

ARTICLE 142 AND THE NEED FOR JUDICIAL RESTRAINT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

People who became unemployed following the court's order prohibiting sale of liquor along highways demonstrate in Chandigarh. | Photo Credit: Akhilesh Kumar

For a number of years, it has been my practice not to speak about the cases in which I had appeared as a lawyer, for it had been my view that doing so would not be appropriate. However, I now feel that remaining silent today is not an option. I am having in mind the recent judgments of the [Supreme Court invoking Article 142 of the Constitution](#) to achieve results of a far-reaching nature, outside the laws governing the issues.

Article 142 provides that “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 cause or matter pending before it...” Ordinarily, a student of law would not recognise this provision as a potent tool in the hands of the Supreme Court to bring about changes in significant policy issues to affect the public at large.

In the early years of the evolution of Article 142, the general public and the lawyers both lauded the Supreme Court for its efforts to bring complete justice to various deprived sections of society or to protect the environment.

Constructive application

We have, for example, the cleansing of the Taj Mahal, whose marble was yellowing on account of sulphur fumes from the surrounding industries. Today, on account of the court's efforts over a period of years, we have had our heritage restored to its original beauty. Similarly, undertrials were rotting in jails for greater periods than the maximum punishment which could have been inflicted on them, as their very existence was forgotten by the criminal justice system. With a single stroke of the pen, thousands of them were released. Stories of miraculous changes brought about to the lives of ordinary people — especially those who, on account of poverty, illiteracy, and ignorance were unable to seek remedies from the courts — were innumerable.

One of the important instances of application by the Supreme Court of Article 142 was in the Union Carbide case — relating to the victims of the Bhopal gas tragedy — where the Court felt a need to deviate from existing law to bring relief to the thousands of persons affected by the gas leak. In this judgment, the Supreme Court, while awarding compensation of \$470 million to the victims, went to the extent of saying that to do complete justice, it could even override the laws made by Parliament by holding that, “prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142.” By this statement the Supreme Court of India placed itself above the laws made by Parliament or the legislatures of the States.

Foraying into forbidden territory

Fortunately, this statement was toned down later in *Supreme Court Bar Association v. Union of India*. It was said therein that the said article could not be used to supplant the existing law, but only to supplement the law.

However, in recent years, one has come across several judgments of the Supreme Court wherein it has been foraying into areas which had long been forbidden to the judiciary by reason of the doctrine of 'separation of powers', which is part of the basic structure of the Constitution.

Unfortunately, these judgments have created an uncertainty about the discretion vested in the court to invoke Article 142 where even fundamental rights of individuals are being ignored. What we have found is that the court, in its anxiety to do justice in a particular case or matter, has failed to account for the far-reaching effects of its judgments, which may result in the deprivation of the rights of a multitude of individuals who are not before the court at that time. Here, I have in mind the following cases:

[The coal block allocation case](#) : Allocation of coal blocks granted from 1993 onwards was cancelled in 2014 without even a single finding that the grantees were guilty of any wrongdoing. The cancellation carried with it a penalty of 295 per tonne of coal already mined over the years. Article 142 had necessarily to be invoked. The individuals were not heard on their particular facts, but only their associations were heard. The result was devastating, so far as these lessees were concerned.

The ban on the sale of alcohol along national and State highways: While the notification by the central government prohibited liquor stores along National Highways only — those abutting the National Highways — the [Supreme Court put in place a ban](#) of a distance of 500 metres by invoking Article 142. Additionally, and in the absence of any similar notification by any of the State governments, the court extended the ban to State highways as well. As a result of the order, thousands of hotels, restaurants, bars and liquor stores were forced to close down or discontinue the sale of liquor, resulting in lakhs of employees being thrown out of employment. It may be noted that the total percentage of accidental deaths caused due to drunken driving, as found by the court from the statistics of 2015, was only 4.2% as against the 44.2% caused by over-speeding. The Supreme Court had itself held that the right to employment is a basic right traceable to Article 21. However, in its order banning the sale of alcohol along highways, it made no reference to the loss of employment to lakhs of people, a direct consequence of the order.

The transfer of cases filed against persons accused in the Babri Masjid demolition case: A two-judge bench passed an order which was in the teeth of an earlier three-judge bench decision of the Supreme Court, between the same parties, which was binding on it. Despite the decision of the larger bench, the court was prepared to hold, while invoking Article 142, that in view of the long pendency of the case for 25 years, it would direct that the [trial would now stand transferred from Rae Bareli to Lucknow](#) . In my view, the judgment did not merely supplement the law but supplanted it by reason of the binding nature of the three-judges bench decision, which was *res judicata* between the parties. The trial was in fact nearing completion at Rae Bareli; it would now take at least two years for the examination of a few hundred witnesses at Lucknow before conclusion of the trial, as the charge of conspiracy has also to be gone into.

I must reiterate that I had appeared as a lawyer in all the above cases.

It is true that Article 142 has been invoked for the purpose of doing tremendous good to large sections of the population and indeed to the nation as a whole. The Supreme Court has perceived its role as one which would require it to 'wipe away every tear from every eye', but perhaps it is time that the use of this vast, unlimited power included checks and balances.

Referral to Constitution Bench

While one ponders over the possible solution to this conundrum, one cannot lose sight of the fact that today, we have a court of 31 judges who sit in thirteen divisions of two or three to

deliberate on the seminal legal issues of the day. One would even be compelled to observe that India has thirteen Supreme Courts as each division represents, by itself, the Supreme Court of India, and each bench is independent of the other. I would therefore propose that all cases invoking Article 142 should be referred to a Constitution Bench of at least five judges so that this exercise of discretion may be the outcome of five independent judicial minds operating on matters having such far-reaching impact on the lives of people. I also propose that in all cases where the court invokes Article 142, the government must bring out a white paper to study the beneficial as well as the negative effects of the judgment after a period of six months or so from its date.

The time has come for the Supreme Court to introspect on whether the use of Article 142 as an independent source of power should be regulated by strict guidelines so that, in the words of Justice Benjamin Cardozo, the judge “is not a knight-errant roaming at will in pursuit of his own ideal...”

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