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Topic- Extent of Executive Powers in Indian Constitution

Extent of Executive Powers in Indian Constitution

The executive along with the legislature and the judiciary forms one of the three agencies through which the State functions. The dispute before the Court has continuously been so as to how much one agency can intrude into the functions of another. Has the Constitution provided a rigid classification? In this context the nature and extent of the executive would be studied emphasizing on the key issues of interpretation of the relevant provisions of the Constitution.

The two important points to be looked into before analyzing the extent and nature of 'executive functions' in the Indian Constitution according to the Constitution is what constitutes the executive and what exactly are executive functions.

In pursuant with the federal structure envisaged in the Constitution, the executive is divided into Union Executive, enumerated in Part V Chapter 1 Articles. 52 to 78, and State Executive, enumerated in Part VI, Chapter 2 Articles 153 to 167.

Article 53(1) vests in the President the executive power of the Union which shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. Article 154(1), with respect to State Executive and specifically the Governor, is exactly worded like A. 53(1), however, A. 156(1) states that the Governor holds his office at the pleasure of the President unlike the tenure of the President which is fixed at 5 years according to A. 56(1). It means that the Union Executive controls the tenure of the Governor since he is expected to be a channel between Union and State Executive. The Governor thus, is appointed by the President (under Article 155) and holds office at his pleasure. The

Court has time and again reiterated that the “pleasure of the President” is “unjusticiable” and can not be questioned since the post of the Governor is not an employment under the Government of India.

Article 74 provides for a Council of Ministers with a Prime Minister at the head, who shall aid and advice the President, who has to act in accordance with such advice. Article 163, similarly, provides for a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his functions, except in so far as he is by or under the Constitution is required to exercise his discretion. The Governor is expressly given a discretionary power, the extent of which will be discussed subsequently. However, to what extent can the President and the Governor act independently of the Council of Ministers is another important issue to be dealt with subsequently.

It is necessary to determine the true meaning of the term ‘executive functions’ which has not been defined in the Constitution. They are certainly difficult to comprehensively define since they “are merely the residue of the functions of government after legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance “of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and state assistance and insurance.”

The Court has also adopted this ‘residuary’ nature of executive functions and has recognised the difficulty of framing an exhaustive definition of what executive function means and implies and have held that the executive power generally connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The views taken by the Court with relation to the constitutional position of the President and the Governor has been one of a titular head without whom the disposition of executive functions is impossible but at the same time, he does not enjoy the privilege of personal discretion, except in special circumstances, thus, pointing to the fact that the legislators of the Constitution were strongly in favour of a parliamentary system on the lines of British Parliamentary System.

UNION EXECUTIVE

Extent of Executive Powers

Article 73 of the Constitution of India, Extent of the executive power of the Union, states that,

“ (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

to the matters with respect to which Parliament has power to make laws; and

to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.”

Thus, the article provides that the extent of executive power of the Union extends to matters with respect to which the Parliament can make laws. That implies that the executive power is competent on matters on which the Union legislature has competence. In *Ram Javaya Kapur* , it has been observed by the Court that while the executive has no authority to act against the provisions of a law, it does not imply that the executive's actions within the ambit of its authority requires any law which specifically authorises such action.

President's acts being bound by the aid and advice of the Council of Ministers

An important case to be dealt with is *Jayantilal Amritlal Shodhan v. F.N. Rana and Ors.*, wherein, the validity of a notification issued by the President under Article 258(1) of the Constitution relating to the delegation of Union functions to the State was discussed. The Court held that Article 258 enables the President to do by notification what the Legislature could do by legislation, namely, to entrust functions relating to matters to which executive power of the Union extends to officers named in the notification. The notification issued by the President was held to have the force of law. This Court held that Article. 258(1) empowers the President to entrust to the State the functions which are vested in the Union; and

which are exercisable by the President on behalf of the Union and further went on to say that Article 258 does not authorise the President to entrust such power as are expressly vested in the President by the Constitution and do not fall within the ambit of Article 258(1).

Thus, a distinction was made by the Court between the executive functions of the Union and the executive functions of the President and held that the notification was issued by an executive authority and thus, had the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law.

This Court illustrated this observation by stating that the power of the President to promulgate Ordinances under Articles 268 to 279 during an emergency, to declare failure of Constitutional machinery in States under Article 356, to declare a financial emergency under Article 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Article 309, are not powers of the Union Government but are vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1).

This position was overruled in *Shamsher Singh v. State of Punjab* wherein it was held that the distinction spelt out in *Jayantilal* does not in any way contradict the fact that the President is the constitutional head of the State. And thus, being the constitutional head of a parliamentary system, he has to act in accordance with the aid and advice of the Council of Ministers. Therefore, whether the functions exercised by the President are functions of the Union or the functions of the President in his personal capacity, they have equally to be exercised with the aid and advice of the Council of Ministers, and the same is true of the functions of the Governor except those which he has to exercise in his discretion.

The Court also laid down the exceptional cases when the President could act independently of the advice of the Council of Ministers and these were:

“The choice of prime minister, though this is restricted since the President has to consider the majority’s command.

The dismissal of the Government which has lost support in the House but refuses to quit office

The dissolution of the House where an appeal to the country is necessitous.”

Thus, constitutionally how does reflect that the President was intended to be just a formal head of the Union who has to act in accordance with the advice of the Council of Ministers? That can be done by the various checks imposed upon him. Firstly, there is the method of impeachment of the President wherein the Parliament can remove the President when he violates the Constitution. Secondly, the Council of Ministers is responsible to the people for the government policies and frameworks, while the President is not and enjoys judicial immunity. Moreover, the language of Article 74 is such that the ‘aid & advice’ of the Council of Ministers seem to be binding since these functions are not just advisory in nature but has a binding and essential nature, especially after the forty-second Amendment, which inserted the ‘provided that...’ clause in Article 74(1).

Thus, now it remains to be examined whether the executive can trench upon judiciary or the legislature in any ways.

Entrenchment upon the Judicial and Legislative Functions

Under Article 72 , the power to grant pardons, etc, and to suspend, remit or commute sentences in certain cases is with the President in certain cases- firstly, in all cases where the punishment or sentence is by a Court Martial; secondly, in all cases, where the sentence is for a violation of a Union law and finally in all cases where the sentence is a death sentence. The Court has termed that this is purely an executive function and not a judicial one and thus there is no transgression since it is directly related to factual considerations and can also not be used to enhance the punishment.

According to Article 217(3), a judicial function is provided to the President which he must discharge personally without the advice of the Ministers and without surrendering his judgment to the Chief Justice, then the decision of the President is not amenable to review by the Courts.

The executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State. It is, according to the ‘residuary’ definition,

subject to the legislature in so far as the executive has to be affecting the laws. But the classification here seems not rigid since where it is necessary for the executive to function without there being a law affecting that, the executive can come up with a temporary guidelines in the form of ordinances, notifications, etc, which have the same force as a law but have to be eventually passed as law.

STATE EXECUTIVE

Extent of the Executive Powers

Article 162 of the Constitution states the extent of executive powers of the State and it extends to all matters in which State legislature can make laws. However, it can not encroach upon matters in the Union list or any other matters entrusted with the Union by way of Central Law. The State executive can thus, not encroach upon matters legislated by the Union but even this does not imply that there is a rigid division between the three agencies of the State as is the case with the Union executive. since there are times when even the executive is entrusted with legislative or judicial functions.

Governor's Discretionary Powers

In a recent Supreme Court judgment of *Madhya Pradesh Special Police Establishment v. State of Madhya Pradesh and Ors.*, the question for consideration is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code. Thus, Article 163 was called for analysis. It was argued that the Constitution of India expressly provides for contingencies/cases where the Governor is to act in his discretion. Articles 239(2), 371A(1)(b), 371A(2)(b), 371A(2)(f) and Paragraphs 9(2) and 18(3) of the Sixth Schedule are some of the provisions. However, merely because the Constitution of India expressly provides, in some cases, for the Governor to act in his discretion, can it be inferred that the Governor can so act only where the Constitution expressly so provides. If that were so then Sub-clause (2) of Article 163 would be redundant. Thus, where it has not been expressly provided that the Governor can act in his discretion, then only the matter can be examined whether the Governor is entitled to act in his own discretion.

The Court after considering various cases wherein the matters where the Governor could act on his discretion, held that even though the Governor has to act on the advice of the Council of Ministers, an exception may arise whilst considering grant

of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. Thus, situations wherein the Ministers are not in a 'fair' position to advise, the Governor can use his discretion.

This case has thrown some light on the discretionary powers of the Governor in his favour and has recognised situations wherein it would be difficult for the Governor to act in accordance with the advice of the Ministers.

It is also recognised that the absence of an express provision of discretion for the President in contrast to the Governor is to uphold the strong Union in a federalist structure. The Governor is expected to be an efficient channel between the Union and the State and thus the framers entrusted the Governor with certain discretionary powers to strengthen the same.

Conclusion

The present constitutional position reinforced by judicial opinions is that the President and the Governor have to act in accordance with the advice of the Council of Ministers headed by the Prime Minister at the Centre and the Chief Minister at the State. However, if we look at the Constituent Assembly debates, it has been observed by H.M. Seervai that the clause relating to the President being bound by the advice of the Ministers was to be incorporated through an Instrument of Instructions which Dr. Ambedkar had said would be subsequently be added to the Constitution. But the Constitution contained no such Instrument of Instructions when it was finally drafted. Thus, if the Constituent Assembly debates are to be seen as aids to interpretation of the Constitution, then this would imply that the Constituent Assembly did not intend to insert the clause in the final draft of the Constitution. In any case, the question of 'being bound by the Ministers' was left in an uncertain manner for the Court to be interpreted.

The framers surely wanted the office of the President to command the greatest respect of all and be a guiding light to the working of the Government. For example, A. 78 provides for instances when the Prime Minister has to communicate to the President information regarding legislations and administration. But, still the Council of Ministers, with the Prime Minister at its head, exercises the real executive power of the Union of India, and the Council is responsible for the governance of the country.

The Governor's position is, as discussed, that of the constitutional head of the State Executive but since he remains in office during the 'pleasure of the President',

thus, he is expected to act as a link between the Union and the State. He too is bound by the advice of his Ministers, but has been given discretionary powers expressly, in furtherance of the objective of acting as an agent of the Union since the State Governments could be unstable and it would thus be the Governor's duty to act as the Union's representative in the State and take decisions independantly in such situations.