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Abuse of Quasi-legislative Power by the Executive in India

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ABSTRACT

In India, Indian Constitution provides for Separation of Powers with checks and balance to prevent concentration and abuse of Powers. Powers are separated between three pillars legislature, executive and judiciary. Legislature enacts law at Central and State level. Executive enforce and administer the law enacted by legislature. Judiciary interpret the law and acts as protector of people's right by Judicial Activism. In the welfare state, Legislature could not concentrate on all the details and to satisfy people's need. Hence legislature started to delegate legislative powers through Parent Act to the executive. It made the skeleton and let the legislative fill the gaps through rules, regulations, bye laws etc. according to people's need and changing circumstances. Legislative functions are divided under two heads. They are essential functions and incidental functions. Essential functions are making policy of the legislature and guiding principles to implement the legislation. Functions which are not essential are called as incidental functions. Legislature cannot delegate essential functions to the executive only incidental functions are delegated. Executive has to be checked to prevent abuse of power. Legislature has two kinds of control to prevent abuse of power.

In this paper we will see whether the executive abuses its quasi legislative power and if so what are the abuses done by executive.

Keywords: *Separation of Powers, Delegation, Essential Functions, Incidental functions, Control Mechanisms and Abuse of power.*

I. INTRODUCTION

Delegated Legislation = Delegated + Legislation. The word "delegate" is derived from the Latin word "*delegare*" which means "to send as a representative".³ That is a person acting on behalf of another person. "Legislation" means the law made by the competent legislature. It can be said as "law making power has been given to the authority who has no power to make it".

Generally, "*Qui facit per alium facit per se*" means one who acts through another is considered

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³ delegate(n.), ONLINE ETYMOLOGY DICTIONARY (Nov 18, 2018), <https://www.etymonline.com/word/delegate>

to act in person". Legislature has delegated the law making power to executive to act on behalf of it. Because of the lot of reasons law making power is delegated to the executive. There are two types of legislative functions. They are essential functions and incidental functions. Essential functions are making policy of a legislation and guiding principles to implement that legislation. Incidental functions are functions which are not essential that is making rules, regulations, orders, bye laws etc. Incidental functions are simply said as functions which are necessary to implement the essential functions. Only the incidental functions of the legislature can be delegated to the executive.

(A) Control of Quasi legislative functions:

Quasi legislative functions delegated to the executive cannot be left unchecked⁴, it has to be controlled by the legislature to prevent abuse of power and excessive use of power.

Quasi legislative power of the executive is controlled through two ways. They are

- Laying on the table
- Committee on Subordinate Legislation

Quasi legislation is also called as Subordinate legislation.

(B) Laying on the Table:

Subordinate Legislation made by the executive has to be presented before the legislature for its approval which is called as laying on the table⁵. There are various kinds of laying procedure is in existence but they are followed in England. In India, we follow only one type of laying procedure. Delegated legislation has to be laid before legislature for 30 days. Any Modification required or annulment shall be agreed by both the houses within that 30 days to bring such modification or annulment into effect in that subordinate legislation. Else after the expiry of 30 days, that subordinate legislation automatically comes into effect. This kind of laying is given in the various Acts of India. It can be said as legislative control is not strict enough to control executive law making power which may pave way for abuse such power of the executive.

(C) Committee on Subordinate legislation:

Committee on Subordinate legislation is a Parliamentary Committee called as Parliamentary Committee on subordinate legislation. It has made various recommendations to control the

⁴ Volume I, M.P. Jain and S.N. Jain, Principles of Administrative Law, 8th Edition (2017)

⁵ Parliamentary Control of Administrative Rule making, LawTeacher.net (August 8, 2019) <https://www.lawteacher.net/free-law-essays/constitutional-law/parliamentary-control-of-administrative-rule-making-constitutional-law-essay.php>

quasi legislative power of executive.

(D) Abuse of Power by Executive:

a. Enacting Subordinate Legislation:

According to the committee on subordinate legislation, subordinate legislation has to be made within 6 months from the date of passing of the act. But many rules were not made within Six Months from the date of Passing of the Act as recommended by Committee on Subordinate legislation.

First Regulation under AIIMS Act, 1956 was made after 43 years gap in 1999⁶. Citizenship Amendment Act, 2019 was passed on December 11, 2019. Citizenship Amendment Rules has not been passed yet. Eighth time extension has been given by Committee on Subordinate legislation for framing rules⁷.

b. Laying on the table:

The Insurance ombudsman Rules, 2017 were notified on 27.04.2017 but were laid in Parliament only on 29 December, 2018 after a gap of more than one and a half years and Reason given was amendment proposed in the Rules was clubbed with the proposed notification of amendment to Insurance Ombudsman Rules, 2017 and the Insurance Ombudsman (Amendment) Rules, 2018⁸.

The Bureau of Energy efficiency (Particular and Manner of their display on Labels of Room Air Conditioners) Regulation, 2017 and The Bureau of Energy efficiency (Particular and Manner of their display on Labels of Self-ballasted LED Lamps) Regulation, 2017 were laid after 8 months but no explanation was given for delay.⁹

AIIMS Regulation, 1999 was passed under AIIMS Act, 1956 after 43 years. Amendments were made to the Regulation in 2003, 2009, 2011 & 2012. But the regulation and Amendment Regulations were not laid before Parliament.¹⁰

The Protection of Plant Varieties and Farmers' Rights (Second Amendment) Rules, 2009 are laid after delay of more than one year with no explanation for delay.¹¹

Between June 2009 and September 2012, 4731 subordinate legislations have been laid on the

⁶ Sixteenth Lok Sabha, 26th Report of Committee on Subordinate legislation

⁷ Vijaita Singh, Home Ministry seeks extension to frame CAA rules, *The Hindu* (Aug 8, 2023, 8:02 am) <https://www.google.com/amp/s/www.thehindu.com/news/national/home-ministry-seeks-eighth-extension-to-frame-caa-rules/article67169456.ece/amp/>

⁸ Seventeenth Lok Sabha- Fourth Report of the Committee on Subordinate legislation

⁹ Seventeenth Lok Sabha(2020-21) - Tenth Report of the Committee on Subordinate legislation

¹⁰ Sixteenth Lok Sabha - 26th Report of the Committee on Subordinate legislation

¹¹ Sixteenth Lok Sabha - Second Report of Committee on Subordinate legislation

table, of which 552 were laid on delay.¹²

c. **Motion:**

While an MP or MPs give notice to move motion to annul or modify the delegated legislation, Chairman of Rajya Sabha or the Speaker of Lok Sabha has to fix time for debate, as the case may be.¹³

A Rajya Sabha MP Hussain Dalwai had introduced a motion to annul Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 but time has not been allotted to the motion, the motion lapsed and rule came into force.^{14,15}

d. **Retrospective Effect:**

As per the recommendation of the Committee on Subordinate legislation, Subordinate legislation has to be given retrospective effect with explanatory note or footnote assuring that no one will be affected by giving retrospective effect to that subordinate legislation.

According to the recommendation of the Committee on Subordinate legislation, rules have to be given retrospective effect only on unavoidable circumstances.¹⁶

The Insurance Regulatory and Development Authority of India (Assets, Liabilities, and Solvency Margin of Life Insurance Business) Regulations, 2016 were published on May 9, 2016 on Gazette was given retrospective effect from 1st April 2016 with no explanation for retrospective effect.¹⁷

The Railway Services (Revised Pay) Rules, 2008 published on 4.9.2008 were given retrospective effect from 1.1.2006 without explanatory note or footnote for no one was affected by it.¹⁸

The Law Officers (Conditions of Service) Amendment Rules, 2008 published on 1.8.2008 were given retrospective effect from 1.5.2008 without explanatory note or footnote for no one was

¹² Parliamentary Scrutiny of Executive Rule making, PRS Legislative Research. https://prsindia.org/files/parliament/discussion_papers/1370586704_Parliamentary%20Scrutiny%20of%20Executive%20Rule%20Making.pdf

¹³ Jaivir Singh and Raghab P. Dash, Parliamentary Control of delegated legislation: the hazards of erroneous delegation, https://books.google.co.in/books?id=Vt5CDwAAQBAJ&pg=PT264&dq=Parliamentary+Control+of+delegated+legislation:+the+hazards+of+erroneous+delegation&hl=en&sa=X&ved=0ahUKEwi0wrW1_pLiAhVUXnwKHYZGBp8Q6AEIKjAA#v=onepage&q=Parliamentary%20Control%20of%20delegated%20legislation%3A%20the%20hazards%20of%20erroneous%20delegation&f=false

¹⁴ sflc.in (Sep 8, 2018) https://sflc.in/parliament-s-last-opportunity-modifyannul-telecom-suspension-rules-2017#footnote2_r8ir4ft

¹⁵ Arvind Kurian Abraham, Delegated Legislation: The Blindspot of the Parliament, The Wire (May 16, 2019) <https://www.google.com/amp/s/m.thewire.in/article/government/delegated-legislation-parliament-executive/amp>

¹⁶ Fifteenth Lok Sabha, Seventeenth Report of the Committee on Subordinate legislation

¹⁷ Seventeenth Lok Sabha, Second Report of the Committee on Subordinate legislation

¹⁸ Fifteenth Lok Sabha, Seventeenth Report of the Committee on Subordinate legislation

affected by retrospective effect of amendment rules.¹⁹

e. **Publication:**

Executive is negligent in publishing the delegated legislation in Official Gazette. According to Committee on Subordinate legislation, delegated legislation has to be published without unreasonable delay. In some delegated legislations, year on the Short title is different from year of publication. Reasons given by the concerned ministry is also frivolous.

Extraordinary Gazette is used for publication of urgent material in which the publication has to be made on the day itself which the Subordinate legislation is send for publication.²⁰

The Ministry of Drinking Water & Sanitation, Multi Tasking Staff, Recruitment Rules, 2012 were published after 1 year and 4 months delay in 2014 in the official gazette. Reason given by the concerned ministry is that ministry did not track the publication by the Press.²¹

The Insurance Regulatory and Development Authority of India (Assets, Liabilities, and Solvency Margin of Life Insurance Business) Regulations, 2016 were published after more than 20 days gap in the extraordinary gazette. Reason given by the concerned ministry is that Insurance Regulatory and Development Authority (IRDAI) was not aware of the revised rates by the Department of Publication. Only after Payment of the increased rate, it was published in the gazette.²²

The Law Officers (Conditions of Service) Amendment Rules, 2008 were published in the extraordinary gazette after delay of 13 days. Reason given by the concerned ministry is that Rules were dispatched after delay of 7 days and delay of remaining days is made by the Press.²³

f. **Formulating Legislative Policy:**

Some delegated legislations contains legislative policy also. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 made under Securities and Exchange Board of India Act, 1992 speaks about related party transaction and the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 made under the Foreign Exchange Management Act, 1999 speaks about Foreign direct investment which are all legislative policy.²⁴ Formulating legislating policy is the essential function of the legislature. This is how legislature steps into

¹⁹ Fifteenth Lok Sabha, Fourth Report of the Committee on Subordinate legislation

²⁰ Recommendation of the Committee on Subordinate legislation (Fifteenth Lok Sabha, Fourth Report)

²¹ Sixteenth Lok Sabha, Tenth Report of the Committee on Subordinate legislation

²² Seventeenth Lok Sabha, Second Report of the Committee on Subordinate legislation

²³ Fifteenth Lok Sabha, Fourth Report of the Committee on Subordinate legislation

²⁴ Bharat Vasani & Varun Kannan, The Rise & Rise of Delegated Legislation- Do we need more safeguards, Cyril amarchand mangaldas(January 6, 2022), https://corporate.cyrilamarchandblogs.com/2022/01/the-rise-rise-of-delegated-legislation-do-we-need-more-safeguards/#_ftn3

the shoes of legislature.

g. **Beyond the Scope of the Parent Act:**

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 were made under Information Technology Act, 2000. Part III of the rules provides grievance redressal mechanism to regulate Over-the Top (OTT) Platform or digital news media platform which is not the object of the Act²⁵.

Objective of the Information Technology Act, 2000 is to give legal recognition to e-commerce and regulates e filing of documents.

Rule 4(2) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 imposes duty on the Significant Social media intermediary to enable identifying first originator of Information if required by court. But the Parent Act does not say anything and not even define the term "first originator".²⁶

These things are beyond the scope of the Parent Act i.e., Information Technology Act, 2000.²⁷

Section 12A of the Insolvency and Bankruptcy Code, 2016 necessitates the approval of Committee of Creditors for withdrawal of application under sections 7, 9 or 10 of that Act. Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 made under Insolvency and Bankruptcy Code, 2016 provides for withdrawal of the said application both before constitution of Committee of Creditors and after Constitution of Committee of Creditors.

In *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17, Court held that before constitution of Committee of Creditors, a party can directly approach National Company Law Tribunal. Hence, Regulation 30A is beyond the scope of Section 12A of the Insolvency and Bankruptcy Code, 2016 i.e., Parent Act.²⁸

A Delegated Legislation cannot go beyond the scope of the Parent Act.

II. SUGGESTIONS

Legislature must be strict enough to control the quasi-legislative power of executive in substantive aspect and procedure aspect to prevent executive go beyond the hands of legislature.

²⁵ Sourav Paul, Excessive Delegation and India's New IT Rules 2021, Constitutional Law Society, https://clsnuo.com/2021/03/26/excessive-delegation-and-indias-new-it-rules-2021/#_edn21

²⁶ Ibid

²⁷ Ibid

²⁸ Anuj Tiwari, IBBI Regulations: Beyond the scope of Delegated Legislation, Bar and Bench (28th March 2020, 4:30 pm) <https://www.google.com/amp/s/www.barandbench.com/amp/story/columns/policy-columns/ibbi-regulations-beyond-the-scope-of-delegated-legislation>

Substantive violations like subordinate legislation beyond the scope of the Parent act, formulating legislative policy and in the case of any other substantive violations, substantive legislation can be made void-ab initio. Procedural violations can be divided into essential procedural violation and which is not essential. Essential procedural violations such as delay in laying on the table, enacting subordinate legislation beyond reasonable period, retrospective effect without proper reason can be made void by Legislature by resolution. Other procedure violations which is not essential like publication on the official gazette can be made voidable which is voidable at the option of legislature by resolution or by the aggrieved person or group of persons by challenging it before the competent court. "A Powerful executive may unduly overstep the limits of delegation"²⁹ . So, it need to be controlled properly. Else it will violate Separation of Powers which is the basic structure of the Indian Constitution.³⁰

III. CONCLUSION

Even though legislature and judiciary control the executive through its control mechanisms, they are not strict enough to control the abuse of power by executive. As seen above, executive is overstepping its limit while exercising legislative power delegated to it. Separation of Powers with Checks and balances were adopted in India to prevent single organ of the government become more powerful. But when the less controlled executive becomes more powerful, the intention behind adopting checks and balances vanishes.

29 *Devi Das Gopal Krishnan vs The State of Punjab* [1967] AIR 1895

30 *Keshavananda Bharati v State of Kerala* [1973] 4 SCC 225

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