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DO "EXECUTIVE COURTS" POSE A PROBLEM IN INDIA'S FEDERAL DEMOCRACY? : AN ANALYSIS BASED ON SHRI RANJAN GOGOI'S NOMINATION TO THE RAJYA SABHA

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INTRODUCTION

Federalism is the one of hallmarks of our Indian democracy. It resonates throughout all the structures of government and is deeply enshrined in our constitution. Within the federal framework, the doctrine of "separation of powers" amongst the Executive, Legislature and Judiciary specifically has supreme importance and is considered to be a part of the basic structure of the constitution[1]. This doctrine consists of one important idea, that is, that the same person should not be a part of more than one of the 3 organs.[2] Although, sometimes an indirect overlap of duties can take place. A pertinent example of this is the development of "executive courts".

Slogans of judicial independence are being widely heard across the nation over the past decade. This principle also has formed a part of the basic structure of our constitution[3]. Usually, an independent judiciary is understood to mean independence from the rest of the government and from executive control. However, independence means something more than that. It also means that judges perform their function while keeping their personal biases and prejudices aside. The foundation of this idea lies on the recognition that even though law is heavily influenced by a country's political scenario, it cannot be reduced to it.[4] It is imperative to keep this is mind especially when dealing with questions of administrative law because that is the vulnerable zone when judiciary may overstep its duties to accommodate executive orders. Instead of maintaining an environment of checks and balances between the organs of the government,

[1] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
[2] Khushi Pandya, *Separation of Powers- An Indian Perspective*, University of Westminster- School of Law (2013), http://dx.doi.org/10.2139/ssrn.2254941.
[3] *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213.
[4] Gautam Bhatia, *The Fear of Executive Courts*, The Hindu (2018), https://www.thehindu.com/opinion/lead/the-fear-of-executive-courts/article25735185.ece.

sometimes what comes to existence is a court which favors the executive and ends up comprising its legitimacy.

This article aims to study the emergence of executive courts in India while focusing on how Shri Ranjan Gogoi's tenure as the former Chief Justice of India (CJI) has changed the dynamics of this issue. In light of recent events pertaining his nomination to the Rajya Sabha, it becomes crucial to debunk the realities of the overlap of function amongst the organs of the government. With his nomination, it is not the first time that we are witnessing the influence of administrative and executive partisanship extending to the legislative bodies as well. This article will further be analyzing whether these executive courts truly pose a problem to our federal democracy through a brief comparative analysis with other countries.

TRACING THE FORMATION OF "EXECUTIVE COURTS"

The emergence of executive courts can be traced back to the 1960s where we saw the first prominent examples of executive favoritism. During the backdrop of the Indo- China war of 1962, and the following declaration of emergency by the then President, an ordinance was promulgated suspending the rights of citizens to move to the court for the enforcement of their rights under Article 21 and 22. As a consequence of this ordinance, the Defence of India Act of 1962 was enacted under which 26 people were detained. These detainees wished to challenge their arbitrary detention before the High Courts of various States on the ground that it was constitutionally invalid and these appeals collectively came to be known as the case of ***Makhan Singh v. Union of India.***[5] The court ultimately held that the appellants had no *locus standi* to challenge the validity of the Act and even though the overarching issues in this case were questions of constitutional law, it was one of the earliest instances of executive interests influencing the mindset of the judiciary.

Similarly, in the infamous 1976, case of ***ADM Jabalpur v. Shivkant Shukla***[6], "supreme importance" was given to the considerations of the State while compromising on human rights. This judgment marked one of the darkest days for the democracy of India where the court once again upheld the validity of an administrative act, the Maintenance of Internal Security Act (MISA) which gave wide powers of indefinite preventive detention to the executive without

[5] *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.
[6] *A.D.M. Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

the requirement for stating reasons for the same. The majority held that no court could scrutinize the actions of the government.

A major advancement from the perspective of administrative law took place in the 1978 case, ***Maneka Gandhi v. Union of India***[7]. Mrs. Gandhi's passport had been seized barring her from international travel. Hence, she challenged this executive order on the grounds that it was a violation of her personal liberty. Further, she was not given the opportunity to present her case and have a hearing regarding the impoundment of her passport. The Supreme Court not only elucidated on the subject of personal liberty, but also adopted the concept of "due process of law" in accordance with the principle of natural justice that "no one should be condemned unheard." The Court recognised that the absence of a fair hearing in Mrs. Gandhi's case violated the procedure established by law by failing to provide a reasonable opportunity to be heard.[8] These principles of natural justice were to apply to administrative bodies as well and not just limit themselves to judicial action.[9]

By the 1990s and the 2000s, courts were intervening a lot in administrative activities as part of "judicial activism". They would constantly manage welfare schemes and oversee other administrative initiatives in order to protect any hindrance caused by corruption. For instance, courts began to go to great lengths to ensure justice by starting "curative petitions" as a last resort for redressal of grievances which would also be applicable against violations of principles of natural justice.[10]

CASE STUDY: TENURE OF SHRI RANJAN GOGOI

Ranjan Gogoi served as the Chief Justice of the Indian Supreme Court from 2018 – 19 and sat on the bench which delivered some landmark judgements such as the Sabarimala Temple case, the Rafale Jet Fighter case, the Ayodhya judgement and many others. His recent nomination to the Rajya Sabha has sparked particular interest across all segments of Indian society because his tenure as the CJI proves to be an epitome of someone who not only compromised on the

[7] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
[8] S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 Washington University Journal of Law and Policy (2001), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1443&context=law_journal_law_policy.
[9] A.*K. Kraipak v. Union of India*, AIR 1970 SC A.
[10] *Rupa Ashok Hurra v. Ashok Hurra*, AIR 2002 SC 177.

principles of natural justice but also weakened the independent functioning of the judiciary by displaying favoritism to the government and executive of the day.

The cardinal principles of natural justice upon which all administrative agencies and bodies of our country function dictate that- a) every person has a right to a fair hearing and b) no one should be made a judge in his or her own cause, known as the "Rule Against Bias" or *Nemo Debet Esse Hudex in Propria Causa.* Ranjan Gogoi drew attention to the violation of these principles by sitting in his own hearing for the sexual harassment charges made against him by an ex- employer of the Supreme Court. There is no requirement to delve into this incident in detail as it hardly scratches the surface of his administrative partisanship however, a plethora of problematic questions emerged out of this which are important to bear in mind. Aside from the fact that the investigation reports of this case were not public and the proceedings commenced *ex- parte* in certain stages, this case is a typical example of what "bias" looks like in a courtroom. No exception or no argument of "necessity" can take away the fact that there existed "subject matter/ departmental bias" in these enquires as well as "personal bias" owing to the relationship shared between the deciding authority and the party. Nonetheless, as seen in many other decisions taken by him, there existed "executive bias" in judicial proceedings.

The most obvious case of this is the National Register of Citizens (NRC) implementation. From the beginning, the NRC had always been an administrative process, and its preparation was the role of the bureaucracy as seen in the state of Assam. This however, is not just any regular administrative process; it has a major impact on citizenship in India and hence affects all other subsequent rights accruing to an individual within the country. The implementation of NRC when clubbed together with the amendments being made to the Citizenship Act, 1955 have been the cause of serious concern and led to multiple protests. When a bill which was so exclusionary in nature and discriminatory on the basis of religion was being questioned, one would assume that since such major identities are at stake, the court would provide adequate safeguards to citizens with amplified rigor. This calls for nothing more than simple judicial review of executive action in order to protect individual rights. Unfortunately, since the judiciary itself had taken over the NRC process and was determining what documents shall be admissible and what should the deadlines for their submission be, there was no redressal mechanism left for people to revert to. People actually died as a consequence of this accelerated process where no room for accommodating extension deadlines was created. Gautam Bhatia wrote that *"in another world, this would be a moment where a constitutional court would be*

asked to step in and protect rights; but a world where the court had become the perpetrator was a world long turned upside-down"[11]

Gogoi's tenure from the start had been marked by the serious lack of transparency it carried which was particularly evident by the overuse of "sealed covers." Every document serving as important and adducing evidence in a case was kept under strict protection and not declared to the public, even with the exceptions of sensitive cases or cases on national importance. There was an atmosphere of secrecy and non- disclosure which was critical in the formation of "executive courts." His own brother judges from the Supreme Court have accused him of compromising on the independence and accountability of the judiciary. Former SC Justice Kurian Joseph commented that *"Justice Ranjan Gogoi has compromised the noble principles on the independence and impartiality of the judiciary."* Former Justice M B Lokur also expressed a sharp reaction to Gogoi's nomination to the Rajya Sabha after just six months of his retirement[12].

ARE "EXECUTIVE COURTS REALLY A PROBLEM?: A COMPARATIVE ANALYSIS

After analyzing how "executive courts" came into being in India, it is now important to theorize this idea and understand what it means. An executive court can be described as a court or legal body that aligns its moral and political compass in congruence with that of the government of the day. This type of court typically reflects the ideologies of the government in its decisions. In India, executive courts are generally looked at in a negative light because it almost seems as if the judicial organ instead of serving its purpose of checking governmental power is displaying partiality towards it.[13] I think that a parallel to this can be drawn with the concept of "Judicial Deference" which implies that courts, especially in administrative matters, instead of exercising their independence choose to comply with the interpretations of statutory

[11] Gautam Bhatia, *The Troubling Legacy of Chief Justice Ranjan Gogoi*, The Wire (2019), https://thewire.in/law/chief-justice-ranjan-gogoi-legacy.
[12] The Hindu, *Former Supreme Court Judge Kurian Joseph Slams Ranjan Gogoi Nomination* (2020), https://www.thehindu.com/news/national/former-supreme-court-judge-justice-kurian-joseph-slams-ranjan-gogoi-nomination/article31092900.ece.
[13] *Supra*, note 4.

provisions as put forth by the executive.[14] However, it benefits to trace similar trends in other common law countries with structures similar to India to truly decipher whether such a practice is "good" or "bad".

In the United States of America, a quasi- federal democracy like India, judicial deference is a commonly debated subset of judicial review and is a central principle of public administrative law. This is primarily owing to the US Supreme Court's decision in ***Chevron, U.S.A., Inc. v. Natural Resources Defense Council (NRDC)***[15] which provided that a reviewing court must defer to an administrative agency's "reasonable interpretation" of the principle statute that it administers.[16] Since then, courts in the US have been overtly willing to accept these reasonable interpretations as given by the administrative bodies. This is apparent from the report of Attorney General's committee on "Administrative Procedure" which now has formed the grounds for enactment of the basic charter of administrative law, the Administrative Procedure Act. The statement read: *"where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body; and such interpretation is to be given weight, and not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it."*[17] Another justification for judicial deference was made in Justice Douglas's majority opinion in ***Panama Canal Co. v. Grace Line Inc***[18]. Justice Douglas pointed out that: "*the principle at stake in judicial deference cases is no different than if mandamus were sought."*[19] Hence, broadly speaking, there is considerable influence of the executive that radiates across the SC's approach. Even as per Article III of the US Constitution, which establishes the judicial branch, the Congress is given notable discretion to determine the shape and structure of the federal judiciary.

With that said, it is noteworthy to compare that in the United Kingdom, another common law country, it is a practice that all sitting judges of Supreme Court find an automatic place in

[14] Robert H. Wagstaff, *Terror Detentions and the Rule of Law: US and UK Perspectives*, Oxford Scholarships (2013), https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199301553.001.0001/acprof-9780199301553-chapter-10.
[15] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).
[16] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 The Yale Law Journal 908-1241 (2017), https://www.yalelawjournal.org/article/the-origins-of-judicial-deference-to-executive-interpretation.
[17] Justice Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke Law Journal, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj.
[18] *Panama Canal Company v. Grace Line Inc*., 356 U.S. 309 (1958).
[19] *Supra* , note 16.

the House of Lords (equivalent to Rajya Sabha) after their retirement without ever generating a controversy that such a tradition impedes the independence of their judicial system. [20]

CONCLUSION

In India, it is a myth that the 3 organs of the government work in independence from each other. Instead they work in complete harmony and co-operation. It is also not true that Ranjan Gogoi's nomination to the Rajya Sabha was the first ever instance of executive preferentiality leading to post retirement benefits. Instances of this practice date back to 1952 when Justice Fazl Ali was appointed as the Governor of Odisha after he completed his tenure in the SC. Justice Baharul Islam too was elected to the Rajya Sabha and after resigning in 1972, he was subsequently appointed as a judge of the Guwahati High Court. -Later on he was appointed to the SC as well. In the case of retired CJI Ranganath Misra who had exonerated the Congress for their involvement in the 1984 anti-Sikh riots, he was consequently nominated to the Rajya Sabha. On the other hand, Justice MC Chagla who served as the first Chief Justice of the Bombay High Court, and was expressly against Prime Minister Indira Gandhi's imposition of emergency, served as the Indian Ambassador to the US immediately after his retirement. After this, he served as the Indian High Commissioner to the UK and later on became a part of the Union Cabinet in 1963. He therefore is a great example of someone who made some excellent contributions in their post retirement spheres despite their vocal opposition to certain executive decisions.

These incidents beg us to question whether "executive courts" should be shunned altogether or is it that in certain situations such courts can actually be beneficial because after all, the judiciary plays a strong enabling role by helping the government to make positive progress while implementing novel administrative policies. To conclude, the only correct answer to this is to maintain a flexible approach while dealing with such cases and realising that executive partisanship or post -retirement benefits are not the benchmarks for declaring the entire concept of separation of powers as blurry.

[20] Jyotika Teckchandani, *Nothing Political about Justice Ranjan Gogoi's nomination to Rajya Sabha*, Wion (2020), https://www.wionews.com/opinions-blogs/nothing-political-about-justice-ranjan-gogois-nomination-to-rajya-sabha-288647.

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