

POWERPLAY OF RIGHTS: POLICY MAKING AND LEGISLATIVE INTERVENTION IN INDIA

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BEST CITATION – ARIHANA GOHAIN, POWERPLAY OF RIGHTS: POLICY MAKING AND LEGISLATIVE INTERVENTION IN INDIA, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (12) OF 2025, PG. 656-662, APIS – 3920 – 0001 & ISSN – 2583-2344

ABSTRACT

India's governance structure is built on the doctrine of separation of powers, ensuring checks and balances between the legislative, executive, and judicial branches. However, in the Indian context, this principle is not applied in its absolute sense and allows a degree of flexibility and interdependence between the branches. There are areas where the branches collaborate for better governance, policymaking being one of them. Taking this as its context, this paper delves into the often-debated topic of executive power in policymaking within the Indian context.

Drawing on the landmark case of *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab*, this paper will explore the distinction between policies formulated by the executive independently and those requiring legislative sanction.¹¹¹² The case examines the functions of the executive, focusing on the initiation and implementation of policies. This paper focuses on policy implementation, arising from the observation that this area lies at the intersection of legislative and executive functions which raises intriguing questions about the separation of powers. The interaction between the executive and legislature brings a new perspective with respect to governance functions in their practical sense and how it squares back to their constitutional significance.

GRASP - EDUCATE - EVOLVE

¹¹¹² *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

I. INTRODUCTION

The governance structure in India is fundamentally shaped by the doctrine of separation of powers, a principle designed to ensure accountability among different branches of government. This doctrine delineates three distinct governmental functions: legislative, executive and judicial. Ideally, each branch operates within its designated sphere, refraining from encroaching upon the domains assigned to others.¹¹¹³

However, India's application of this doctrine has a unique character. As noted in the *Ram Jawaya Kapur* case, the Indian constitution does not adhere to a rigid separation of powers.¹¹¹⁴ Rather, while the functions of each branch are sufficiently differentiated, there exists a degree of flexibility and interdependence. The Constitution, therefore, does not envision one organ or part of the State assuming functions that essentially belong to another.¹¹¹⁵

The case primarily examines executive powers which in their literal sense refer to the power to execute laws.¹¹¹⁶ According to the strict interpretation of the doctrine of separation, these comprise of the residuary powers of the judiciary and the legislative. That is, the powers left over *after* the powers wielded by the judiciary and legislature are determined. However, the judgement delivered by Mukherjea CJ in *Ram Jawaya Kapur* case delineates to an understanding that asserting an exhaustive definition of executive function may be misleading.¹¹¹⁷ The case broadens the conventional perception of executive powers beyond mere law enforcement, tax collection, and public safety maintenance. It acknowledges that the executive, when appropriately empowered, may even exercise limited judicial functions. Essentially, the

judgment emphasizes that among the executive's non-exhaustive functions stands the power to formulate and implement policies.

While India's Constitution establishes a federal structure, it draws inspiration from the British parliamentary system.¹¹¹⁸ In this model, the executive branch bears the primary duty of shaping governmental policy and guiding its transformation into law. The executive has the power to both initiate and implement policies. However, this authority is not absolute; it remains contingent upon the executive maintaining the legislature's confidence.¹¹¹⁹ The policy-making power of the executive varies on the levels of independence. In some instances, the executive can act independently, formulating and implementing policies without direct legislative involvement. In other cases, legislative action becomes necessary, to provide legal backing and address constitutional concerns. This interaction between executive and legislative creates a nuanced system of governance, which this paper will explore while examining when and why executive policymaking requires legislative sanction, when it can function independently and how it impacts the executive powers.

II. POLICYMAKING IN PRACTICE

The doctrine of separation of powers highlights how policymaking and law are the common threads between the legislative and executive branches. While the executive has multifaceted roles, implementing laws formulated by the legislature is indeed one of them. This overlap between the two branches extends to policy making, which can be viewed as a product of balancing executive and legislative powers. When a policy is sanctioned by the legislative, it is believed that the legal backing strengthens its enforceability.

The relationship between the separation of powers doctrine and policymaking has been a subject of scholarly debate. Some argue that over time, the discussion about the separation

¹¹¹³ 85 PHILIP B KURLAND, THE RISE AND FALL OF THE "DOCTRINE" OF SEPARATION OF POWERS' 592 (Michigan Law Review 1986).

¹¹¹⁴ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹¹⁵ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹¹⁶ UDAY RAJ RAI, CONSTITUTIONAL LAW: GOVERNANCE STRUCTURE 67 (2nd edn, Eastern Book Company 2022).

¹¹¹⁷ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹¹⁸ id.

¹¹¹⁹ id.

of power doctrine when applied to policymaking have overlapped formal, functional and normative arguments which obscure the doctrine's true significance.¹¹²⁰ Others believe that each branch of government has its own tools for addressing different parts of policymaking and should avoid meddling with one another.¹¹²¹ These discussions show that the standard conception of powers creates specific realms for each branch in the policymaking process.¹¹²² However, in practice, policymaking is fundamentally an interbranch concept.

To illustrate this point, we can take the example of the United States. American policymaking does not result from the edicts of any single branch of governmental branch; rather it emerges from interactions among them.¹¹²³ This collaboration ensures a more balanced policy-making process.

In India, policymaking is deeply rooted in its federal structure.¹¹²⁴ While the Constitution attempts a division of functions between the two levels of government, substantive functions remain entrusted with the state government. Most subjects which constitute the ingredients of development and administration fall under the state's direct jurisdiction: agriculture, housing, industries being few of them, while other subjects which fall under both the state and the center's jurisdiction are included in the concurrent list, where the Centre exercises overriding power, but effective one nonetheless remains the State.¹¹²⁵ In the case in hand which is a matter of education, both the center and the state have the jurisdiction over it as it falls on the concurrent list.

Each branch has its significance in the governance mechanism. The executive, in essence, is an accountable body which is safe

guarded by the framework of the Constitution within which it functions. For instance, one of the state's executive's roles is to formulate policies and overall work under the guidance of the Directive Principle of State Policies which falls under Part IV of the Constitution.¹¹²⁶ These principles are formulated based on the fact that the main function of the State must be to secure national independence and equality, international co-operation and world peace, social wellbeing of the people and economic prosperity of the nation.¹¹²⁷ Although they are non-justiciable, they are fundamental in the governance of the country, and it is the moral duty of the state to follow them in making policy decisions. The fact that we cannot have them translated into actions by courts of law highlights how it is indeed difficult to lay down what the government should do and what it should not do and how such categorical assertion would only defeat the very purpose of the government.¹¹²⁸

III. INDEPENDENT POLICY IMPLEMENTATION BY EXECUTIVE

The *Ram Jawaya Kapur* case speaks of a crucial principle: the executive can implement policies independently, provided these policies do not infringe upon citizens' rights.¹¹²⁹ When such infringement occurs, legislative sanction becomes necessary.

In the specific context of this case, the petitioner's side argued that the new policy introduced for the nationalization of school textbooks, where the government had retained more control over the production of these books, restricted their right to carry on the trade which is guaranteed under Article 19(1) (g) of the constitution by mere executive orders without proper legislation.¹¹³⁰ The new method prescribed only one textbook per subject as opposed to the old method which gave a

¹¹²⁰ MARK C. MILLER & JEB BARNES, MAKING POLICY MAKING LAW 37 (Georgetown University Press 2004).

¹¹²¹ id.

¹¹²² id.

¹¹²³ id 4.

¹¹²⁴ SR Maheshwari and SR Maheshwari, *Public Policy Making in India*, 48 The Indian Journal of Political Science 336, (1987).

¹¹²⁵ SR Maheshwari and SR Maheshwari, 'Public Policy Making in India' (1987) 48 The Indian Journal of Political Science 336.

¹¹²⁶ INDIA CONST. PART IV.

¹¹²⁷ TS Narayan Rao, 'Directive Principles of State Policy' (1949) 10 The Indian Journal of Political Science 16.

¹¹²⁸ id.

¹¹²⁹ *Rai Sabib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹³⁰ INDIA CONST. art 19 (1)(g).

choice to the headmasters to choose among more than one book for their schools.

In the judgement delivered by Mukherjea CJ, the government's new policy regarding textbooks did not violate any private rights of publishers and printers. While they were invited to submit their books on certain subjects for consideration, this invitation did not guarantee selection for use in schools. Most importantly, the policy did not restrict their right to conduct business; publishers remained free to sell their books in the open market. Even if their submissions are accepted as textbooks, there will always be a possibility that they can be discontinued in the future. Therefore, the court held that this policy's implementation did not encroach upon fundamental rights of the petitioner. It is, in fact, a case of *damnum sine injuria* – a loss suffered without injury in the legal sense. Consequently, it fell within the executive's autonomous policy-making authority, requiring no additional legislative backing. The case thus provides a practical example of when executive policy implementation can proceed independently. The case highlights that even if the acts of the executive are illegal, in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, they would have no right to complain under Article 32 of the Constitution.¹¹³¹

The petitioners also argued that the Council of Ministers did not have the authority to formulate such a policy. The court, while rejecting the argument, held that 'real executive powers are vested in the Ministers or the Cabinet' with the President as the constitutional head.¹¹³² With a majority in the legislature, the cabinet hold 'virtual control of both legislative and executive functions', and therefore 'the most important questions of policy are all formulated by them'¹¹³³. In other words, executive powers are collectively responsible to the

legislature. In India, that is the council of ministers.

Article 53 of the Indian Constitution vests executive power in the President, while Article 74 establishes a Council of Ministers to aid and advise the President. However, Article 75 provides crucial context for understanding these provisions.

Article 75(1) states: "The Prime Minister shall be appointed by the President and the other ministers shall be appointed by the President on the advice of the Prime Minister." Article 75 further specifies:

- (2) Ministers hold office at the President's pleasure.
- (3) The Council of Ministers is collectively responsible to the Lok Sabha (House of the People).

These clauses emphasise on the practical operation of executive power. While the President formally appoints ministers, the Prime Minister's role in advising these appointments is the key to the governance structure. Moreover, the Council's collective responsibility to Parliament explains the parliamentary nature of the India's executive. Therefore, Articles 53 and 74 must be interpreted in the light of Article 75.¹¹³⁴

The principles established in *Ram Jawaya Kapur* case find further support in the case of *Motilal v. Government of the State of Uttar Pradesh*.¹¹³⁵ This case addressed whether a State Government possesses the constitutional authority to operate a bus service in the absence of specific legislative enactment. Chief Justice Malik's opinion expanded on the nature of executive power in India's written Constitution. He argues that executive power may be explicitly granted, or it may be "implied, ancillary, or inherent" as well.¹¹³⁶ This broad

¹¹³¹ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225; INDIA CONST. art 32.

¹¹³² *id.*

¹¹³³ *id.*

¹¹³⁴ SHUBHANKER DAM, EXECUTIVE, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 24 (Oxford University Press 2016); INDIA CONST. art 53 54 and 75.

¹¹³⁵ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.; *Motilal v. Government of the State of Uttar Pradesh* AIR 1951 ALL 257.

¹¹³⁶ *id.*

interpretation allows the executive to carry out a wide range of activities necessary for fulfilling constitutional objectives.

Additionally, the Chief Justice affirmed that the State retains rights similar to those of citizens in managing property and conducting business, provided such activities do not infringe upon others' rights or contravene existing laws. This principle extends the executive's role beyond conventional duties into economic activities.

The judgment articulated a key principle: an act falls within the State's executive power if it meets three criteria:

1. It is not assigned by the Constitution to other authorities or bodies
2. It does not contradict any existing law
3. It does not encroach upon the legal rights of any member of the public¹¹³⁷

This ruling reinforces the *Ram Jawaya Kapur* decision, further clarifying the scope of executive powers in policy implementation.¹¹³⁸ It emphasizes on the broad yet bounded nature of executive power in India's constitutional framework, emphasizing the balance between its autonomy and the protection of citizens' rights. These cases provide a comprehensive framework for understanding the scope of executive power in policy implementation in India. The principle: the executive can implement policies independently as long as they do not infringe on citizens' rights; grants the executive significant freedom in day-to-day governance and policy execution which is independent of the legislature. Moreover, the three-point test provided in the *Motilal v. Government of the State of Uttar Pradesh* judgement for determining the validity of executive actions offers a clear framework for assessing the limits of executive power.¹¹³⁹

However, both the cases emphasize the need to balance governance implemented by executive in relation to the protection of citizens' rights.

The executive's power is broad but not unlimited, as it is constrained by the requirement not to encroach upon fundamental rights or existing laws.

IV. POLICIES REQUIRING LEGISLATIVE SANCTION

The executive's authority expands over a range of functions; however, the legislature retains the key mechanism to ensure that the conventional role of the executive, which is to execute laws made by the legislature, is carried out effectively. According to the aforementioned principle, legislative sanction is needed when citizen's rights are encroached and when it contravenes existing laws and, in these instances, legislative approval becomes an essential safeguard.

In the *Ram Jawaya Kapur* case, the court conceded that legislative sanction may be necessary for various exercises of executive power, though not for all.¹¹⁴⁰ For instance, in this very case, funds were necessary which needed to be authorized by the relevant Appropriation Act, because if a trade or business involves expenditure of funds, they need to be authorized either directly or under the provisions of a statute.¹¹⁴¹ Under Article 266(3) of the Constitution, no moneys from the Consolidated Funds of India or the Consolidated Funds of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution. The expression "law" here includes the Appropriation Acts.¹¹⁴² The court does recognize that Appropriation Acts cannot be said to be same as giving a direct legislative sanction to trade activities, however provided that these activities follow the government's policy, supported by the legislative, it pertains to the fact that these were formulated with the backing of specific legislative approval.

¹¹³⁷ *Motilal v. Government of the State of Uttar Pradesh* AIR 1951 ALL 257.

¹¹³⁸ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹³⁹ *Motilal v. Government of the State of Uttar Pradesh* AIR 1951 ALL 257.

¹¹⁴⁰ *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225.

¹¹⁴¹ UDAY RAJ RAI, *CONSTITUTIONAL LAW: GOVERNANCE STRUCTURE* (2nd edn, Eastern Book Company 2022).

¹¹⁴² *Rai Sahib Ram Jawaya Kapur and Others v State of Punjab* (1955) 2 SCR 225; INDIA CONST. art 266(3).

A case where the court held that legislative sanction is needed for certain executive actions is the case of *State of Madhya Pradesh & Anr. v Thakur Bharat Singh* where the Supreme Court held that the state's order under section 3 (1) (b) of the Madhya Pradesh Public Security Act, which authorized the imposition of restrictions on a person's freedom of movement, was unconstitutional as it lacked the authority of law.¹¹⁴³ This was violative of Article 19(1) (d) and (e) of the respondent, hence the appeal was dismissed.¹¹⁴⁴

A prominent example of such a policy is the implementation of the Aadhar unique identification number project. Firstly, Unique Identification Authority (UIDAI) was established to oversee the implementation and management of Aadhaar on 28 January 2009.¹¹⁴⁵ Following elaborate discussions and considerations, the Aadhaar Act came into effect on 11 March 2016 to back the actions of the Aadhar.¹¹⁴⁶ Although the constitutionality of the act was questioned in the 5-judge bench case of *Justice K.S. Puttuswamy v Union of India*, the Aadhaar Act, 2016 was upheld by a 4:1 majority as constitutional, with certain sections being held unconstitutional.¹¹⁴⁷ Such instances show how the three branches balance out each other.

On the same line, the five-year plan acquires finality after Parliament has accorded its approval. Similarly, it has passed several policy resolutions such as the industrial Policy Resolution, Policy Resolution on Science and Technology, Resolution on National Education policy etc., and these policies thus come to acquire sanctity of the highest level.¹¹⁴⁸

These examples illustrate how the branches interact with one another and how their

functions overlap to protect citizens' rights and uphold constitutional principles.

V. CONCLUSION

The relationship between the executive and legislative presents a nuanced picture of governance. While the doctrine of powers provides a foundational framework, India follows a more independent model. The executive's role goes beyond mere law implementation and extends to policy initiation and implementation. However, this power is not absolute and requires legislative sanctions for certain policies, which act as a safeguard and ensure accountability.

The need of sanctions for this executive action's validly poses the larger question on the impact of the legislature's involvement on executive's powers. In this interaction of these branches, the executive's role is not strictly limited, rather it serves the larger idea of the branches of the government being interdependent to cater to the needs of the citizens. While the executive's functions are not exhaustive, it still must abide by the conventional roles defined by the doctrine of separation of powers. The doctrine's primary motive is to ensure accountability of the branches – a clear indication of their interdependence. Therefore, legislative involvement enhances the executive's actions by providing a legal basis and keeping the process democratic. Conversely, the executive's expertise in policy implementation enhances legislative decision making. Their interaction forms an equilibrium which contributes to the overall welfare of the nation.

Therefore, the Indian model of governance demonstrates that a degree of overlap and cooperation between branches can be beneficial, as long as it is balanced and prevents the abuse of power by any of the branches.

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¹¹⁴³ *State of Madhya Pradesh & Anr. v Thakur Bharat Singh* AIR 1967 SC 1170; MADHYA PRADESH SECURITY ACT, 1990 sec. 3(1) (b).

¹¹⁴⁴ INDIA CONST. art 19 (1) (d) and (e).

¹¹⁴⁵ Amit Tyagi, G Rekha and N Sreenath, *Is Your Privacy Safe with Aadhaar? An Open Discussion* (2018) <https://ak-tyagi.com/static/pdf/58.pdf>.

¹¹⁴⁶ id.

¹¹⁴⁷ *Justice K.S. Puttuswamy v Union of India* (2019) 1 SCC 1.

¹¹⁴⁸ SR Maheshwari and SR Maheshwari, 'Public Policy Making in India' (1987) 48 *The Indian Journal of Political Science* 336.

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