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Judicial, Legislative and Other Controls over Delegated Legislation in India

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ABSTRACT

The Parliament of India was established by the Constitution of India to act as the supreme legislature of the country so that national laws could be made and Union government could be held accountable for its policies; the most important function of the parliament being legislation or enactment of laws. The legislature is responsible for making laws in the form of primary legislation. Any other legislation which is subordinate or auxiliary to primary legislation is known as delegated or ancillary legislation, which is the exercise of legislative power by an agency subordinate to the legislature. This subordinate body, which may be the executive, cabinet, council of ministers or a specific administrative agency, acquires such a power from an act of parliament itself. Delegated legislation because of its increasing growth, complexity and the dangers it poses to individual liberty and freedom, has occupied a significant place in the administrative law.

The main question, in today's scenario, is not whether delegated legislation is desirable or not, but what controls and safeguards can be introduced so that the conferment of legislative power on the Administration by the Legislature is not abused or misapplied. Therefore, the paper, firstly, seeks to evaluate the various controls that are laid down over delegated legislation in India. Since, it is the Legislature which delegated legislative power to the Administration, the paper, secondly, explores how it is the legislature's primary responsibility to supervise and control the actual exercise of this power, ensuring it is not used objectionably by the Administration. Thirdly, the paper highlights the validity of delegated legislation with respect to Judicial Control or Judicial Review and how the courts have to see whether the power delegated is within the ambit of the constitution. Lastly, the paper puts into perspective the various issues with regard to Delegated Legislation and recommends solutions for the same.

Keywords: *Delegated Legislation, Legislature, Judicial Review, Parliament.*

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I. INTRODUCTION

Thomas Cooley, expressing a very strong critical opinion about the power to delegate has said, “One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body of authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed².” Delegated Legislation, although a very prevalent practice in modern times, has been one of the most disputed issues in the legal domain because of all that it entails. Academicians and scholars have invariably presented contradictory views about delegation of legislating power, taking differing stances on the issue. There have been arguments about how no legislative body should delegate the power to enact laws to another department of the government because such a high prerogative has been entrusted to the legislature because of its own “wisdom, judgement, and patriotism, and not to those of other persons, and it will act ultra vires if it undertakes to delegate the trust, instead of executing it³.” Hence, several questions do arise with respect to the rectitude and ethicality of delegating the power to legislate by the Legislature to a subordinate body, the truth is, it is a general practice today in all the modern democratic countries. Hence, we must understand what is delegated legislation before diving into its various facets and how and why there is a need for safeguards and restraints on delegation of legislative power and the various controls over delegated legislation in India.

(A) STATEMENT OF PROBLEM/ ISSUES RAISED

1. The paper holistically raises the basic issue of how well can delegated legislation work in India and how far can it go and also attempts to give an answer to the same.
2. The paper also, by introducing legislative, judicial and other checks and controls over delegated legislation in India, raises the issue of their effectiveness while recommending solutions to resolve at the same time.

(B) OBJECTIVE OF THE PAPER

- The objective of the paper is to briefly explain the concept, the importance and the need for delegated legislation in our country.
- The paper will point out the need for safeguards over delegated legislation while evaluating and helping the readers, at the same time, grasp a deep understanding as to

² Thomas McIntyre Cooley, “*A Treatise on the Constitutional Limitations*”, 1868, Volume I

³ Thomas McIntyre Cooley, “*The General Principles of Constitutional Law in the United States of America*”, 1891

the functioning of the Judicial, Legislative and other controls over delegated legislation in India.

(C) METHODOLOGY

The method that the researcher will adopt for this research paper will be Doctrinal Research Method, covering references from reliable text books and journals and pronouncements of renowned legal scholars.

(D) LITERATURE REVIEW

1. M P Jain and S N Jain, PRINCIPLES OF ADMINISTRATIVE LAW, Seventh Edition, Amita Dhanda, Lexis Nexis

The authors in the book have, comprehensively, with the provision of separate bifurcations over every topic, explained the concept of delegated legislation and how several checks such as that of legislative and judiciary work over the same in India. Every point has been substantiated with case laws, detailing it with explanations and arguments. There is a clear-cut representation of various headings that fall beneath every major topic that needs understanding pertaining to the broader concept that Delegated Legislation is.

2. Dr. Mukund Sarada, Principle and Dean, Faculty of Law, New Law College, Bahraji VidyaPeeth University, JUDICIAL CONTROL OVER DELEGATED LEGISLATION

The author in her paper has, through citing leading legal scholars and academicians, very sophisticatedly traced, at first, the concept of delegated legislation, comparing it with how the same is perpetuated in other governmental structures. Furthermore, the author has detailed the checks and balances issued by the Indian Judiciary over the prevalent delegated legislation in India.

II. WHAT IS DELEGATED LEGISLATION?

Delegated Legislation, also called secondary legislation or subordinate legislation or subsidiary legislation is the process of making laws by an executive authority because of powers entrusted to them by primary legislation in order that the requirements of the same can be met. The legislature grants the authority to a person or a body of persons to make such a law. The process entails, a legislature passing a statute that prescribe various principles and set out broad outlines, delegating authority to an official from the executive or the administrative branch so that they may provide procedures that help in implementing the

substantive provisions of the statute. This statute or the Act which is passed by the Parliament is called the primary legislation and creates the framework and highlights the purpose of a particular law that needs to be further created by the body subordinate to the Parliament. The subordinate draws on from the given outlines and gives the new legislation, the subordinate legislation a more detailed structure⁴. The legislation that's created in the wake of primary legislation is to be made in synchronization with the purposes highlighted in the Act of the Parliament⁵. A delegated legislation has a similar legal standing as that of an Act of Parliament from which it was engendered.

III. IMPORTANCE OF DELEGATED LEGISLATION

There are a number of factors that have caused the growth of delegated legislation in modern Democratic states. A State is no longer confined to preservation of public peace, the execution of laws and defending the geographical boundaries⁶. The Union and the State Legislatures are bereft of the time and the skillset it requires to tackle technical and circumstantial intricacies that invariably are complicit with the modern-day complex life. In such a situation, delegated legislation helps anticipate and caters to unpredictable and unknown situations. This is exactly what makes delegated legislation and modern administration⁷, inevitable and indispensable⁸. The State's function extends to securing for its citizens the objectives outlined in Part III and Part IV of the Indian Constitution. This has led to an increased amount of legislative activity.⁹

The functioning of a modern day State takes place on such a wide front, managing the everyday lives of the people, supervising the socio-economic development of the country, with the Central Government, striving since independence of the country to develop a democratically socialistic pattern, with massive organization and administration of various ventures, especially private trade and commerce; such circumstances only create gaps that can only be filled with ever-increasing legislations. This demand for law generates a tremendous pressure on the Legislature's work which apart from legislating, also supervises the Government, holds discourses with it, thereby, influencing its policies, gives exposure to public grievances, etc.¹⁰ Therefore, delegated legislation helps the legislature economise the legislative time. The legislature restricts itself to laying down essential principles and policies

⁴Dr. Ketan Govekar, "Delegated Legislation in India"

⁵ Supra

⁶ M P Jain & S N Jain, "Principles of Administrative Law"

⁷ The Report of the Committee on Ministers' Powers, 1932

⁸ Registrar, *Co-operative Societies v. Kunjabmu*, AIR 1980 SC 350 : (1980) 1 SCC 340

⁹ Supra

¹⁰ Jain, "Indian Constitutional Law" (7th Edition)

in the legislation it enacts, leaving the task of structuring and expanding the details to the concerned administrative agency.

The system of delegated legislation continues to gather popularity because it has the advantages of flexibility, elasticity, expedition and opportunity for experimentation. We already know how numerous socio-economic schemes today are only experimental in nature and one can't predict the possible problems that would arise while they are being worked out in practice. The process of delegated legislation allows consistent adaptation and adjustment to strange future conditions and experience of experimentation in place of the legislature amending the legislations time and again. Wade and Phillips opine that delegated legislation fulfils the needs of the complex modern time, stating, " that something less cumbersome and more expeditious than an Act of Parliament shall be available to amplify the main provisions, to meet unforeseen contingencies and to facilitate adjustments that may be called for after the scheme has been put into operation¹¹." The Defence of India Act, 1971 and the Enemy Property (Amendment and Validation) Act 2017 are instances of situations that were met pertinently because the Government was pre-armed and the executive had the requisite standby powers.

In the case of *Agricultural Marketing Committee v. Shalimar Chemical Works Ltd.*¹², the Supreme Court mentioned the following as the dominant reasons for delegating the power of legislation to the Government:

- The area for which the powers are given to make delegated legislation may be technically complex, so much so, that it may not be possible and may even be difficult to set out all the permutations in the statute.
- The Executive may require to experiment and to find out how the original legislation was operating and therefore to fill up all other details.
- It gives an advantage to the Executive, in the sense that a Government with an onerous Legislative time schedule may feel tempted, to pass skeleton legislation with the details being provided by the making of rules and regulations¹³.

IV. NEED FOR SAFEGUARDS

Many a time, the Act passed by the Legislature is only skeleton in form, consisting of only barest of general principles. This leaves the Executive with the task of not only giving it a

¹¹ Wade and Philips, "Constitutional Law" (1965)

¹² AIR 1997 SC 2502, at 2507; (1997) 5 SCC 516

¹³ *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77: AIR 2005 SC 3401

detailed structure but also formulating policies and determining principles with respect to the crux of the legislation. This renders the Executive all-powerful because of which it has the potential to affect the life, liberty and property of individuals, bereft of democratic restraints and controls put by a Legislative debate that usually takes place when a Statute is enacted by the Legislature¹⁴. When a Bill is passed in the Legislature, it usually garners publicity because of the extensive discussion that takes place both within and outside the legislative chamber. The same allows for gauging of the public perspective and stance on the same. This allows for any legislation to not be discordant with the public sentiment and mood. However, this essential democratic safeguard is lacking in the case of delegated legislation¹⁵, drafted in Government chambers and more often than not, promulgated all of a sudden without much publicity. In this way there's an apprehension that the Government may become undemocratic for the misuse of the available powers. Both civil and personal liberties too may be endangered by an unshackled use of delegated legislation by the Administration. It is therefore, becomes primary in importance, that adequate safeguards and controls be devised so that only the advantages of delegated legislation may be benefitted from while the risk of abuse that's inherent therein is mitigated.

The controls over delegated legislation operate at two stages:

a) At the level of delegation of power by the Legislature

This stage is called the pre-natal control which involves a determination of the extent of power that the Legislature must be permitted to delegate to the Executive.

b) At the level of exercise of delegated power by the Administration

This stage is called post-natal control which involves determination of the restraints and the safeguards that must be put on the delegate while its exercising the delegated legislative powers.

It is essential to understand that both levels of control supplement each other. How efficiently, the control at the second stage works is largely dependent upon the first. If the Legislature at the very first instance confers powers in a very broad manner, the exercise of the same by the delegate cannot be effectively put to restraint later. However, if the Legislature confers power conditioning it with respect to certain norms and standards then the exercise of the same can be checked in the light of those norms and standards. Also, if the delegate makes an attempt to flout those norms then the same can be curtailed by invalidating

¹⁴ M P Jain & S N Jain, "Principles of Administrative Law"

¹⁵ Supra

the delegated legislation produced by the delegate by applying the Doctrine of Ultra Vires¹⁶.

V. RESTRAINTS ON DELEGATION OF LEGISLATIVE POWER

The Indian Parliament, being a product of the Constitution, has its powers and privileges specified and put to limitation by the Constitution¹⁷. Therefore, the permissible limits that could be put over delegation of legislative power has been a question of importance since the independent India. In the case of *Jatindra Nath Gupta v. Province of Bihar*¹⁸, Federal Court, on the eve of independence held that there could be no delegation of legislative power in India beyond “conditional legislation” which is an extremely restrictive form of delegation. If we were to look at the Constitution, it, too, is silent and neutral on the matter of delegated legislation as there is nothing in the Indian Constitution that expressly prohibits or permits, for that matter, the Legislature to delegate its legislative power to the Administration. Therefore, the courts were required to find restrictions on the basis of some general theories and principles of constitutional law and not by placing reliance over some specific provision of the Constitution. The famous case of *re Delhi Laws Act*¹⁹ gains supremacy as the Supreme Court was faced with questions with respect to delegated legislation.

In the aforementioned case, there were a few Part C States under the direct administration of the Central Government, without having a Legislature of their own; Delhi being one of them. Because it was very difficult for Parliament to find the necessary time to legislate for these States, it passed a law, the Part C States (Laws) Act, 1950. This Act authorised the Central Government to extend any enactment, in force in Part A State, to any Part C State with necessary restrictions and modifications. The Government could also repeal or amend any corresponding law, apart from a Central Law, which might be in force at the time in the concerned Part C State. The Supreme Court adjudging the validity of the above-mentioned provision, laid down that the Legislature should not delegate its essential legislative functions which consists of formulation of policy and enacting it into a binding rule of conduct²⁰. The Legislature itself must lay down standards or policies in the delegating Act, leaving the delegate with the privilege to make rules, executing the policy laid down by the Legislature²¹.

In the *re Delhi Laws Act* case, the specific provision, which was under scrutiny, was held valid but the part of it which authorised the Government to repeal a law already in force in

¹⁶ M P Jain & S N Jain, “Principles of Administrative Law”

¹⁷ *Rajaram Patel v. Hon’ble Speaker Lok Sabha*, (2007) 3 SCC 184; (2007) 2 JT 1.

¹⁸ AIR 1949 FC 175

¹⁹ AIR 1951 SC 332

²⁰ *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77 : AIR 2005 SC 3401

²¹ *Krishna Prakash Sharma v. Union of India*, (2001) 5 SCC 212 : AIR 2001 SC 1493

Part C State was held to be bad. The case also legitimized delegation of legislative power by the Legislature to administrative organs and also an outer limit was placed on the same such that unlimited legislative power could not be delegated to the Administration. Delegation of essential legislative function was held impermissible. Hence the Legislature delegate its own power to repeal the law or modify its essential features²².

VI. LEGISLATIVE CONTROL OVER DELEGATED LEGISLATION

A whole system of legislative supervision over delegated legislation has come into being in India²³ only because it is the Legislature which delegates legislative power to the Administration and hence it is its primary purpose to supervise the functioning of the same.

(A) MEMORANDUM ON DELEGATION

The first step in the process of Parliamentary control of delegated legislation is taken at the stage of delegation itself. A rule of procedure of each House of a Parliament requires that a bill involving proposal for delegation of legislative power shall be “accompanied by a memorandum explaining such proposals and drawing attention to their scope, and stating also whether they are of exceptional or normal character²⁴.” The rule, which is of an informal nature, has been characterised by the Lok Sabha Committee on Subordinate Legislation as mandatory. It has also been emphasized that the memorandum attached to a bill should give full meaning and effect of the delegation of power to subordinate authorities, the points which may be covered in the rules, the particulars of subordinate authorities who are to exercise the delegated power and the manner in which such power is exercised. The purpose of the memorandum is to focus the attention of the members of Parliament to the provisions of the bill involving delegation of legislative power²⁵. The Speaker may also refer bills containing provisions for delegation of legislative powers to the Committee so that the extent of the powers that are to be delegated may be examined²⁶.

(B) LAYING PROCEDURE

Once the rules are made, the second link in the chain of legislative control comes into play which is the “laying procedure”. In the case of *Atlas Cycle Industries Ltd. v. State of Haryana*²⁷, the Apex Court noticed that there are three different laying clauses which assume different forms depending on the degree of control which the Legislature may like to exercise

²² Vasu Dev Singh v. Union of India (2006) 12 SCC 753, 796

²³ M.P Jain, “Parliamentary Control of Delegated Legislation in India”, PUBLIC LAW

²⁴ Lok Sabha Rule 70, Rajya Sabha Rule 65

²⁵ Lok Sabha (First Report) (1954); Lok Sabha (Second Report) (1964)

²⁶ Direction 103 A of the Speaker; *Directions by The Speaker Lok Sabha*66 (3rd Edition, 1980)

²⁷ (1979) 2 SCC 196: AIR 1979 SC 1149

namely,

- i. Laying without further procedures*
- ii. Laying subject to affirmative resolution*
- iii. Laying subject to negative resolution*

A technique to invoke legislative supervision of delegated legislation requires laying Rules before the Legislature which act as a check on excessive delegation²⁸. The several variants of laying procedure are:

- The simplest laying formula which requires rules to be laid down before the Legislature serves an only informative purpose. This formula informs the Houses of the content of the delegated legislation made under various statutes.
- The procedure of laying rules before the Legislature with an affirmative resolution requires the assent of the House. For instance, Article 352 of the Constitution envisages that a proclamation of emergency shall be laid down before each House of the Parliament and “shall cease to operate at the expiration of one month” unless it is approved by both the Houses of Parliament. Similarly, Article 356 of the Constitution lays down that a proclamation issued by the Central Government, taking over a State’s governance, has to be presented before both the Houses of Parliament which will also cease to operate after the expiry of two months unless approved by both the Houses. However, in some cases, the delegating statute may mandate that the rules be laid down before the Houses before their enforcement. In such cases, the rules are laid only in the draft form and become effective after the stipulated period expires or once the Houses pass resolution affirming these rules. This procedure of laying with affirmation is not used as frequently in India. The terms of the delegating Act in question dictate whether it is to be used or not²⁹. The affirmative procedure is followed in two statutes, namely, Salaries and Allowances of Ministers Act, 1952; and Essential Services Maintenance Act, 1968. The Rajya Sabha Committee on Subordinate Legislation is of the opinion that the affirmative procedure would make Parliamentary control more effective and meaningful.
- The third type of laying procedure is laying with a negative resolution which involves annulment of the draft rules laid before the legislature. In the present day scenario, the

²⁸ DCM v. Union of India, (1983) 4 SCC 166: AIR 1983 SC 937

²⁹ Krishna Kumar Singh and Ors. v. State of Bihar and Ors. (2017) 3 SCC 1 : 2017 (2) SCJ 136 : (2017) MLJ 698

laying formula occurs more frequently in the Central statutes and a standard formula has been evolved for this purpose. There is no time-frame within which the rules are to be laid before the House after their promulgation. The rules come into force as soon as they are made while the laying procedure takes thereafter³⁰. As per an agreement between both the Houses, they can either modify the rules or even annul them. The modification or annulment is effective upon the rules and they operate under modified terms or cease to be of no effect at all, whatever is the case. This laying formula is directory in nature and not mandatory³¹. Pearce says that the Parliamentary review of delegated legislation is an essential part of the law-making process and in order that the Parliament be able to do so, laying procedure must be regarded as mandatory³².

(C) LAYING PROCEDURE AND JUDICIAL REVIEW

Laying procedure does not exclude judicial review of delegated legislation. Laying of rules does not make them valid if they are ultra vires the statute under which they are made. The courts can still scrutinize them vis-à-vis the relevant statute. It has been held in several cases^{33,34} that just because a notification is to be laid down before the Parliament does not mean, that the jurisdiction of the court to pronounce on its validity is ousted. The Supreme Court too has accepted the proposition in a number of cases³⁵, observing,

“The fact that the regulations...when made have to be laid down before the Legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well defined canal with stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the Courts are bound to ignore them when the question of their enforcement arises.³⁶”

(D) PARLIAMENTARY COMMITTEES

The Parliamentary control is further exercised through two Committees on subordinate legislation, one in each House³⁷. The Lok Sabha Committee on Subordinate Legislation is older than the Rajya Sabha Committee on Subordinate Legislation. The former was established in 1953 while the latter in 1964. The formation of these Committees has made

³⁰*Thanval v. Union of India*, AIR 1959 Raj 206

³¹*Prohibition & Excise SUPDT v. Toddy Toppers Co-op. Society*, (2003) 12 SCC 738: AIR 2004 SC 658

³²D.C Pearce, “*Delegated Legislation in Australia and New Zealand*” (1977)

³³*Dai-Ichi Karkaria Ltd. v. Union of India*, AIR 2000 SC 1741: (2000) 4 SCC 57

³⁴*J.K Industries Ltd. v. Union of India*, (2007) 13 SCC 673: (2007) 12 JT 529

³⁵*Indian Express v. Union of India*, AIR 1986 SC 515: (1985) 1 SCC 641

³⁶*Bharatidasan University v. All India Council for Technical Education*, AIR 2001 SC 2861: (2001) 8 SCC 676

³⁷Lok Sabha Rules 317- 322; Rajya Sabha Rule 204-212

delegated legislation in India more effective. The Committees help automatically scrutinise the rules that are laid down before the House in the process of laying. It is the Committee's function to analyse and report to the House whether the power to make rules, regulations, etc., delegated by the Parliament has been properly exercised within such delegation. The Committee is to check

- Whether the order laid down before the House is in accordance with the general object of the Constitution or the Act in the wake of which it is made;
- Whether the matter contained in it should have rather been dealt with in an Act of Parliament;
- Whether it contains an imposition of tax;
- Whether it bars jurisdiction of the Courts, directly or indirectly;
- Whether it involves expenditure from the Consolidated Fund of India or the public revenues.
- Whether it has made some strange or unforeseen use of the power conferred by the Constitution or the Act pursuant to which it is made;
- Whether its laying before the Parliament or publication was unjustifiably delayed;
- Whether it gives retrospective effect to any of the provisions with regard to which the Constitution or the Parent Act does not empower it; and
- Whether its form or structures requires further detailing for some apparent reason³⁸.

VII. CONSULTATION OF INTERESTS

“Consultation of Interests” is a modern democratic technique which is one of the **Procedural Controls** that controls the exercise of power of delegated legislation. The democratisation of the rule-making process is what is regarded as the most desirable safeguard and essentially involves public participation. In this way, it enables those whose interests are affected be known to the rule-making authorities. This is even done through “**Publication of Rules**”, another **Procedural Control** such as in the Official Gazette, which gives the “**Notice of the Rules**” to those whose interests will be affected by the same. Non-publication of the rules affects their legal validity. The Legislature through its primary function of legislating represents the various interests of the public. If the Legislature itself cannot scrutinise the rules made by the Administration, then that's where the opportunity must be given to the

³⁸ M P Jain & S N Jain, “*Principles of Administrative Law*”

public to voice their grievances to the rule-making authority. This process of “Consultation of Interests” is symbiotic in nature and benefits both as the rule-making authority too can gather necessary information about the prevalent issues and hence meet more suitable rules to resolve the same. The technique of consultation prohibits a possible crossing of the interests between the rule-making authority and the interests that are likely to be affected by these rules, facilitating a cooperative spirit between the two. This sense of participation in the administrative process dilutes the stigma that’s there against delegated legislation, branding it as bureaucratic and non-representative. However, the well-accepted proposition of law that legislative action is not subject to the rules of natural justice bars those adversely affected by delegated legislation from claiming a right to be consulted by the rule-maker³⁹. It has been held in the case of *Aruna Roy v. Union of India*⁴⁰ that consultation can be claimed if there’s a statutory provision that warrants the same. In the absence of a statutory provision, consultation cannot be claimed as a matter of right. For instance, it was held in the case of *Rajnarain v. Chairman, Patna Administration Committee*⁴¹, when the Act prescribes that before an administrative body levies a tax, the people will have a right to file objections against the tax levy and to be heard, the provision is mandatory. The Courts have invariably treated the democratic process of consultation as highly significant in the rule-making process as this technique helps attain a balance between the individual interests and the administrative urgencies.

VIII. JUDICIAL CONTROL OVER DELEGATED LEGISLATION

When the Legislature delegate its powers, it has to bear the responsibility of ensuring that the delegate doesn’t overstep or commits a violation by exceeding the powers that are delegated in the first place⁴². Delegated Legislation has to be controlled, otherwise, the executive may become a potential dictator or even a parallel Legislature⁴³. Legislative control over delegated legislation is not just a “living continuity”⁴⁴ but also a “constitutional necessity”⁴⁵. However, legislative controls have practically become ineffective in today’s time, so much so that, Mr. Llyod George has gone on to make a serious remark, stating, “legislatures have no control over the executive.” This is where the need for Judicial Control over delegated legislation arises. Had it not been for Judicial Control, an inevitable necessity today, the executives

³⁹*Indian Express Newspapers (Bombay) p. Ltd. v. Union of India*, AIR 1986 SC 515 : (1985) 1 SCC 641

⁴⁰ AIR 2002 SC 3176: (2002) 7 SCC 368

⁴¹ AIR 1954 SC 569 : (1955) 1 SCR 290

⁴²Dr. Mukund Sarda, “*Judicial Control over Delegated Legislation*”

⁴³ Supra

⁴⁴ Justice Krishna Iyer in Arvind Singh’s case

⁴⁵ Supra

would have surely been acting as super-legislatures or potential dictators⁴⁶. We have already discussed how delegation of legislative power can be confined to only ‘non-essential’ or subsidiary matters and how delegation of legislative powers of quintessential nature would be invalid⁴⁷. This was also the first principle laid down in the domain of Judicial Control and was subsequently expatiated to a number of rules which were also laid down by the Judiciary.

IX. SCOPE OF JUDICIAL REVIEW

The Supreme Court has examined scope for Judicial Review in several cases, holding consistently that the power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent⁴⁸. The duty of the court is to confine itself to the issue of legality; to decide whether the decision-making authority has exceeded its power or committed an error of law or committed breach of the rules of natural justice; given a decision which no rational Tribunal would have; or abused its powers⁴⁹. The Court is to ensure that the statutory functions are not carried out whimsically by the officers of the Government/ local body arbitrarily. However, the Court itself cannot assume the role of these officials and function in their shoes⁵⁰. Although the power of Judicial Review is restricted in nature, it covers both the cases where the administrative orders are irrational and the cases where the statutory authority has undergone a dereliction of duty and has failed to perform its statutory duty as per law. It has been held in several cases^{51,52} that the courts review delegated legislation on a number of grounds, for instance, violation of the Constitution either by the parent Act or by the delegated legislation; violation of the substantive provisions of the parent Act; violation of mandatory procedural provisions; non-conformity with other statutory provisions; bad faith in making it; and arbitrariness⁵³.

(A) CONSTITUTIONALITY OF THE PARENT ACT

When the validity of a statute is under question and there are two possible interpretations, the one that makes the law valid must be preferred to the one that makes it void. When the Court is to pronounce upon the constitutional validity of a statute, it is only required to see if what is passed is within the scope of power conferred on a legislature and abides by the restrictions imposed upon that power. Such a law must be upheld regardless of what the Court otherwise

⁴⁶ C.K Takwani, “*Lectures on Administrative Law*”, 5th Edition (2012)

⁴⁷ Re Delhi Law Act case, AIR 1951 SC

⁴⁸ M P Jain & S N Jain, “*Principles of Administrative Law*”

⁴⁹ *Ganesh Bank of Kurundwad Ltd. v. Union of India*, (2006) 10 SCC 645

⁵⁰ *Nagar Nigam, Meerut v. Al Faheem Meat Exports (P) Ltd*, (2006) 13 SCC 382, 394

⁵¹ *LIC of India v. Retired LIC Officer Assn.* (2008) 3 SCC 321; AIR 2008 SC 1485

⁵² *M. Chandra v. Chennai Metropolitan Development Authority*, (2009) 4 SCC 72

⁵³ *A. Kerala Samasthana Chettur Tozhilali Union v. State of Kerala* (2006) 4 SCC 327

thinks of it⁵⁴. The parent Act under which legislative powers are delegated to the Administration must be constitutional in order for the delegated legislation made under it to not be void. The Parent Act can be unconstitutional if there has been excessive delegation or a breach of Fundamental Rights or if there has been a breach of the Federal structure of governance with either the Centre or the State going beyond its prescribed legislative sphere.

(B) CONSTITUTIONALITY OF DELEGATED LEGISLATION

It was held in the case of *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*⁵⁵ that only when it has been established beyond reasonable doubts that there is a clear violation of Constitutional provision then only can the Court declare the Act to be unconstitutional. A delegated legislation can be unconstitutional even when the parent Act is not. For instance, when delegated legislation is in contravention with the Fundamental Rights guaranteed by the Constitution. In the case of *Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh*⁵⁶, a few provisions of the U.P. Control Order, 1953, made under s. 3 (2) of the Essential Supplies Act, 1946, were declared ultra vires as infringing Article 19 (g), a Fundamental Right guaranteed, to practice any profession or to carry on any occupation, trade or business, to all the citizens. In *Air India v. Nergesh Meerza*⁵⁷, the Supreme Court declared certain regulations pertaining to the conditions of service of air hostesses in Air India, an undertaking of the Central Government, as discriminatory under Article 14 of the Constitution which guarantees equality before the law or equal protection of laws within the territory of India.

(C) DOCTRINE OF ULTRA VIRES

Ultra vires is a latin phrase which means “beyond the powers”. An act which requires legal authority but is done without it is characterised in law as ultra vires. Ultra Vires acts are invalid.

A subordinate legislation may be questioned on the ground that it is not in conformity with the parent statute. It may be further questioned on the basis of it being in contravention to some other statute that pertains to a similar subject-matter. Similarly, it can also be questioned on the ground of its being arbitrary. Delegated Legislation has also been challenged several times on the ground that it violates Article 14 of the Indian Constitution⁵⁸. When a subordinate legislation is challenged, the question that’s posed is whether the power given to the rule-making authority is exercised with adherence to the purposes for which it is

⁵⁴*Karnataka Bank Ltd. v. State of A.P.*, (2008) 2 SCC 254

⁵⁵ (2008) 5 SCC 33

⁵⁶ AIR 1954 SC 224:1954 SCR 803

⁵⁷ AIR 1981 SC 1829 : (1981) 4 SCC 335

⁵⁸*J.K Industries Limited v. Union of India* (2007) 13 SCC 673

given. The court must examine the nature, object and scheme of the legislation and must begin with the presumption that the impugned rule is *intra vires*. The validity of delegated legislation may be adjudged by the Courts on the ground if it's *ultra vires* or *intra vires* the parent Act. The doctrine of *ultra vires* envisages that an authority can exercise only so much power as is conferred on it by law. The most basic test is to ascertain the source of power with respect to the rule in question. A rule has to be in symphony with the parent Act⁵⁹. When a piece of delegated legislation is declared *ultra vires* in nature, it is deemed to be void *ab initio* and hence, becomes unenforceable. It does not affect the rights and duties of any one.⁶⁰ A person whose interest has been adversely affected by some delegated legislation can directly challenge it in a court of law. The court may grant an injunction or declaration or issue *mandamus* or award as is appropriate.

(D) MALA FIDES OF THE RULE-MAKER

A rule may be challenged if the *mala fides* of the decision maker vitiates an administrative action. It has been reiterated time and again that all powers are to be exercised in good faith⁶¹. There are two ways in which a case of *mala fides* can be made out; one, that the impugned action has been taken to specifically damage the interest of the part and two, such action is aimed at helping some other party because of which there is a resultant damage to the party who is alleging *mala fides*⁶². It has been held by the Courts of law that conclusions cannot be drawn with certainty unless the allegations of *mala fide* are proved beyond doubt⁶³. An allegation of *mala fide* cannot be levelled based on conjectures or speculations.

(E) ARBITRARINESS OF THE RULES

The test of unreasonableness was laid down in Britain in the case of *Mixnam Properties Ltd. v. Chertsey V.D.C.*⁶⁴-

“...the kind of reasonableness which invalidates a bye-law is not the antonym of ‘reasonableness’ in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires’...”

In India, the test of unreasonableness is applicable to delegated legislation both on the basis

⁵⁹*Union of India v. S. Srinivasan*, 2012 (5) SCALE 702 : 2012 7 SCC 683

⁶⁰ M P Jain & S N Jain, “*Principles of Administrative Law*”

⁶¹*Bombay Dyeing Manufacturing Company Co. Ltd. v. Bombay Environmental Action Group* (2006) 3 SCC 434: AIR 2006 SC 1489

⁶²*Girias Investment Private Limited v. State of Karnataka*, (2008) 7 SCC 53

⁶³*M.V. Thimmaiah v. Union Public service Commission*, (2008) 2 SCC 119

⁶⁴ (1964) 1 QB 214

of general principles of Administrative Law as well as under such Fundamental Rights as Article 19 or Article 14 of the Indian Constitution. It was held in the case of *State of M.P. v. Mahalaxmi Fabrics Mills Ltd*⁶⁵, it was held that a subordinate legislation can be challenged on the ground that it is arbitrary, irrational or confiscatory in nature so as to be violative of Articles 14 and 19 (1) (g) of the Indian Constitution.

(F) PROCEDURAL ULTRA VIRES

While the delegated legislation is under making, the delegate may be necessitated by the parent statute to follow certain procedures like previous publication, consultation with affected interests, laying before the Legislature, etc. The Courts have opined that the procedural norms that are merely directory in nature may be complied with substantially but the mandatory norms must be observed with meticulous detail⁶⁶. While applying the doctrine of procedural ultra vires, the Court has to simply decide first if the provision in the Act, which prescribes the procedure for rule-making, is merely directory or mandatory.

X. ANALYSIS

India is a parliamentary country and legislative control exercised over administration is more of a theory than a practicality⁶⁷. Krishna Iyer J. in the case of *Avinder Singh v. State of Punjab*⁶⁸ expressed that parliamentary authority over delegated enactment should be a living continuity as a protected need. The real picture, as it is, is not as efficacious as it should have been. There are a lot of factors which are responsible for the ineffectiveness of legislative control over delegated legislation in India. The Indian Parliament is bereft of the time as well as the expertise to control the administration which has become as voluminous as it is ridden with complexities. The executive holds leadership powers over the legislature and hence is significantly responsible for the formulation of its policies and standards. With a size as big as that of the Parliament, it is not only difficult but also unmanageable to get the Parliament to be unparallelly effective in the discharge of its functions. Also, because of the majority which is so vehemently enjoyed by the Executive in the Parliament, the probability of constructive critique is mitigated. With the augment in the delegated legislation, the Parliament's role in forming meticulous laws has reduced and hence, the powers of bureaucracy has tremendously increased. Moreover, the control and privileged powers that the Indian Parliament enjoys is mostly very general, sporadic and also, highly politicised in

⁶⁵ 1995 Supp (1) SCC 642

⁶⁶ *Raza Buland Sugar Co. v. Rampur Municipality*, AIR 1965 SC 895: (1965) 1 SCR 970

⁶⁷ <http://www.legalservicesindia.com/article/1894/Effectiveness-of-Parliamentary-Control-over-Delegated-Legislation.html>

⁶⁸ 1979 AIR 321, 1979 SCR (1) 845

its nature. It is noteworthy that Parliament also lacks a strong and firm opposition because of which it has further led to an increased ineffectuality of legislative control over Indian administration. Lastly and sadly, as a whole, the Parliament is also divested of automatic machinery for automatic scrutiny; more so, the magnitude and knottiness of Parliamentary structure prohibits effective reliance on such scrutiny.

If we talk about Judicial Control or Judicial Review, we know that it is an important feature of the Constitution's basic structure and hence, can't be done away with even an amendment of the Constitution. The same has raised a few problems with respect to judicial control over delegated legislation and has posed questions like

- How can the Judiciary be made responsible for exceeding its legitimate limits?
- How can Judicial Control also ensure a preservation of the 'Rule of Law'?
- How can it be made certain that the Judiciary steps in only when a certain piece of delegated legislation takes on the form of super-legislature or parallel legislature?⁶⁹
- Most importantly, how can there be an adequate exercise of power by the Judiciary?

The answer to the dilemma raised by the above questions can only be answered in a way when the rules of Judicial Control are codified so that the powers of the Judiciary are restricted to the norms that are already laid down. Moreover, the Apex Court must formulate these rules under Article 141 which would be legally binding under Article 144, limiting its powers judiciously at the same time. In a nutshell, these self-prescribed and automatically imposed rules by the Supreme Court may prove to be a reliable solution to the hurdles faced by Judicial Control while it is supposed to be made answerable and well-within the limits prescribed by the Constitution in order to preserve the 'Rule of Law'. The very acclaimed observation of Justice Frankfurter in the case of *Trop v. Dulles*⁷⁰, also referred to in *Union of India v. Hindustan Development Corporation*⁷¹ must be thrown light on-

“Judicial review is not against human weakness. It also must be on guard against encroaching beyond its bounds, and not the less so, since only restraint upon it is self-restraint.”

Once, the Supreme Court frames rules with respect to its power of Judicial review, considering the arena of delegated legislation, the same will beneficially serve as guidelines and highlights for all the High Courts of the respective states, for the Government which will

⁶⁹Dr. Mukund Sarada, “Judicial Control over Delegated Legislation”

⁷⁰ 356 US 86 (1958)

⁷¹ (1993) 3 SCC 499

in turn bear the same in mind and for the Legislatures while enactment of laws. This *modus operandi* will go a long way in the preservation and protection of constitutional powers and the 'Rule of Law' in a modern democratic country as ours.

XI. CONCLUSION

Having analysed the role and functioning of delegated legislation in India and the various forms of controls that work over it, it can be established that the technique of delegated legislation is here to stay and the reality of its existence and perpetuity in the current legal scenario cannot be overlooked. The nation is growing and hence, the functions to be performed by the government are ever-increasing in nature in order to continue to shape the nation and help it grow further. In such a scenario, delegated legislation needs graver acknowledgement. All the more reason, why there should be an adequate control over the exercise of legislative power by the administrative agencies. The safeguards that are already laid down need to be religiously followed so that powers handed down to the Executive is not unwarrantedly abused. It is no wonder that during the period of 1973-1977, a span of 4 years, the Parliament enacted only 300 statutes but rules framed by the Executive went well beyond 25000 and the same was highlighted even in the case of Arvind Singh⁷² by the Apex Court. Undoubtedly, the Parliamentary control over delegated legislation is weak and under-developed because of over-dependence on the Indian Courts for every single matter and also because the officers of the Parliament are lacking in legal skills, knowledge and expertise. The fact that India has a quasi-federal structure and not a very strict system of separation of powers, the primacy and efficacy of legislative control in order to curtail excessive delegation has not been able to be realised. But on the other hand, the priceless treasure that democracy is can only be realised in its entirety when effects of individualistic powers are diluted and friction reduced.

However, if, as has incessantly been said, delegated legislation is to be made a living continuity then, the role of the Parliamentary Committees need to be fortified and smoothed. A separate law like the Statutory Instruments Act⁷³, which will provide for uniform norms for laying down of rules and their publication and notice, ought to be passed in India too, instead of our country simply drawing from it. A group of expert officials may supplement as well as complement the Parliamentary Committees in order that the vigilance of delegated legislation can be made more effective. Furthermore, it would be better if India too had statutory provisions with respect to "laying" of delegated legislation. Lastly, it has to

⁷² AIR 1979 SC 321

⁷³ Statutory Instruments Act, 1946; an Act of the United Kingdom Parliament

fall on the Parliament to take active interest so that the burden and the pressure on the Judiciary is reduced, without simply being dependent over it and rather, keeping alive the doctrine of separation of powers so that the wheel of governance is prevented from being clogged.

XII. REFERENCES

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