹⁵. Before there was no provision for sexual harassment of women in the workplace. However, in this case there is a legislation regulating the police force, and the legislature or the government can decide whether it is necessary to enact a new law on a case-by-case basis. The supreme court clearly violated the legislative field through this judgement.

In *State of U.P V Jeet Singh Bisht*, the U.P Government had approached the Supreme Court against the order of Allahabad High Court where the High Court apart from making observations on the merits of the case, directed the respondent Government to constitute at least five state consumer forums at the state level under section 16 of the Consumer Protection Act by making necessary amendments.¹⁶ In addition, the High Court issued an instruction that the moderator of a judge should be a retired High Court Judge who enjoys the same facilities and facilities as the High Court Judge. Disagreements between the divisional judges eventually led to the issue being submitted to a larger bench. Interestingly, the establishment of the court and the decision to grant the presiding officer the qualifications and eligibility criteria and qualifications are purely legislative functions and can only be prescribed by the legislature through enactment rather than the judiciary.

⁹ *Manipur Regular Posts Vacancies Substitute Teacher's Association v State of Manipur*, 1991 Supp(2) SCC 643

¹⁰ *State of Kerala v. Mahesh Kumar and others* (2009) 3 SCC 654

¹¹ *Union Carbide Corporation v. Union of India*, 991 SCR, sup.(1) 251

¹² *Union of India v Association for Democratic Reforms*, civil Appeal no. 215 of 2002.

¹³ *Southern pacific co v. Jensen*, 244 US 205 (1917)

¹⁴ *Prakash Singh v. Union of India*, (2006) 8SCC 1.

¹⁵ *Vishaka v. State of Rajasthan* AIR 1997 SC 3011

¹⁶ *State of U.P v Jeet Singh Bisht*, (2007) 6 SCC 586.

Court on its Own Motion v. Union of India & ors.¹⁷ In this case the court dealt with the aspect of fines in the traffic department. This case is a major instance of judicial overreach, wherein the Delhi High Court, after taking suo-moto cognizance of growing death toll on Delhi roads enhanced the traffic fines. This illustrates how the judiciary violates its functions and takes over the work that is entirely within the parliamentary field. Because of legal judicial activism, the most thing it can do is to reflect the necessity of amending the fine, or to order the government to do so by issuing an injunction, because the addition or modification of the fine is purely a legislative function and can only be amended by the legislature.

In *Vishnu Dutt Sharma V Manju Sharma*¹⁸ the Supreme Court refused to grant divorce on the basis of irretrievable breakdown of marriage. The earlier decision of the court which accepted such grounds was negated in this case on the ground would be like adding another to section 13 of the Act, which is clearly in the legislative domain.

The intervention of the Supreme Court in areas such as the 2G investigation and the appointment of the Chief Alert Officer has caused the top officials and politicians to once again be angry at the “over-expansion” of the judiciary. Ironically, the 83 former civil servants led by former Federal Cabinet Secretary General TSR Subramanian recently filed a petition with the Supreme Court for civil service reform, including the determination of bureaucratic tenure, primarily to ensure stability and insulation.

In *Kumari Madhuri Pat v Additional Commission*¹⁹, around fifteen guidelines were given in the form of legislation pertaining to the rights of the schedule caste and schedule tribe. “the Judicial Power was exercised to interpret the constitution as a living document and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves.”

7. VALIDITY OF JUDICIAL LEGISLATION

In the present generation the question is frequently raised as to whether the judicial legislations are valid? Are they not violating the basic structure of separation of powers? In this context two judgements one delivered by J. Markandey Katju and another delivered by J. Ashok Kumar Ganguly in *University of Kerala v Council Of Principal’s for colleges, Kerala*²⁰ are elaborately discussed. The question of great constitutional importance which arose in this matter was “whether after getting recommendations of some expert by a court order, can the court itself implementation the said recommendations of some expert body by a court order, can the court itself implement the said recommendations by passing a judicial order or shall the court send it to the Legislature or its delegate to consider making a law for implementation of these recommendations.” An important question about judicial legislation is raised. The question is, whether in our constitution such judicial legislation is permissible? And even if it is, what is the extent of judicial legislation?

According to J. Markandey Katju, the interim order directing the implementation of the commission’s recommendations is equivalent to legislation. According to him, this kind of action by the court violates the broad decentralization of the constitution, so an organ should not infringe on the field of another.

According to Katju’s decision, once the court receives the report of the committee, the court should not use judicial orders to direct the implementation of the recommendations, but send them to the appropriate legislature or its representatives. The relevant legislature or authorities should immediately accept the law of the report or to accept certain changes. The court cannot enforce the committee through judicial orders. He criticized the courts decision and the court has made an order on the nature of law.

In another independent judgement, Justice Katju declared that the prayers made in the petition required legislative and administrative instructions, which could only be given by the legislature or the executive. The judiciary cannot violate the tire legislation or administrative field. If such an instruction is issued, it will violate the principle of separation of powers.²¹

J. Ashok Ganguly believes that judicial causes require judicial intervention, especially in the context of legislative gaps. In his judgement, he drew attention to the fact that many accomplished jurists such as Richard Posner, Benjamin Cardozo and others believed that the judge did have laws in place. The legal formulation of the court is also recognized in various other decisions and is considered to be carried out under the expanded elements of articles 141 and 142 of the Constitution.

Thus it can be observed that there is a dichotomy in the opinion of the two judges regarding the role of the courts and the nature and scope of article 142. At the end, it can be said that the balance is required between judicial activism and the judicial restraint.

8. JUDICIARY PERFORMING EXECUTIVE FUNCTION

Often many critics of the judiciary have come out in open, especially during the phase of judicial over activism. Judiciary has time again not just made recommendations and suggestions, but has entered into the zone of executive, and stepped into its shoes. Despite the existence of separation of power, judiciary has often inferred with policy decisions of the government.

The development of policies and the implementation of these policies are within the scope of activities of the executive branch. It is not within the power of the judiciary. In addition, the judiciary has no expertise or domain knowledge to formulate policies or modify policies. On the other hand, managers have experts, professionals, managers, consultants etc. in specific areas, and have the expertise to develop policies after considering all aspects of the problem.

Therefore, in general the judiciary cannot interfere with the governments policy decisions in the administrative field.

¹⁷ Court on its Own Motion v. Union of India & ors, 139 (2007) DLT 244.

¹⁸ Vishnu Dutt Sharma v Manju Sharma, (2009) 6 SCC 379.

¹⁹ Kumari Madhuri Pat v Additional Commission, (1994) 6sc 241

²⁰ University of Kerala v Council of Principal’s for colleges, Kerala, AIR 2010 SC 2533

²¹ Common Cause (A Regd. Society v Union of India and others. 11th April 2008

Despite this, in some cases, the court may intervene in government policy decisions. For example, if the policy decides to violate the basic rights guaranteed by the constitution or violates other provisions of the constitution, the court can intervene. Similarly, if the policy decides to violate the parliamentary bill or the rules laid down under the bill, the court may intervene again.

9. JUDICIAL INSTANCES

The judicial interferences in the public field became essential due to executive inactiveness and indifferences towards rule of law. One of a such instance is the case of *M.C. Mehta v Union Of India*²² which dealt with environmental degradation. In 2002, the Supreme Court noted this and instructed the state and central government to regulate the activities. In the judgement, the court made it clear that mining operations in the area would be closed. Noting the serious mistakes made by the State Government, the Supreme Court completely banned mining in Aravalli region. The court observed that “The paradox is that there is no dearth of enactments, the problem lies in non-compliance and as a result mining on extensive scale without approved plans and without taking remedial measures has led to land and ecological degradation.”

The result of this case is to expand the scope of the powers set forth in this article. It can be noted that, although there are legal and legal procedures, the court can exercise its power to fully exercise justice if necessary. This is not the first time the Supreme Court has invoked the constitutional power under article 142 to prevent environmental degradation.

In *All India Judges Association v. Union Of India*²³, the Supreme Court gave the Government of India directions to establish an All India Judicial Service, in order to make available several services for the judiciary all over the country. This issue, involves a question of policy making, which is a function of the executive and thus judiciary has clearly transcended its boundaries by giving directions to the parliament.

There are several such instances where the judiciary has surpassed its powers and have encroached upon executive domain like duty of the government to spread awareness about the environment through slides in cinema hall or special lessons in the syllabus of schools and colleges.²⁴ Other instances was the direction to seal commercial premises in Delhi which were in violation of the master plan under the Delhi Development Act, 1957²⁵

The research just contains few of such instances, but the judiciary has interfered with so many functions of executive in terms of appointment, fixture of salaries, formation of committees and or given them direction and asked them to behave in a particular manner.

²² *M.C. Mehta v Union of India*, 2004 12 SCC 118.

²³ *All India Judges Association v. Union of India*, AIR 1992 SC 165

²⁴ *M .C Mehta v Union of India*, IR 1992 SC 382.

²⁵ *M .C Mehta v Union of India*, Writ Petition (Civil) No. 4697/1985.