



**THE LINE BETWEEN JUDICIAL  
ACTIVISM AND JUDICIAL OVER-  
REACH: A PERSPECTIVE ON  
ARTICLE 142**

*By Manasvi Gupta*

*From School of Law, Manipal University Jaipur,  
Jaipur*

**Abstract**

India is the dynamic country and we practice separation of power through the system of checks and balance, where every organ of the state has its own duty to perform according to the power and functions given to it and also cannot interfere in the matters of other organ. But, when one of the three organs fails to perform their function then one of the other organs can step in to protect the State to continue its smooth functioning. Hence, if there is any failure by the Executive or Legislative, the Judiciary can step in by the power given to it under Article 142 of the Constitution of India.

It provides that in order to do “Complete Justice”, Supreme Court can pass any decree or order or judgment. This article provides unlimited and discretionary power to the Hon’ble Supreme Court to decide any matter. In the recent years, it is observed that in order to do complete justice Supreme Court have interfered in the matters of legislature and executive. This may seem beneficial for the state but threatens the basic foundation of our democracy, that is, the system of separation of power.

Article 142 is a great power that protects our democracy and prevents from misuse of power. Hence, Supreme court not only have the duty to provide complete justice in accordance to judicial activism but also

practice judicial restraint to not exceed its power as provided by the doctrine of separation of power.

Key words – Judicial Over-reach, Complete Justice, Article 142, Judicial Boundaries, Separation of Power, Constitution

**Index of Authorities**

1. Constitution of India
2. Golak Nath v. State of Punjab (1967)
3. Ram Jawaya Kapur v. State of Punjab (1955)
4. Supreme Court Bar Assn. v. Union of India (1998)
5. M.C. Mehta v. Kamal Nath (1997)
6. S. Ahlawat v. State of Haryana & Anr, (2000)
7. Laxmidas Morarji v. Behrose Darab Madan (2004)
8. State of Tamil Nadu v. K. Balu & Ors (2018)
9. Damodar S. Prabhu v. Sayed Babalal H (2010)

The line between Judicial Activism and Judicial over-reach: A Perspective on Article 142

Montesquieu introduced the concept as the Doctrine of Separation of Power. It is a renowned doctrine according to which if legislative and executing powers are given to same person or body, it will enact tyrannical laws, which give rise to apprehension in the state. If judiciary power is joined with legislative power then the judge will be the legislator and act arbitrary which will hinder life and liberty. Where it joined with executive there will be violence and chaos. Further, if judicial powers are not separated with legislative power and executive power there will be no liberty. This doctrine is accepted and practiced around the world. For



example, in United States of America where the all the three organs maintain their separate powers and keep a check on each other.

Our state has three primary organs, namely, Legislature, Executive and Judiciary, and they maintain their mechanism and power with the help of the system of checks and balances. According to which one organ keeps a check to prevent arbitrary exercise of power by the other organs. In India, we follow this doctrine but not in the strict sense. Our executive is interlinked with the legislature whereas the judiciary is independent. The Cabinet of Minister that forms the executive is also part of the Lok Sabha that forms a part of the law making body i.e. legislature. Over the years, India has upheld this doctrine of separation of power through the system of check and balances but as observed this is not done in a strict sense.

In *Golak Nath v. State of Punjab*<sup>1</sup>, Subba Rao CJ observed :

“ The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.”

In *Ram Jawaya Kapur v. State of Punjab*<sup>2</sup>, the court held that the Indian Constitution has not indeed recognized the doctrine of separation

of power in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contempt assumption, by one organ or part of the State, of function that essentially belong to another.

Judiciary is the organ which posses the supervisory power which is given under Art. 142 of the Constitution of India. It provides power for the enforcement of decrees and orders by the Supreme Court. It states that for the Hon'ble Supreme Court to exercise its jurisdiction, it may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before the Supreme Court.<sup>3</sup> In *Supreme Court Bar Assn. v. Union of India*<sup>4</sup>, the Court established that Art. 142 gives it unlimited power, but it also adopted a deterrent and balanced approach. Dr. A.S. Anand, J. (as the learned Chief Justice then was) for the unanimous Constitution Bench observed:

"Indeed, these constitutional powers cannot be controlled by any statutory provisions but these powers, at the same time, are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject." <sup>5</sup>

Further, in the case of *MC Mehta v. Kamal Nath*<sup>6</sup>, it was held that the exercise of power under Article 142 of the Constitution couldn't be imposed in a situation where action under it would lead to a contravention

<sup>1</sup> *Golak Nath v. State of Punjab* AIR (1967) SC 1643

<sup>2</sup> *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 189

<sup>3</sup> INDIA CONST. art. 142, cl. 1

<sup>4</sup> *Supreme Court Bar Assn. v. Union of India*, AIR 1998 SC 1895

<sup>5</sup> SCC p. 432, para 48.

<sup>6</sup> *M.C. Mehta v. Kamal Nath*, (1997)1 SCC 388.



of the specific provisions of a statute. Similarly, In *M.S. Ahlawat v. State of Haryana & Anr.*<sup>7</sup>, the court held that under Article 142, the court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. While reviewing its earlier order, the court corrected its order punishing the petitioner under Section 195 of Code of Criminal Procedure, 1973 holding that the requirements of the provisions cannot be ignored in the exercise of powers under Article 142.

The law on Article 142 was well summed up in *Laxmidas Morarji v. Behrose Darab Madan*<sup>8</sup>, wherein the court held that

“Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass an order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief, which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used

sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties.”

But what is complete Justice? Is it to only protect the rights and liberties of a person? Or to provide maximum happiness to the maximum number of people as was dictated by Bentham? The idea of Justice differs from person to person, meaning, what is justice for one may not be justice for another. It is an illusion, which cannot be defined because the definition in itself varies from person to person. As John Rawls determined that justice depends on the interest and perspective of an individual failing to distinguish between their interests with the other. Hence, to provide “complete justice” under Art. 142 is a discretionary power provided in the hands of the court.

In *Ram Janmabhoomi-Babri Masjid land dispute case in Ayodhya* in which the Supreme Court granted entire 2.77 acre of disputed land in Ayodhya to deity Ram Lalla had also exercised its power under 142 and held that by depriving muslims of the structure of the mosque would be a great injustice against the commitment towards a secular nation as given under rule of law. The Constitution postulates the equality of all faiths. Tolerance and mutual co-existence nourish the secular commitment of our nation and its people. Hence the court had allotted 5 acres of land to be allotted to the Sunni Central Waqf Board in order to do justice.

However, in recent years, it is observed that judiciary not only acting as a supervisory body but also meddles in the administrative

<sup>7</sup> *M.S. Ahlawat v. State of Haryana & Anr*, AIR 2000 SC 168

<sup>8</sup> *Laxmidas Morarji v. Behrose Darab Madan* AIR 2004 SC 2236



functions of the government. This act of judiciary is highly appreciative and beneficial for the state but it also dilutes the concept of separation of power. For instance, in the case of State of Tamil Nadu v. K. Balu & Ors<sup>9</sup>, the Hon'ble Supreme Court banned the sale of liquor within 500 meters of state and national highway but does not apply within city limit granting relief to the liquor and hospitality industry. The Supreme Court was highly praised, as there were a remarkable reduction in drink and drive cases and rash driving cases. But the execution of the same could be tricky as there was no guideline given as to how to measure 500m from the highway. Further, the loss incurred by hotels, the restaurant had directly affected the employees resulting in a reduction of jobs that form part of their livelihood.

Excessive power for any organ in the system is perilous for any country. Although the Hon'ble Supreme Court must uphold the rule of law by exercising power given under Art. 142 of the Constitution of India, yet, there is no guideline to it.

For instance, when the Hon'ble Supreme Court in a bench headed by CJI Ranjan Gogoi exercised its power of "complete justice" and appointed a former High Court Judge, Justice Virendra Singh as Uttar Pradesh's Lokayukta after expressing its frustration as the UP government did not meet the Supreme Court deadline.

"The failure of constitutional functionaries to comply with the orders of the highest court of the land is deeply regretted and astonishing," Justice Gogoi observed.

Further, In Damodar S. Prabhu v. Sayed Babalal H<sup>10</sup>, the court framed the guidelines relating to compounding of Section 138 of Negotiable Instruments Act 1881 and reasoned that it was aware that framing such guidelines may amount to judicial lawmaking, thereby breaching the perimeters of its jurisdiction, however, in order to do complete justice the court would be justified in framing such guidelines in cases where there is complete legislative vacuum.

The Judiciary must step in to exercise the power of Article 142 where there is a failure to constitutional functionaries as observed above. But, does government failure equals to constitutional failure by the government?

In November 2019, the Supreme Court was asked to intervene when the BJP has formed its government in Maharashtra when Shiv Sena Chief Uddhav Thackeray was claiming the support of 162 legislators. The Court had directed the newly formed BJP to take a floor test and prove its majority but it had failed to do so.

The utmost importance in today's society is the protection of our democracy and to do so, we need to protect our system of separation of power and rule of law that forms the basis of our democracy. If the government fails in any way, judiciary steps in.

But, if the government continued to fail and judiciary continued to step in then that may lead to totalitarianism. Hence, the current situation raises a milestone for our Judiciary that is to differentiate between judicial activism and judicial overreach. To draw a

<sup>9</sup> State of Tamil Nadu v. K. Balu, (2018) 3 SCC 336

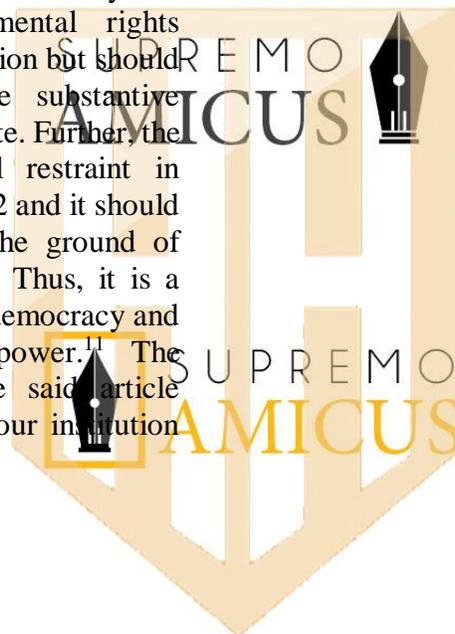
<sup>10</sup> Damodar S. Prabhu v. Sayed Babalal H, AIR 2010 SC 1907



line of what would amount to judicial activism and judicial overreach. This distinction will protect the judiciary from over utilization of its power resulting in protection and continuance of the doctrine of separation of power.

Thus, to conclude, the Supreme Court has been given wide discretionary power to do complete justice between the parties under Article 142 of the Constitution. It can pass any order which it deems fit in the facts and circumstances of the case. However, an order which the Court passes to do complete justice between the parties must not only be consistent with the fundamental rights guaranteed under the Constitution but should also be consistent with the substantive provisions of the relevant statute. Further, the court must exercise judicial restraint in relation to invoking Article 142 and it should not exercise the power on the ground of sympathy or on mere asking. Thus, it is a great power that protects our democracy and prevents from misuse of power.<sup>11</sup> The protection granted under the said article forms an integral part of all our institution and upheld the rule of law.

\*\*\*\*\*



---

<sup>11</sup> Dr. Justice B.S. Chauhan, Courts and its endeavor to do Complete Justice, <http://www.nja.nic.in/17%20Complete%20Justice.pdf>