Constitutional Law and Public Administration in India

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Supreme Court of India

The seat of the Supreme Court is in New Delhi. There has been some debate or controversy surrounding whether the seat of the Supreme Court can be beyond Delhi because litigants and lawyers must practice and travel to Delhi very often. But post covid most of the court proceedings can be attended in a hybrid mode, virtual as well as physical. So, this has kind of eased the situation quite a bit. The process of appointment of judges could be, especially in the high courts. Usually, judges are opted as additional judges initially for a year or two and then they are made permanent judges. But that kind of an option is in terms of, trying to test the performance of someone and then making a permanent judge of the High Court.

Most of the judges of the Supreme Court come from the High Court and they are already having constitutional positions. So, they become permanent members of the Supreme Court as well. But there can be situations where the President can appoint someone as the acting Chief Justice. Wherever the office of the Chief Justice goes vacant or is in temporary absentia, then an acting Chief Justice can also be appointed by the President of India. Can there be an appointment of ad hoc judges if it is necessary for the discharge of the duties? The Supreme Court ad hoc judges can also be appointed, or even retired judges sometimes can be appointed if it is necessary for the case to be.

Coming to the fact that the Supreme Court under Article 129 is a court of record, it means the Supreme Court is empowered to act as a court, which can take cognizance of non-compliance of the judicial orders. And hence, we have what is known as the Contempt of Court Act where either civil or criminal contempt can be initiated against any individual who does not comply or follow or adhere to the directions, orders, and judgments of the Supreme Court of India, which is declared as the law of the land by the Constitution itself. Now, if one evaluates all these powers of the court, one will say that the independence of the judiciary is something that the Constitution itself has prescribed and it kind of lays down that the judiciary ought to be independent from the executive interference or from any kind of legislative role. However, if you see what the reason is why independence of the judiciary is a basic structure, why the independence of the judiciary is core and important to constitutional values and constitutionalism and why it has contributed to the

protection of democracy and fundamental rights of citizen, you can notice that the judiciary is one institution that is the most respected institution across the country. It is the judiciary that is the final door of justice even for executive transfers and appointments or denial of any kind of privileges as well.

It is the judiciary that lays down the fairgrounds of every kind of governance. So, wherever there is an encroachment of procedural or an interference by the executive branch, the judiciary has always prevented it from touching its independence. What does the independence of the judiciary do? First and foremost, it brings about judgments that are not something that the judges have to fear, or they need to favor someone. So that kind of fearless judiciary or a judiciary that is not arbitrary, unfair, or unreasonable seems to be the growth of the establishment. Impartial functioning of the judiciary is the key to democratic and constitutional values and safeguarding the tenets of justice is something that can only be done if the judiciary is independent.

It is supremely secure in terms of its tenure and is a court of records that can punish contempt of court even to anyone in the highest positions of government be it the president, prime minister, ministers, politicians, members of parliament or members of legislative assembly or even chief ministers for that matter. So, what have been the key features of this kind of independence of judiciary? First and the foremost, is the mode of appointment of judges to the court, which the judges have reserved for themselves. So, the role for the cabinet or the prime minister or the president is a more consultative process. It is not, so it is the judges who initiated the first nomination, and the government is involved in that consultative process. So, you will notice that the executive's discretion in appointment is curtailed to a very large extent and the kind of political influence on appointments is completely kind of taken off.

So, the politicians do not have a say. Their political ideologies cannot come into the scenario in terms of appointment of judges and it is the judges who decide whether a person is suitable to occupy a position of a judge or not, because they are in that role, they are in that profession. So, they are the best judge to find out the integrity and the independence of any judge to occupy such a high position. Second, apart from appointment, security of tenure to the judges is core and important. Up to 65 years is tenure for the Supreme Court judge, unless subject to impeachment. That no judge can be removed from his position is something that gives security to the judges to act without fear or favour.

So, they continue to hold the office, though under the pleasure of the President, they are completely independent from the executive branch of the government. They have fixed service conditions, there is no problem that the parliament cannot amend the service conditions of the judges. They can amend it to their benefit but not to their detriment. This kind of amendment cannot be done at any cost, except maybe when there is a financial emergency, but it has never been used so far. So, the condition of the judges remains the

same during the tenure of the office or is announced from time to time as the pay scale fixation happens.

Among the many things that the Supreme Court is now doing, they have used a lot of digital technology to enhance the experiences in the courtroom and provide easy access to litigants and lawyers. There is so much digitalization, there is so much technology that is being used, people can access many things online in terms of listing of cases. Rather, the Supreme Court has also looked at how certain courts can become completely paperless. So can everything be uploaded and then the courts can decide all these expenses and charge it to the consolidated Fund of India. And there is no vote in the Parliament for the same.

This means the salaries, the allowances, the pension, and the expenses of the administrative wing of the Supreme Court are all charged to the consolidated Fund of India. And this also ensures the independence of the judiciary. The conduct of judges cannot be discussed within the Parliament or within the state legislature. This would amount to disrespect to the duties of the Supreme Court and the High Court judges. A discussion of or on the judges can only happen during impeachment and not under any other consideration. That also ensures that the judges are not discussed either by the politicians or the executives. There is no ban after retirement. So once a judge leaves his position, there are so many other things that he can do. Some of the Supreme Court judges are taken as members of parliament or appointed as governors of the state.

So, there is nothing that prohibits them from continuing in a position. A lot of judges act as arbitrators as well. And in some cases, a lot of High Court judges have started practice as well. So that is how they are having what is known as post-retirement jobs as well. Power to punish for contempt is a very strong power, which establishes that the judicial wisdom must be respected and honored and no kind of challenge or some kind of deviation, which may lower the dignity and authority and honour of this court will ever be entertained.

No kind of disobedience to the authority, dignity and honour of the court will be entertained and an action for contempt can also be initiated. The Supreme Court has complete independence in appointing staff at the court itself. They can appoint officers and servants to the Supreme Court without the interference of the executive and they can also prescribe the terms and conditions for their service. The parliament cannot curtail the jurisdiction of the Supreme Court, it can enhance it obviously. That is something that is guaranteed in the constitution and the parliament has no role in limiting the jurisdiction of the court.

And finally, all of these clearly establish that the judiciary is on its own, it is independent from the executive, the executive has very limited role in judicial functions and hence, judicial power possesses that kind of independence and authority in implementation of judicial administration in the country. As to jurisdiction and the powers of the Supreme Court.it has quite a few jurisdictions of its own and the constitution also has such a kind of

jurisdiction. The Supreme Court is supreme and hence it can decide its own jurisdiction if the need be or if the need arises. But broadly if the jurisdiction and the powers of the Supreme Court must be classified, they can be classified into the following categories.

First, we call it the original jurisdiction of the Supreme Court. So, original jurisdiction of the Supreme Court can arise in certain matters, where you can go to the court directly as the first court to adjudicate the dispute. So, you do not have to go to the district court and the high court, you can go to the Supreme Court directly. This is called the original jurisdiction. Now, original jurisdiction can arise between the Government of India and one or more states.

If there is a dispute between center and state, this is called the center-state relationship, then you can go to the Supreme Court under original jurisdiction. Between the Government of India or any state or states on the other side or between one or more states, of course, you can go to the Supreme Court. Article 32 also provides for original jurisdiction because here is where a citizen's fundamental rights are being violated. He can go to seek either habeas corpus, certiorari, mandamus, or prohibition as a writ remedy for the protection of his fundamental rights. Article 32 itself is a fundamental right and that is where the original jurisdiction of the Supreme Court will arise.

Disputes arising from a treaty, agreement, covenant or any other engagement or similar instrument can also come before the Supreme Court in its original jurisdiction. Generally, disputes between private citizens and the state and the center can also go in the same manner. Most importantly, any kind of interpretation of a federal law can also be part of an original jurisdiction that may arise that may go to the Supreme Court. Also, interstate water disputes under Article 262 are something that can go to the Supreme Court, under original jurisdiction. Anything that is in relation to finance; center-state relationship includes finance, taxation, expenses to be adjusted between center and state can also come under the original jurisdiction.

It can include some kind of recovery of damages from the state by the center or any other ordinary commercial dispute or business-related dispute within center and state. All of these can go to the Supreme Court under its original jurisdiction. The challenges of the dual federalism that we follow, say state government and central government, all that can be referred to the Supreme Court. It is the apex court, it is the final word in the constitution, it has the final word to interpret the principles of the constitution. And hence, the Supreme Court can take all of that into cognizance and decide under its original jurisdiction.

Under the original jurisdiction, the Supreme Court can also decide the validity of any law that is passed by the parliament, whether it is constitutional or void, this kind of challenge can go to the Supreme Court. So, any law that is passed by the parliament can go to the Supreme Court directly under its original jurisdiction and the Supreme Court can decide

the validity or constitutionality of those legislations as well. Now the Supreme Court is also a kind of a constitutional court of appeal. This is called the appellate jurisdiction that is arising from the final decision of a High Court. It can either be in civil or criminal cases. In most of these cases, it is a High Court that must give a certificate saying that there is a legal question or a legal issue that must be resolved through constitutional interpretation and hence the High Court is referring the matter to the Supreme Court. So, once a certificate of appeal is granted by the High Court, then the matter can come before the Supreme Court as an appeal for deciding a legal question and not based on any factual matter and the same is provided under Article 132. So, what are the wide-ranging appellate jurisdictions of the Supreme Court? Generally, it can be divided into following categories. First, appeals in all constitutional related matters that can be arising. Appeal in civil matters, it could be anything about a law like land acquisition or so on and so forth.

Appeal in criminal matters, for example, if a person or an accused has been given the death penalty, he has a right to appeal to the Supreme Court and that is an appeal in criminal matters. And finally, appeals that can be preferred as a special leave petition. So, these are under Article 134. Criminal appeals are preferred by a person accused in a death row or if the lower court has sentenced him to death, then in all those cases an appeal can be preferred. So, this is all provided in the articles of the constitution when and what can be the appellate jurisdiction. In criminal matters, suppose the trial court has given a kind of a sentence and the high court has reversed that sentence; in those cases also certain kinds of appeal can be made. This is under Article 136, which speaks of the appeal on special leave. Special leave is kind of an authority that is granted by the Supreme Court as a matter of its discretion where it says that any judgment or any kind of an order that is made by a tribunal, it could be tribunals that have been established under various powers of various state and central legislations.

Usually, tribunals are made under several laws. Today, most special laws have a tribunal in place, consumer forum, right to information, competition commission, income tax table. Then you can appeal to the Supreme Court even if there is no provision for it by taking the special leave of the court. This is a very discretionary power. So, where there is no appeal or right to appeal under any other provisions of the constitution, the 136 appeals can be sought before the Supreme Court of India. This is not an ordinary appeal from the High Court, but it is mostly applicable to those that come from the tribunals. Article 136 special leave is a discretionary power. It cannot be claimed as a matter of right. It cannot be granted in any judgment whether final or interlocutory. It may be related to constitutional matters, civil or criminal or income tax, labour, revenue, or even matters of an advocate right under the Advocates Act.

It can be granted against even High Court matters, but it is not necessarily so. But these are cases where the High Court does not give you a certificate of appeal and hence you are seeking the special leave of the Supreme Court of India. So, under Article 136, it is a very

wide power. So, wherever the High Courts are not granting this certificate of appeal, wherever from the judgment of a tribunal, you have no right to appeal, then the Supreme Court still has the power to grant you special leave and to admit your cause, decide the matter and give you justice or finality of what the law should be. So, this is highly an exceptional power that is granted. This is a power in which you can override all other lower courts decisions. If the High Court does not give you a certificate of appeal, you have no other choice, but to let the Supreme Court decide whether this is a good case to come to the Supreme Court or not. Those are the reasons why this provision in the constitution is there. That is why we say it is the apex court or the final court to decide whether matters should be in one way or the other.

It is an extraordinary situation where 136 appeals are being allowed. But this does give unfettered powers to the Supreme Court to set down what shall be the rule of law in case of judicial appeals. Under Article 137, the Supreme Court has power to review any judgment or order made under any other law made by the parliament or any rules that are made by the parliament as well. There is something called the writ jurisdiction of the Supreme Court as well. Writ petition under Article 32 for the violation of fundamental rights is called the writ jurisdiction. And the constitution has provided the writ jurisdiction to the High Courts as well. When such writ petitions for writ jurisdictions come into play, there is Article 138 and Article 141. These are also those articles that give power to the Supreme Court. Deciding parliamentary laws, whether they fulfil the mandate of the constitution or whether their constitution or not is something that the courts can make a final call upon.

Under Article 142, the Supreme Court has power to pass any decree or order necessary to ensure complete justice in any pending case or pass such decree that is to be made enforceable to the entire territory of India in a manner that may be prescribed by the parliament or by the president. So, what the Supreme Court has here is the power to issue orders for securing even the attendance of a person, discovery or production of documents or investigation or punishment of contempt for the entire territory. Article 142 very clearly says that the power of the court is extended to the entire territory of India. Though the Supreme Court is not a trial court, it is not a court of evidence. Yet, if the Supreme Court insists that they would want to summon someone, they want to examine any document or any kind of evidence, then the Supreme Court still has the power to continue doing the same.

Coming to the next jurisdiction of the Supreme Court, it is called the Advisory Jurisdiction under Article 143. There are two categories in which the Supreme Court can give an advisory opinion. First is on any question of law or fact of public importance which has arisen, or which is likely to arise or any dispute arising out of a pre-constitutional treaty or agreement or covenant or etc. So, here, to exercise advisory jurisdiction, please note being the highest court, the President may want to seek the advice of the Supreme Court. So, the

President can refer any such question to the Supreme Court and the Supreme Court is duty bound to provide this advice to the President of India. Usually, such an advisory opinion is given to the government whenever there is a problem in understanding the judicial verdict or the judicial order. And there is more than one interpretation that it is possible that those are the circumstances when the government would want the Supreme Court to give an advisory opinion. It is not a judicial pronouncement, it is only an advisory, but it is something that is sought by the President and once the advice is given, it is not necessary that the President is bound by the advice. He may just follow the opinion in the advice or prefer not to follow that opinion in the advice.

Advisory jurisdiction sort of facilitates the government taking an authoritative legal opinion from the Supreme Court apart from seeking the same from the Attorney General of India, who is the first law officer or the solicitor general of India. So, still the Supreme Court can come in an advisory position. So, generally advisory opinions of the Supreme Court have been asked in many matters. There is in fact a list of such Acts or legislations in which the advisory opinion of the court has been sought. The latest is the 2G spectrum case where auction was mandated by the court saying that auction is the rule and first come first serve should not be followed. That was the case in terms of whether auction is a rule for all natural resources. And second was, is the auction the only rule, or should it be the preferred one? Because in some cases you may not want to follow the auction. That was something that the president sought after the judgment of the court. So, in an advisory jurisdiction, the Supreme Court did clarify and say auction is not the rule, it is the most preferred one. That is how clarificatory opinions are sought for judgment of the court so that there is clarity in the implementation. The executive may want to seek that clarification. *Ram Janma Bhoomi* case of 1993 is another case in which advisory opinion was sought. The Delhi Law Act of 1951, *Re Berubari Union* case, Sea Customs Act of 1963, *Keshav Singh's* case, President's Election case, Special Courts Bill of 1978, Jammu and Kashmir Resettlement Act, Cauvery Water Dispute Tribunal 1992 are all some of the cases in which the advisory opinion of the Supreme Court was sought.