

# Art 142 of the Constitution of India: Is a Nuclear Weapon of the Supreme Court of India?

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**Abstract:** In democracy people decide its own fate and huge cultural changes take place ensuring liberty to the citizens of the country. Separation of powers is a sine qua non for its success and an important parameter for success of democracy. Three wings of the government are separate and absolute in their own area of operation. People elect the members of the legislature through adult suffrage and executives are selected from the ruling party having majority legislators. Judiciary remains apart but the judges are selected through collegium process where executives play a role in ultimate selection. Supreme Court being the highest in the judicature plays an important role in a democratic form of government and is invested with various powers under Art 136, Art 141 – Art 143. Art 142 of the Constitution. The Constitution provides a unique power to the Supreme Court which often is used as a tool for social transformation through judicial activism. The power of the Supreme Court in the context of judicial review of legislature and executives become a matter of contention with other organs of the government. The Parliamentarians and the executives often feel distressed at the role of the Supreme Court as an intruder in their empire. In a promising democracy with tendency towards parliamentary dictatorship and executive despotism the Supreme Court works as a check and balances to ensure fair democracy to the people providing social, economic and legal justice to the citizens.

**Keywords:** Judicial Review, Judicial Activism, Executive Despotism, Parliamentary Dictatorship.

## 1. Introduction

In an eclipsed democracy characterized by executive exuberance, election aberrations as well as obsessed parliamentarians the Judiciary stands apart of other organs with much of enmity of the legislature and executives. Some of the stalwart framers of the Constitution like Pt. Nehru with colossus personality also disfavoured supremacy of the judiciary and regarded the advocates as pirates of the constitutional interpretations. He was an ardent supporter of absoluteness of the Parliament as the members thereof are elected by the citizenry. He expressed that ‘within limits no judge no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over sovereign will of the Parliament.’<sup>1</sup> Very recently in an issue of undue delay in providing assent on ‘Bills’<sup>2</sup> presented before the Governor of Tamilnadu, the Vice President of India regarded the President

of India as protector of the Constitution and remarked the judges as ‘super power’. But with all respect President of the Country is a part and parcel of executive and not the interpreter of law. Judiciary has been placed in the gallows for judicial overreach for use of its power under Art 142 of the Constitution. But role and power of the Supreme Court as a saviour of democracy to be examined in this context. In the instant case the Judges J.B. Pardiwala and R. Mahadevan held under Art 142 that Governor’s delay is disposal of the Bill was erroneous. An old issue of confrontation between the judiciary and executives has clouded the democratic horizon of the country. .

## 2. Powers of the Supreme Court

The Supreme Court of India is invested with enormous powers under the Constitution of India and have different roles to play. Constitution of the apex court has been detailed under Art 124 of the Constitution. Roles of the apex court have been detailed as under:

- i) *Interpretation of laws:* Interpreter of the Constitution to safeguard the fundamental rights of the citizens and uniformity in application of law across the country. As an apex court the authority may resort to purposive interpretation of the laws. It is true that provisions inserted before 75 years ago cannot hold good in the present day as both the society as well as people have changed overtime. Concept of transgender was not in the views of the framers of the Constitution in 1947.
- ii) *Judicial Review:* The Supreme Court is invested with the power of judicial review of executive and legislative actions with the purview of the Constitutional framework. This power very often creates enmity with other organs of the government especially the executives who prefer absoluteness in their actions. Declaration of emergency on 25<sup>th</sup> June 1975 for 21 months during the regime of Smt. Indira Gandhi through order issued by the President Fakhuruddin Ali Ahmed was a glaring example of executive exuberance. Similarly, 39<sup>th</sup> Amendment of the Constitution was an example of legislature excesses in the Country.
- iii) Guarantor of Fundamental Rights under various

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articles of the Constitution of India. Since the era of A. K. Gopalan (1950) role of the apex court has changed considerably in Maneka Gandhi's case (1978);

- iv) The Supreme Court work as Federal Court under Art 135 of the Constitution;
- v) The Court performs as an advisor to the President of India on law points under Art 143 when asked for by the President.
- vi) Settlement of disputes from Appellate Jurisdiction under Art 132 and Art 133 of the Constitution;
- vii) Accept and disposal of Special Leave Petition (SLP) under Art 136 of the Constitution;

Disposal of Curative Petition of the Appellant in special cases. Curative petition is filed after rejection of review petition by the Court. It is to rectify the errors and to prevent a situation which may lead to gross injustice. The concept was developed in the case of Rupa Ashok Hurra Vs Ashok Hurra and Anr (2002).

But these are the routine role of the apex court. The apex court certainly possess developmental and innovative role under various Articles of the Constitution.

### 3. Innovative Role of Supreme Court

Art 142 of the Constitution is the source of latent powers of the Supreme Court of India. The framers of the Constitution apprehended for more special powers to complete justice where existing laws of various statutes are inadequate. Constitution is a living organism and the semantics used 75 years ago may not hold in the present day. This apart despite various good features of democracy, the form of governance relies on number or rule of majority. Democracy being ruled by the majority needs checks and balances to avoid tendency towards parliamentary dictatorship, improved quality of legislators etc., for public good. Robo- parliamentarians or hand raising representatives may satisfy the party-supremo but quality of democracy touches abysmal depth. Art 142 of the Constitution is a rider for executive excesses and legislative absoluteness to ensure fundamental rights of the citizens and draw a new horizon in the history of civilization as well as transformation of the society from animality to rationality.

#### A. Art 142 (1) of the Constitution Runs as:

"The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any case of matter pending before it and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law by Parliament and, until provision in that behalf is made, in such a manner as the President may by order prescribe."

This indicates the gap filling power of the apex court where existing laws are inadequate. Such judgments of the Court may hurt legislature or executives in a different way and the

antagonistic remarks of them may deprave the democratic environment of the country. As per existing provision 'Bills' passed in the legislature are sent to the Governor for his assent. Powers of the Governor in this regard is contained in Art. 200 of the Constitution. The Governor may provide his assent or disapprove and send the Bills back to the Assembly for reconsideration unless the 'Bill' is money bill. In some cases the Governor may send the bill to the President for his assent. Art 201 of the constitution deals with such powers of the President. If a Bill is returned to the Assembly and resubmitted to the Governor he is bound to put assent on the "Bill". However, no time limit has been provided in the Constitution in this matter. But whether the Governor may hold the Bills under his Power under Art 200 of the Constitution for an indefinite period was the leading question in the case of WP (Civil) 1239/2023. On 31<sup>st</sup> October 2023 the Government of Tamilnadu approached the Supreme Court challenging the decision of the Governor to keep various bills submitted by the state governor pending indefinitely. It was held by the apex court that the decision of the Governor was erroneous for such undue delay and exercising discretionary powers under Art 142 the Bench headed by Justice Padriwala viewed the bills as deemed to be assented. The Supreme Court also prescribed time limit for disposal of such 'Bills'. Justice J. B. Padriwala to rule out the remarks of the executives on alleged casual exercise of the Art 142 in the judgment remarked that,

'on the contrary it is only after deepest deliberations (we) have reached the conclusion the a) actions of the Governor - first in exhibiting prolonged inaction over the bills b) secondly, in declaring a simpliciter withholding of assent and returning the bills without a message and iii) thirdly, in reserving the bills for the President in the second round - were all in clear violations of the procedures envisaged under the Constitution and that we have decided to declare the deeming of assent to the 10 bills considering it to be our constitutional burden duty"<sup>3</sup>.

The executives also raised hue and cry for travel of the judiciary in an uncharted territory with adverse implication on law making and separation of powers.<sup>4</sup> Sri K.K. Venupopal, the then Attorney General of India also remarked in the wake of Sabarimalai Case<sup>5</sup> (Indian Young Lawyeer's Association Vs State of Kerala) in 2018 against the Supreme Court as Art 142 cannot be described as "Kamdhenu "from which unlimited powers may flow."<sup>6</sup> The Vice President of the Country remarked presently that such judgment as 'nuclear missiles against democratic forces available to the Judiciary 24 x 7'.<sup>7</sup> It was also described as judicial overreach and designating the apex court as "Super Parliament". We can remember resonance of same tune from Pt. Nehru long before. He also stated that 'We cannot have a situation where you direct the President of India and on what basis? The only right you have under the Constitution is to interpret the Constitution under Article 145(3)<sup>8</sup>. He also stated that such interpretation should come

only from Constitution Benches of five or more judges.’<sup>9</sup> Art 145(3) of the Constitution stated that a minimum of five judges must hear cases involving a “substantial question of law as to the interpretation of this Constitution or any reference made to the Supreme Court by the President under Art 143.” Protest of the executive hovers around procedural issues regarding composition of Constitutional Bench rather than acceptability of the judgment. The President of India also raised queries to the Supreme Court regarding the matters and the issue of presidential reference is under hearing before the 5-Judge Bench of the Supreme Court. Executives also mentioned that in such case of stalemate condition the concerned Chief Minister could talk to the Prime Minister for intervention and settlement as judiciary is not the panacea of all ills. But in reality delay arose in case of States where government is run by the opposite political party (Non-BJP government). It is not clear whether such provision exists in the Constitution in case of Union- State Relationship. The remark of the Solicitor- General in the matter is debatable for attaining pure democracy. But reason for delay in case of opposite party led government has not been submitted by the executive.

It may be noted that bills may be passed in the Assembly for various purposes to ensure economic and social justice to the downtrodden people of the country and such a move needs immediate attention for spearheading economic progress of the country. The latent power of the Supreme Court is to empower the country for better and improved democracy and arrest political hegemony of the ruling party.

#### 4. Important Case Laws under Art. 142

Examples of invoking powers under Art 142 are not few and far between. The Court has invoked its power under Art 142 in 1549 cases since 1950 till 2023 and exercised its power in 791 cases where reference was ambiguous in case of 40% cases and rejection was for 10% cases. Important cases were as under:

- a) Bhopal Gas Leak (AIR 1988 SC)<sup>10</sup> where the Court imposed a penalty of US \$ 476,00 million on the Union Carbide for providing compensation to the affected persons;
- b) State of Tamilnadu and Ors Vs K Balu and Anr<sup>11</sup>(Liquor Ban Case) 2016 where the Court exercised ban on sale of liquor within 500 meters of National Highway for public safety, arrest fatal accidents as well as constitutional morality;
- c) Ram Janmabhoomi Case (2019)<sup>12</sup> where the Court applied discretionary powers under Art 142 to settle a long standing national disputes between two religious groups allowing construction of Ajodhya temple and allowing separate land to the Muslim community for erection of Masjid. Though there are debates over the judgment of the case but was an important and novel

step for settlement of a religious – demographic dispute.

- d) Shah Banoo Case (1985).<sup>13</sup> In Ahmed Khan Vs Shah Banoo Begum the Supreme Court delivered a judgment for providing maintenance to an aggrieved divorced Muslim lady. It was a landmark decision of the Supreme Court of India.
- e) Coal Block Allocation Case normally known case “Coalgate” (Manohar Lal Sharma Vs the Principal Secretary & Ors,<sup>14</sup> WP (criminal) 120 of 2012 where the apex court cancelled 204 allocation out of 219 cases for lack of transparency and loss of revenue of the government
- f) In case of Visakha (1997)<sup>15</sup> separate guidelines were formulated for sexual harassment of women workers in workplace and was regarded as a landmark decision and a case of judicial activism to ensure social justice to women
- g) In case of Shivshakti Sugar Mills Vs Shree Renuka Sugar Mill<sup>16</sup> the Supreme Court took a view regarding economic impact of investment as well as employment opportunities of huge workers. As per Sugar Control Regulation a ban existed for setting up of new factory within 15 k m of existing factory. As huge investment was made (US \$ 47 million) by the new company and huge workers were engaged in the new factory the court adopted a humanitarian view under its discretionary power.
- h) In Shilpa Sailesh Vs Varun Sreenivasan (2023)<sup>17</sup> the Supreme Court invoked Art 142 for granting divorce without mutual consent for irretrievable marriage breakdown;
- i) In Bilkis Bano Vs State of Gujarat (Bilkis Bano case) (2024)<sup>18</sup> the apex court ordered to return 11 convicts who were immaturely released in the gangrape case.
- j) Chandigarh Mayoral Election Case<sup>19</sup> was an example in the matter where the apex court invoked Art 142 to overturn election irregularities and result was reversed. The Court warned the Presiding Officer for vote tampering.
- k) Aruna Shanbaug (Aruna Ramchandra Shanbaug Vs union of India & Ors)<sup>20</sup> is another landmark case for dealing with passive euthanasia where right to die with dignity was also accepted by the apex court.

On study of the cases under Art 142 it is clear that invoking Art 142 is the discretion of the apex court and may be used:

- i) to ensure complete justice;
- ii) beyond existing provision;
- iii) as a tool of social transformation;
- iv) to enrich jurisprudence;
- v) to achieve transcendental value of black and white

law;

- vi) for path finding exercise for justice (ref: Aruna Shanbaug Case).

### 5. Conclusion

Art 142 of the Constitution in India is a nuclear weapon for social engineering and to deliver improved democratic ethos where existing provision fails. Erstwhile Attorney General of India Sri K K Venugopal remarked on 18<sup>th</sup> May 2017<sup>21</sup> that the Supreme Court's use of vast power under the Article has done tremendous good to the deprived sections of people of the country<sup>22</sup>. As against the popular belief of the citizenry, the judiciary is also accountable to the society as a whole for path finding exercise with purposive interpretation of law and as a catalytic agent for social change. The cases under Art 142 cited above may be segregated under i) social transformation ii) human rights iii) economic perspective iv) political hegemony etc. In all cases the judgments of the apex court do not attract adverse criticism except the cases where the judgments cast remark on the decision of legislature or executives. It is obvious. The Article may really be termed as 'nuclear missile' for judicial activism for social re-engineering as well as arresting executive overreach and legislative dictatorship. Separation of powers is a tool for fair democracy where independence of all the wings needs to exist with checks and balances. The wings need not be hostile to each other to ensure democracy.

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