



## Metamorphosing the understanding of executive through the case of Ram Jawaya Kapur

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### Abstract

Heavily modeled upon the British Constitution, the Indian constitution adopted parliamentary form of government which follows the Doctrine of Separation of Powers. The three organs i.e., Legislature, Judiciary and Executive have been allotted independent powers and functions which operates as a means of checks and balances too on each organ as it disregards the dominance by any one organ. It is with respect to executive and its powers, that needs most of the focus as the functions and powers of it affects the rights of people on daily basis. It was with the case of Ram Jawaya Kapur v. The State of Punjab <sup>[1]</sup> that the understanding of the Executive as an organ revolutionized, which is why this article attempts to analyze the judgement of Ram Jawaya to understand how exactly the scope and ambit of Executive was broadened.

**Keywords:** executive, separation of powers, executive notifications, constitution, legislative sanction

### Introduction

From the time when the constitution was drafted to the contemporary issues, there has been a substantial augmentation in the powers of executive. Being one of the most powerful organs, it is also the least understood one and it is exactly why the scope, extent and nature of its powers need reflection. The prevalence of executive powers can be understood from the time when there were constant disputes between Rajendra Prasad and Jawahar Lal Nehru to the Covid situation that has been part of today's troubles. Executive has time and again been predisposed with an immense amount of powers which transcends the conventional meaning of it and hence escalates a lot of speculation and controversy regarding the same. It is through Ram Jawaya case <sup>[2]</sup>, that the journey of executive from being understood as an organ whose only function was to execute laws made by the legislature to an organ which has residue functions that remains after taking away of legislative and judicial functions <sup>[3]</sup>, can be appreciated and acknowledged.

### Issue

The early case of Ram Jawaya <sup>[4]</sup> deals with the question of extent of executive powers which consequently leads to the broader regime of doctrine of separation of powers and its application in the Indian Constitution. Evolution of the role of the state through judicial interpretation has undeniably altered from being just a police state to acting as a welfare state. Drawing inference from it, it can be said that the notion that executive being a subordinate organ acts merely as a servant to the legislature is flawed. The assumed rigid application of the doctrine of separation of powers i.e., division of powers in a horizontal manner is also not absolutely correct. That's why it becomes significant to fathom the functional meaning of executive and the nature of its powers. The court in Ram Jawaya case engages itself in exactly these types of issues which relates to the rapid expansion and growth of the executive powers and attempts to answer most of it. The major issue that is brought to the attention of the court is whether executive has the

constitutional capacity and power to issue notifications which are not backed by any legislative sanction. Along with it, comes up another issue relating to fundamental rights being infringed by the same notification as any restriction on the fundamental rights necessarily require sanction by the legislature.

Today, it is quite evident from the headlines of the newspapers and the way in which the whole Covid situation was managed through these executive notifications, that the executive has been bestowed with a greater sense of responsibility and powers, which provides all the more reason to grasp the accountability and limitations that come with it, which has been interpreted by the courts in different cases.

Primarily, the addressing of the issue of executive powers was done in the case of Ram Jawaya <sup>[5]</sup>, nonetheless there was one specific case which also dealt with analogous issues. It was in the case of Motilal v. The Government of State of Uttar Pradesh <sup>[6]</sup> that the issue of unsanctioned executive notifications which allowed the state government to take over the business of running bus service, was raised. The majority opinion was inclined towards the broader interpretation of not only the word executive but also its functions and powers. At that time also, the comprehension of the executive power was such that as long as the legislature has competence to pass laws on that specific subject and the same has not been explicitly allotted to any other organ by way of constitution, the facts that notifications were unsanctioned will not hold much water. The executive was well within its boundaries to pass such notifications and continue with the trade of running a bus service. The cognizance of the powers of executive is not just limited to executing laws was prevalent even back then in 1950s. The minority opinion of Agarwala, J. was dismissed as being too tight and certainly not something which the drafters of the constitution intended as the non-insertion of the doctrine in the constitution was on purpose <sup>[7]</sup>.

The same perception with much more detailed explanations was put forward by Ram Jawaya case to make it clear that

the dictionary meaning of executive and the harsh application of separation of powers is not something which Indian constitution accounts for <sup>[8]</sup>. The evidence for the same can be seen from the language and provision of the constitution itself in Article 73 and 162 <sup>[9]</sup>. There has been no explicit mention of separation of powers between organs except for Article 50 which proposes to separate powers of judiciary and executive. In a landmark judgement of *Re, Delhi Laws act* <sup>[10]</sup>, the concept of delegated legislation was laid down and from that time the jurisprudence on this doctrine has only evolved. From a misguided understanding that the doctrine lays down clear functional separation of powers, it has been well accepted that there will always be a structural overlapping of powers and functions, specially between executive and legislature. In order for the executive to actually implement the aims and objective of the constitution, it is vital to confer law making power to it so that it can function in a way that it adds life to the skeletal provided by the legislature.

### Analysis

The change in understanding of the separation of powers in the context of one organ encroaching upon powers of the other, is one of the major consequences of the case. This interpretation of doctrine paves way for distinction between essential and incidental powers. While the doctrine is made flexible and accommodating in the sense that incidental encroachment i.e., overlapping of functions and powers is allowed, the limitation to it is that no essential function should be encroached upon. The court examines the modern function of state which is basically to serve as a social welfare state, and how there is an inherent need to confer executive with extraordinary powers, as a result of which, executive is permitted to issue unsanctioned notifications with only limitations being that the said notification should not be in contravention with any legislative act, provisions of constitution and should not infringe or restrict fundamental rights. Indian constitution does not make water-tight compartments of separated functions specially when it comes to legislature and executive due to which the pre-requisite of having prior legislative action for an executive notification to be based upon is rejected <sup>[11]</sup>. The line of reasoning used by the court in this case has found its place in several other cases <sup>[12]</sup> where the court has reiterated the same principles which wholly invert the conventional picture of executive.

The decision given by the court is based upon the “tacit support” of the legislature being given to executive. The fact that for carrying on with the trade of publishing of textbooks, the state government needed funds and as per procedure, asked the legislature for the same, was relied on by the court. In lieu of appropriation bills <sup>[13]</sup> which accounted for these funds, the implied support of legislature was observed and thus the need for expressive sanction was disposed with. The court failed to acknowledge the fact that the support which is being assumed here might work in a unicameral legislature, since there is only one house, but when it comes to bicameral, there is no guarantee that the upper house i.e., Rajya Sabha will always be in favor of the bills. The executive comprising of the majority in Lok Sabha along with the fact that through appropriation bills the demand for funds was approved, the support being talked about can be assumed, but when it comes to Rajya Sabha, the support might not be there. This is why the idea

of tacit support that the court talked about needs more consideration to determine whether the support is actually there or not.

With respect to fundamental rights being infringed due to the notifications, the court doesn't go in too much depth as it denied the existence of fundamental right in the very first place <sup>[14]</sup>. This part of the judgment could have been better had the court realized that the way education markets function is different and when this is acknowledged, it could have been easily deduced that the notifications do in effect infringe the rights <sup>[15]</sup>. When it comes to schools, no school can truly and effectively function without the recognition of the government. In fact, it is given as per UGC guidelines that the admissions to college will happen only if the student is from a government recognized school. The notification prohibited publishers from selling textbooks to any of the government recognized schools, which essentially in effect curbed the market for these publishers. There could have been possibly no private school that was without government recognition where the publishers stood a chance to sell books. Even if there was no prohibition on publishing of books, it cannot be denied that the business of these publishers actually came to a full stop, which the court failed to recognize. The question that the court willfully ignored was that the power which these government recognized schools had was something which in itself affected the fundamental rights. Without a doubt, the state is allowed to create monopoly and impose reasonable restriction on the fundamental rights <sup>[16]</sup>, but the catch here is that this can only be done by a law <sup>[17]</sup>, which means that these notifications without any sanction, couldn't have done what they did. Had the legislature backed these notifications, the court would have allowed for it. The court, while only looking at the object of these notifications, failed to acknowledge the effect of these and also didn't consider the whole debate and deliberation process which would have occurred in the legislative assembly as something substantial or important. By denying the presence of fundamental right in the first place, the court did not look further into the requirements of Article 19 of the Indian Constitution.

### Conclusion

While addressing the issues, the court while right in answering the very first issue that for executive to issue notification, expressive sanctioning of legislature is not always needed, could have recognized that the notifications, in effect, do restrict the fundamental right of the petitioners and hence the accurate way as per our legal regime would have been that for the executive to go ahead with this, the approach should have been to first get the legislative backing and then proceed with it. Had the case been decided in today's time, the court might have ruled that the effect of notifications is such that legislative sanction is required <sup>[18]</sup>. All in all, the judgement does provide us with a new comprehensive and broader interpretation of the functions of executive. It is not as if that the powers of executive are unfettered and there is no way to keep a check on these powers. The executive even though is not subservient to the legislature, still needs the support of it to be able to issue notifications and create the effect that it has been creating. More than the distinction between these organs, what is needed in contemporary times is that the three organs function in a coordinating and cooperative manner which

will ensure that the government is functioning in a smooth way.

### References

1. AIR 1955 SC 549.
2. Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.
3. Ram Jawaya Kapur (n85) [12].
4. AIR 1955 SC 549.
5. Ibid.
6. AIR 1951 All, 257.
7. Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549, para 13.
8. The interpretation of this in the case was somewhere based upon what Walter Bagehot also talks about in his description of the British government, *The English Constitution*, Walter Bagehot, Second Edition, 1873.
9. Article 73 and article 162 talk about the executive powers of union and state respectively. The expression used is “matters with respect to which Legislature has powers to make laws” which makes it clear that it is not necessary that the legislature must first make a law and then only the executive can execute its powers.
10. AIR 1951 SC 549.
11. *The Oxford Handbook of the Indian Constitution*, Executive, Shubhankar Dam: Powers and functions of executive, 5<sup>th</sup> para.
12. *Maganbhai Ishwarbhai Patel v. Union of India*, 1970, 3 SCC 400; *Kharak Singh v. The State of Uttar Pradesh and others*, 1963 AIR 1295.
13. The structure of appropriation bills is very general in the sense that the specific reason for which funds are given to the executive is not mentioned or specified.
14. *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, para 23.
15. Article-19(1) (g) of the Indian Constitution.
16. Article 19 (6) of the Indian Constitution.
17. Article 19(6) clearly specifies that the reasonable restrictions can be imposed only if there is actually a law to begin with. Without there being any law, the question of reasonable restrictions doesn't even come into the picture.
18. The view of the Supreme Court changed in the case of *Bennett Coleman & co. & ors v. Union of India & ors*, 1973 AIR 106 and in many other cases with respect to test that was being used to determine the infringement of fundamental rights. The test formulated was “object and effect test” which meant that it is actually the effect of the law that is seen and not just the object while determining the question of infringement of fundamental rights.