

**INTERNATIONAL JOURNAL OF LAW  
MANAGEMENT & HUMANITIES**  
**[ISSN 2581-5369]**

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**Volume 4 | Issue 1**

**2021**

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# The Confluence of Judicial Guidelines and Justice

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## ABSTRACT

*In various instances, the Supreme Court of our country has resorted to issuing guidelines on matters where both the executive and legislature have not come up with legislation. This raises several important constitutional questions, the primary ones being related to the fundamental constitutional principle of separation of powers and concerns of judicial overreach. The powers to make laws and to lay down administrative decisions are vested exclusively with the legislature and the executive, and intervention by the Supreme Court gives rise to concerns that the judiciary oversteps its authority, interfering with functions of the other pillars of democracy. This article will present various instances where the Supreme Court has issued such guidelines, discuss their constitutional and legal status and effects, and analyze the Supreme Court's interpretation of the same.*

**Keywords:** *Supreme court guidelines, separation of power, judicial overreach, administrative decision*

## I. CAN THE SUPREME COURT URGED TO THE LEGISLATURE TO OUTLINE THE LAW?

In India, the Parliament and state legislatures are the law making bodies, and not the government. The courts have the constitutional duty to interpret the law and protect fundamental rights. Enacting laws is outside their purview. Thus, owing to its limited role, even the Supreme Court of India cannot engage in judicial legislation. While deciding a 2013 petition for framing guidelines to prevent misuse of national flags, the Apex Court explicitly affirmed the fact that courts in India do not have the authority to order the government or the legislature to frame any law or to prescribe a specific time period for the same.<sup>2</sup> Such directions by the courts would be in dissonance with the fundamental principle of separation of powers between the three pillars of democracy.

A bench comprising Justices Swatanter Kumar and B.S. Chauhan in *the case of V K Naswa v.*

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<sup>2</sup> *Court can neither pass law nor ask govt to frame it: SC*, BUSINESS STANDARD (Jan 21, 2013), [https://www.business-standard.com/article/economy-policy/court-can-neither-pass-law-nor-ask-govt-to-frame-it-sc-112011500042\\_1.html](https://www.business-standard.com/article/economy-policy/court-can-neither-pass-law-nor-ask-govt-to-frame-it-sc-112011500042_1.html).

Home Secretary, UOI and ors,<sup>3</sup> said that courts have very limited powers in the legislative matter. They can only recommend to the legislature to enact or modify the statute but they cannot give direction to the executive/legislative bodies to enact or amend the law. In case if there is no law on any subject matter and require an immediate action to do complete justice, in such cases courts under its constitutional obligations can give guidelines till the law is framed. Thus, it can be understood that all the three pillars of democracy have a definite role under the constitution of the country, and as such, the courts cannot order the law-making bodies to make laws, and vice-versa.

## II. JUDICIAL GUIDELINES IN INDIAN JURISPRUDENCE

The Judiciary is tasked with judicial review of legislative and executive actions to ensure that these organs do not act in contravention to the constitution, while the legislature oversees the executive. In number of cases the courts have propounded legal policy related orders via their judgments. For example, the Supreme Court issued guidelines against Mob Lynching in Tehseen S. Punawalla case and the D.K. Basu Guidelines for arrest by the Supreme Court.

Such guidelines continue to be law in that specific area until the legislature enacts some legislation.

Justice P.N. Bhagwati introduced public interest litigation in India in the year 1983, and in the same judgment Justice Pathak warned against the “*temptation of crossing into territory which properly pertains to the Legislature or to the Executive Government.*”<sup>4</sup> Justice Katju has also held that, “*Courts cannot create rights where none exist nor can they go on making orders which are incapable of enforcement or violates other laws or settled legal principles.*”<sup>5</sup>

The power of the Supreme Court to lay down guidelines emanates from Articles 32, 141, and 142 of the Constitution of India. Article 32 empowers the SC to issue directions or orders to preserve the fundamental rights of citizens and can be used to enforce fundamental rights in areas of legislative vacuum. The Supreme Court has recognized that fundamental rights are limitations upon the State power, and in the most recent case of **Skill Lotto Solutions PVT. LTD V. Union of India**,<sup>6</sup> the Supreme Court held that Article 32 is a crucial and indispensable part of the Constitution of India. This Article meant to ensure observance of rule of law and enforce fundamental rights, which is most potent weapon.

<sup>3</sup> Writ Petition (Civil) No.533 of 2011.

<sup>4</sup> Bandhua Mukti Morcha, (1984) AIR 802 (India).

<sup>5</sup> Suyash Tiwari, *MSP and Public Procurement*, PRS INDIA, (Dec 9, 2020), <https://www.prsindia.org/theprsblog/msp-and-public-procurement>.

<sup>6</sup> Writ Petition (Civil), 961 of 2018, Dec 03, 2020.

Article 141 of the Indian Constitution deal with the rule of precedent, which means all subordinate courts are bound by the decision of the Supreme Court. Whereas Article 142 bestowed special power to the judges of Supreme Courts, to do complete justice between the parties i:e when law does not provide any remedy Apex Court can exercise the power given under Article 142 and do the complete justice. In the Ayodhya case the Hon'ble Supreme Court described its power under Article 142 – *“The phrase ‘is necessary for doing complete justice’ is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally worded laws to the specifics of a case before courts.”*<sup>7</sup>

The Supreme Court has exercised this authority liberally and has laid down numerous guidelines for complete justice or to fill the void of policy lacunae, where no legislation exists on the subject of dispute. Some of these major and landmarks judgments are listed below:

In the case of *Tehsheen S. Punawalla v. Union of India*,<sup>8</sup> the Apex Court issued guidelines for curbing mob lynching all over the country in the name of sacrilege, caste etc. This was the welcoming judgment as for the first time law enforcement system is completely overhauled in this regard. The Supreme Court issued guidelines for the prevention, punishment and remedies to curb the violence. In this case the Supreme Court also recommended to the legislative bodies to make mob lynching a different crime and also provide different punishment for it. Though this recommendation is not mandatory for the Parliament to follow and no action is taken yet. But if any state is not following any guidelines issued by the Supreme Court then the court can issue notice and take legal action against those states. In 2019 Apex Court issued notice against 10 States not following the guidelines on mob lynching.<sup>9</sup>

In *Rajnish vs Neha and ors*,<sup>10</sup> Supreme Court of India gave a reviving guidelines regarding maintenance under section 125 of Criminal Procedure Code. Now both husband and wife need to disclose their source of income and if maintenance were already provided under

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<sup>7</sup> King Stubb & Kasiva, *Article-142 Constitution of India - Is it Sword of “complete justice”?*, LEXOLOGY (Apr 1, 2020), <https://www.lexology.com/library/detail.aspx?g=ba92810f-7711-42d8-b8ed-1288af033b75>.

<sup>8</sup> *Tehseen S. Poonawalla vs Union Of India* (2018) 6 SCC 72 (India).

<sup>9</sup> *Lynching: 10 states ignore Supreme Court guidelines, get notices*, THE NEW INDIAN EXPRESS (Jul 27, 2019), <https://www.newindianexpress.com/nation/2019/jul/27/lynching-10-states-ignore-sc-guidelines-get-notices-2010028.html>.

<sup>10</sup> Criminal Appeal No. 730 of 2020.

different statutes, the courts would consider an adjustment or set off of amount previously awarded. Apex Court also said that now maintenance will be payable from the date of filing the application for maintenance to bring uniformity between different statutes on matrimonial matters.

In *Forum, Prevention of Environment and Sound Pollution v. Union of India*,<sup>11</sup> guidelines to reduce the noise pollution were propounded. These guidelines deal with noise emanating from loudspeakers and public address systems in cultural events and religious performances in busy commercial localities. Musical noise was complained against as causing nuisance and making life miserable. This landmark Environment Law judgment, it has made creating noise at night (between 10 p.m. and 6 a.m.) a punishable offence. Stringent guidelines for the reduction of noise pollution in the country as a whole were also laid down.

In the landmark case of *D.K. Basu v. State of West Bengal*,<sup>12</sup> which dealt with the protection of rights of arrested persons, the SC gave eleven guidelines to be followed by the police when arresting any person. This judgment of the Supreme Court has ensured that people have proper rights and remedies to lead a life of dignity while under imprisonment. The scope for the abuse of powers by the police at the time of arresting someone has been curtailed to a great extent by this judgment. Any violation of these guidelines would amount to contempt of the court and will have to be dealt with accordingly by the court.

In the case of *Laxmi Kant Pandey v. Union of India*,<sup>13</sup> guidelines for giving up of a child for adoption to foreign parents were laid out. Moreover, in the case of *Sunil Batra v. Delhi Administration*,<sup>14</sup> the Supreme Court propounded guidelines for the protection of the rights of the prisoners.

The Supreme Court laid down detailed guidelines with respect to of inter-country adoption, which refers to the adoption of Indian children by citizens of foreign countries, in the case of *L. K. Pandey v. Union of India & Anr.*<sup>15</sup> Before the guidelines were issued, there was no legislation enacted by Parliament on the subject. Thus, it can be seen that the Supreme Court guidelines have played positive role in regulating areas which endured policy lacunae and filling the voids in the legislative scheme of the nation. They are a welcome step in moving towards establishing justice based egalitarian nation.

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<sup>11</sup> *Forum, Prevention of Environment and Sound Pollution v. Union of India*, (2005) 5 SCC 733 (India).

<sup>12</sup> *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416 (India).

<sup>13</sup> *Laxmi Kant Pandey v. Union of India*, AIR 1984 SC 469 (India).

<sup>14</sup> *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579 (India).

<sup>15</sup> *L. K. Pandey v. Union of India & Anr*, AIR 1986 SC 272 (India).

In perhaps the most famous and important case of *Vishaka v. State of Rajasthan*,<sup>16</sup> focused attention and encouraged discourse on a topic that was largely ignored by the executive and legislature. The Vishaka guidelines were laid down for the purpose of bringing gender equality and the first and foremost step to prevent sexual harassment at workplace.

In the year 1997, when the judgment was pronounced, sexual harassment at the workplace was not recognized as a separate offence. In an act of judicial activism, the Supreme Court filled the gap existing in the Indian scenario. It incorporated the definition of sexual harassment as provided in the General Recommendation 23 under Article 11 of *UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW)*, 1979. The Vishaka guidelines have now become obsolete with the enactment of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*.

### III. THE LIMITS OF JUDICIAL ACTIVISM

In India, the courts have assumed the responsibility of passing orders and guidelines only in areas where both the executive and legislature have failed to come up with legislation, with the intention to fill legislative vacuum. The Courts' intervention in the form of guidelines or regulations stands only the Parliament frames the appropriate legislation covering the area. The Supreme Court has adopted a careful approach for intervening in legislative or executive functions.

In *Aravali Golf Club v. Chander Hass* case,<sup>17</sup> it was held that without justification, judges should attempt to carry out executive or legislative tasks under the pretext of judicial activism. The judiciary must respect the authority and functions of other State organs. Even though judicial activism is useful and sometimes even necessary, in the opinion of the court, such activism can only take place in extraordinary circumstances – in situations where the lack of judicial action would be detrimental to the interests of the nation or of the weaker sections of the society. The Constitution is the ultimate source of law in this country, and explaining its approach, in the case of *Dayaram v. Sudhir Batham & Ors.*,<sup>18</sup> the Supreme Court very stated that “*This Court has neither re-written the Constitution nor resorted to ‘judicial legislation’.* The judicial power was exercised to interpret the Constitution as a ‘living document’ and to enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves.”

Indian courts have not violated the constitution by issuing such guidelines. Although some of

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<sup>16</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 (India).

<sup>17</sup> *Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683 (India).

<sup>18</sup> *Dayaram v. Sudhir Batham & Ors.*, (2012) 1 SCC 333 (India).

them were legislative, they were propounded to fill up the existing legislative lacunae, only till the legislature enacts some law to deal with the particular situation. Such acts have protected the poor and the weak from the unconstitutional acts of the executive and legislature and preserved the fundamental rights of individuals. Thus, the pragmatic approach of the Judiciary has been instrumental in upholding our constitutional goals.

#### **IV. CONCLUSION**

It is contended that the concerns of judicial overreach by the Supreme Court of India in its exercise of judicial activism are without merit, as without them for regulating areas where a legislative vacuum exists, the fundamental rights of individuals cannot be protected from abuse by the executive. It is an admitted fact that the judiciary does not possess absolute powers in our constitutional democracy; however, the guidelines issued by the Apex Court in furtherance of the fundamental rights of people are motivated by the goals laid down in our constitution, and as such, cannot be constitutionally void. The courts' actions, on the other hand, can be legitimately viewed as a reminder and an invitation to the judiciary to step up and fulfill its duty by enacting legislation to fill the policy lacunae. The guidelines cease to have the effect of laws when the legislature lays down such legislation, thus not interfering, but simply assisting the law-makers.

However, it is also extremely crucial that the judiciary exhibit a high degree of judicial restraint so as to not undermine the other organs, for without such restraint, judicial activism can easily violate the doctrine of separation of powers. There are risks involved in promoting judicial activism without restraint, including the possibility of judges laying down laws as per their own subjective ideas. Statutory law should remain at the centre of legal system, not law made by judges. Judges should legislate only in exceptional circumstances to prevent misuse of law and abuse of fundamental rights. Till now, the judiciary has acted in a positive direction to advance the constitutional mandate, and stepped up to fill in the gaps in statutory law and the legislative vacuum left by the legislature, which must be commended.

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