

HOW SHOULD THE EXECUTIVE GOVERNMENT FUNCTION?

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The Constitution of India in Part V for the Union and Part VI for the States divides the functions of the State between separate, equal and interconnected wings, the Executive, the Legislature and the Judiciary. Article 53 of the Constitution and Article 154 of the Constitution vest the executive power of the Union and the States in the President and Governors respectively. As per Articles 76 and 163 the executive power is to be exercised on the aid and advice of the Council of Ministers. In effect, therefore, the Council of Ministers exercises executive power. Under Articles 73 and 162 the executive power of the Union extends to all matters with which Parliament has power to make laws and, for the States, to the extent of power of the Legislature to make laws. The executive power, therefore, is to be exercised at the judicious discretion of the President or Governor and it is only the Legislature which by law can circumscribe the executive power. Otherwise neither the Judiciary nor the Comptroller and Auditor General, nor the Legislature acting in a watchdog capacity can limit this executive power. To put it another way, that which the law does not either limit or prohibit is permissible in the exercise of executive power. As will be explained later, this is an extremely important point because many of the problems of governance in India have arisen out of an incomplete or wrong understanding of what executive power means and the manner in which such power can be exercised.

The conduct of business of the Government of India is governed by rules framed under Article 77 and in the case of the States by rules framed under Article 166. These rules divide the business of government between different ministries or departments and assign to each department its area of jurisdiction and competence. The rules also prescribe how a minister will deal with a case and how the Secretary and his officers will advise the minister or implement laws, policy or lawful orders of the minister. The rules also categorically state and it is the personal responsibility of the Secretary concerned to ensure compliance with the Business Rules. Where an individual department cannot take a decision or where more than one department is involved in decision making, the case may be referred to the Prime Minister or Chief Minister in coordination or it may be submitted to the Council of Ministers for orders. Within its own area of competence and subject to laws, rules or normal practices of the department, the department is competent to take an executive decision. If the decision is legal and not contrary to rules, it cannot normally be called into question, unless there is positive evidence of wrong doing. The fact that a particular decision may opt for a more costly option does not by itself make the decision bad in law or even executively ill-advised.

Let us take the case of spectrum allocation. At the time when mobile telephony began to make its presence felt in India, this country had about the worst telecommunication system in the world. It is only the introduction of digital telecommunications which transformed the telephony picture. It is in this context that government decided to throw open the doors of the telecommunication industry in order to attract more participants. Present revenue was not the concern but rather the swift development of a sector which provided vital infrastructure for communications. The policy followed was that spectrum would be allotted on a first come first served basis. Because in implementation there were severe flaws, including major complaints about corruption, the case came under audit scrutiny and the Comptroller and Auditor General went public in stating that by not auctioning spectrum government incurred a loss of Rs. 1,72,000 crores. If auction had been done the exchequer should have benefitted to this extent. The word 'if' is very dangerous here because if wishes were horses pigs would fly. Therefore, speculation on what might have been is quite unacceptable. The problem with the 2G spectrum case was that in implementation the then minister committed a number of unacceptable

mistakes, including going ahead with allocation contrary to the stand taken by the Ministry of Finance. In fact the Secretary of the Ministry should have refused to issue any orders in this case until the Council of Ministers took a decision, but the Minister was in a hurry. When the bubble burst government panicked and heads were allowed to roll. This is a case where if the executive power had been correctly exercised there would be no scam, largely because it is still not clear whether there actually was a scam or not. What should the government have done? There should have been a clear-cut decision on policy about allocation of spectrum. This could be by auction, it could be by allowing every serious contender to participate in the development of telephony, it could even be a decision to allocate a spectrum on a nominal fee, but with annual fee being periodically adjusted according to expansion of the network. Eventually this would come to a huge amount and while giving India even greater mobile telephony facilities, it would have served the consumer by keeping call rates low but, because of the size of the market, giving government enormous revenues. Nothing of the sort happened and instead we had arbitrariness of the minister on the one side, dithering of government on the other side and government generally behaving like a naughty school boy caught with his hand in the jam jar. The quite uncalled for statement of CAG that a loss of Rs. 1,72,000 crores had been suffered only added fuel to the fire, despite the fact that the calculated loss is based on an argument somewhat on the following lines, "If A had been done instead of B, then the revenue would have been XXX and because it was not done and because the revenue did not reach this figure, therefore, XXX is the loss". This whole argument falls to the ground because it is based on pure speculation. Why has government been hesitant in stating this in clear terms? Why has government not taken the stand that it took a certain executive decision about spectrum allocation and that it stands by this decision and strongly refutes any suggestion or wrongdoing?

There is another area which is of some concern and that is equipment of the armed forces adequately to fulfil their task of defending India against all comers. Defence deals right from the time of Krishna Menon as High Commissioner in London have been subjected to complaints, counter complaints and hesitation on the part of government to take a final decision. It was not always so because our defence agreements with the Soviet Union, for guns, armoured vehicles, fighter and transport aircraft, fighting ships and every conceivable piece of military equipment seem to have been completed without undue delay. Again, all these agreements were government to government, which made decision making relatively easy, but they were not necessarily without some consideration passing at individual levels. It is in our weapons deals with western bloc countries that we seem to have had trouble because here it is the private contractors or suppliers who provide the equipment. When the Bofors gun was purchased there was loud and persistent complaints about corruption in the deal, the echoes of which still reverberate. The gun is first rate and it has been the mainstay of our artillery arm. However, because the then Prime Minister stood accused of wrongdoing, every government now hesitates to take a decision about weapons purchase. Scorpene and HDW submarine deals with France and Germany seem to be on a roller-coaster ride and the purchase and production have been inordinately delayed. The purchase of T-90 tanks seems to be hanging fire. The Army has not acquired a worthwhile artillery piece since the purchase of Bofors 155mm guns. The specialised ammunition needed by our Armoured Corps is not being acquired because the firm supplying is has been blacklisted. Even Rafale fighter purchase seems to be slowing down because someone has complained. The net result is that the armed forces just do not have the equipment they require to fight a war successfully on at least two fronts, Pakistan and China. What use is our claiming to prevent corruption if as a result thereof India is left defenceless?

This issue is stressed because equipping the armed forces is an executive decision and lies entirely within the realm of the executive government. Here the process of decision making would involve the armed forces in that they would project their requirements and convince government of the need for a particular weapon system. This calls for a constant dialogue between the Service concerned and the Ministry of Defence, with a clear understanding on both sides that the matter has to be finalised within a given finite period. Once government is convinced of the requirement of that particular Service, the sanction for purchase must be given and the budget placed at the disposal of the Service Chief concerned. The entire process of testing of equipment before starting the process of purchase, floating tenders, evaluating tenders both technically and financially, arriving at the best option, making the final selection and placing an order should all be done on the advice of a committee set up by the Service Chief and including a representative of finance and one or more expert scientists who could give technical and scientific advice. The role of the executive government would be to stand by the decision taken and to defend it at all levels, including in Parliament. Unless there is proven misconduct, with the proof being of the highest order, government should not hesitate in approving the weapon acquisition concerned. That is how a government must behave. Provided that the process of acquisition is according to set procedures, rules, principles of prudence and is transparent one need not be afraid of any ex post facto criticism.

There are many areas in which the executive government is subjected to directions by the courts on how an executive decision should be taken or how and in what areas legislation must be enacted. One such area is police reforms. It is legitimate for the Supreme Court to direct that the police, which is the investigating arm of government in the matter of criminal law, should be insulated from every kind of pressure or influence when investigating a case so that the cause of justice is furthered by impartial investigation. For this purpose certainly the Supreme Court can direct government to take necessary executive measures or to provide legal safeguards whereby the police performs its functions without fear or favour. What the Supreme Court cannot direct is that the law governing the police must be worded in a particular way, the police organisation should be of a particular kind and that the personnel policy relating to the police must be as suggested by the Supreme Court. How to insulate the police from undue pressure, what personnel policy to follow to protect individual policemen who do their duty, without reducing the superintendence, direction and control role of the executive government are all issues on which it is the executive which will take its own decision and prepare the draft legislation for the consideration of the Legislature. It is the Legislature which will decide how the Bill in its final form as approved by the Legislature is enacted into law. In other words, micromanagement of the police is beyond the jurisdiction of a court and fully within the domain of the executive. This does not mean that one wants a police force which is servile but one does want government to retain the authority to restrain the police if it exceeds its legal brief or begins to operate in a manner which is not in the public interest. The executive decision in this behalf and the draft of the legislation to be placed before the Legislature fall within the executive domain.

One very sensitive area is corruption. Can the executive, which itself is corrupt, be trusted to ensure a corruption free society? Here the campaign against corruption is to be divided into three parts. The first relates to legislation and it is the job of the executive to suggest what laws are needed and for the Legislature to enact laws which would facilitate the fight against corruption. The second part relates to the role of the executive, which has to implement anti-corruption laws. The executive must set up an efficient agency which investigates cases of corruption without fear or favour and then takes suitable steps to prosecute offenders. Like the police this agency must be insulated from pressure, partly through legislative cover and partly through executive decisions to give autonomy to the agency. This is a very important executive function. The third part would be prosecution and trial in which the Judiciary will

have to pronounce on guilt or innocence and to determine the quantum of punishment in cases where conviction takes place. It is for the executive to facilitate the Judiciary in arriving at just and fair decisions, which also means that the executive must not come in the way of trials, either by refusing or delaying sanction of prosecution or by asking the investigating agency to go slow in the presentation of its case before a court. However, there is a further role for the executive in curbing corruption, which is a review of all rules, regulations and procedures which bring about a citizen-government interface, with a view to reduce this interface to a minimum, simplifying procedures and drastically reducing or eliminating delays in decision making. This has to be linked with a firm decision to bring about one administrative reform. There should be clear-cut assignment of functions and duties to government officials at all levels, with interlocking accountability whereby the superior of the government official concerned is held fully accountable for the action or inaction of his subordinate. This would dramatically improve supervision of subordinates because the superior knows that a default of the subordinate will be visited on him also. Simplification of rules and procedures, avoidance of delay and inter-locking accountability would bring about a major improvement in the functioning of government and make the executive government function more efficiently.

At the highest level of the Prime Minister or a Chief Minister the executive government has to make its policy on any issue completely clear, specific and unambiguous. If it is a policy relating to land allotment, let it be made public. If it is a policy relating to purchases, let the policy be made public. If it is a policy relating to government's approach to specific problems let the policy be made public. However, once a decision is taken the executive government must stand by it and not get swayed or deviated because someone does not like the policy or has complaints against its implementation.

The present position is that the executive government has abdicated its functions through sheer indecision. Thus if a person raises a claim against government the officer empowered to take a decision just pushes the file back and forth, forcing the claimant into expensive and long drawn out litigation. This does not necessarily stop corruption, but it does provide a shield to an officer because in our system indecision is not penalised. At the level of policy government avoids all hard decisions under the excuse of the compulsions of coalition. In areas of national security, economic development, education policy, even fighting corruption, if there is no consensus there is no decision, but only a dangerous drift. This is a negation of government. Into this vacuum other players step in -- Naxalites, terrorists, agitators to name just a few. Or the judiciary takes on an executive role. This is why through public interest litigation our High Courts and Supreme Court increasingly venture into areas where no court in other democracies would dare to tread. Or else the Legislature refuses to allow even such vital Bills as 13 Bills of the Human Resources Development Ministry to be introduced, much less enacted. Such a grid lock can only be broken by an assertive executive that functions as an executive should, firmly, decisively and with confidence. India needs such an executive – fast.
