

JUDICIAL CONTROL OF DELEGATED LEGISLATION VIS-A-VIS SEPARATION OF POWER

Mr. Paikar Mustafa

Student

B.A.L.L.B. Hons., V Year - Law College Dehradun

ABSTRACT

The Indian Constitution establishes welfare state which means that the State legislature has to legislate on innumerable activities encompassing human life to ensure maximum happiness and minimum pain for assurance of utilitarianism as an important aspect in the governance of a nation. With the increasing burden on the legislature, it left with no adequate time to minutely discuss and legislate on most of the matters dealing practical life of individuals and thus the delegation of legislative power becomes inevitable to overcome the limitations as it is justified on the ground of speed, flexibility, and adaptability. While delegated legislation has become a concrete reality the other task which comes into play is the control that is put over the acts of administrative authorities exercising such power. The legislature reserves its power to keep a check on power so delegated but where it proves to be ineffective the judiciary appears to be a safe haven to provide a safeguard against abuse of power by the administrative authority and keep a check on actions done by them so as to promote public interest at large. Though delegated legislation as it appears is against the strict rule of the doctrine of separation of power which provides for independent functioning of every organ of Government without encroaching upon the areas of activity of one another but control applied over delegated legislation by and large keep the separation of power a guiding principle in matters of exercising function. This research article aims to explain how judiciary exercises control over delegated legislation and the limitations that exist, difficulties that are faced by judiciary while exercising its power of Judicial review.

INDEX TERMS- Administrative, Constitution, Delegated, Legislation, Power

INTRODUCTION

In order to maintain the essence of the welfare state as mandated by the Constitution of India, there are various areas in which the State has to legislate upon to allow the harmony in the society. This has further increased the involvement of the State in the matters of mundane, and sometimes sensitive areas wherein, the State may not be able to devote the functionality as much as needed. Therefore, it becomes essential to let the executives that are involved with the grassroots level to understand and to take care of the matters. This has given birth to the delegated legislation. Hence, the delegated legislation can be defined as the law made by an authority other than the primary legislature, but within the purview of the primary legislation in order to proceed or to provide the functionality to the laws initially made by the primary legislation. Herein, the primary legislature is constitutionally determined, such as the parliament or the state legislatures, and the authority to whom the delegation is given can be executive. The delegated legislation is also called the secondary legislation or the subordinate legislation in the Administrative Law. The power to proceed with the delegated legislation is authorized by the act called the enabling statute or the parent act.

The delegated legislation has an advantage that they can be formulated and amended as when necessary without formal involvement of amendment processes. Orders, rules, bylaws, the Rules of Supreme Court, and the codes and conduct of various bodies are the examples of the delegated legislation. Except for the bylaws, most of these delegated legislations are subjected to parliamentary control in varying degrees in order to make sure that the delegatee does not breach the legitimate domain, thereby making legislative control over delegated legislation as 'living continuity as a constitutional necessity'¹. The Administrative Law deals with the administrative functionalities of the administrative agencies.

¹ See Justice Krishna Iyer's observation in- Arvinder Singh v. State of Punjab, 1979 SCR (1) 845

ADMINISTRATIVE LAW – DEFINITION

According to Sir Ivor Jennings, “Administrative Law Is the Law Relating to the Administration. It Determines the Organization, Powers, and Duties of Administrative Authorities.” This definition was criticized for lacking the clear difference between the Administrative Law and Constitutional Law.

According to I.P Massey, “Administrative law is that branch of public law which deals with the organization and powers of administrative and quasi-administrative agencies and prescribes the principles and rules by which official action is reached and reviewed in relation to individual liberty and freedom.”

Further, K.C Davis states, “Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the governing judicial review of administrative action.”²

ADMINISTRATIVE LAW – MEANING AND CONCEPT

An understanding of the essence of the Administrative Law needs the following two facts into consideration:

1. It deals with the manner of the enforcement of the power of the government.
2. It is meant to define the functional boundaries for those powers of the government which it seeks to deal with.

The foundation of Administrative Law is based on the following³:

1. To keep a check on the abuse of administrative power
2. To allow the citizens with remedies by the officials, thereby protecting them from the encroachment of their rights
3. To ensure accountability of the public servants

In order to affect the above-mentioned foundation bricks so that the Administrative Law can potentially realize its purpose, the following principles need to be set up:

1. Administrative justice that believes in the safeguard of the general public
2. Executive accountability to restrict the breach of powers given to an administrator while exercising the duty
3. Transparent administration that has universally accepted and rational standards.

EVOLUTION OF ADMINISTRATIVE LAW IN INDIA

The Administrative Law was functional since ancient times in India during the rule of Mauryas and Guptas. It was a centralized administrative law and was based on the rule of ‘Dharma’. It was practiced as per the rules of natural justice. However, such an ancient form of the administrative law was different from what it is known in the present time. The 20th century witnessed the exclusive rise of Administrative Law in India. The expansion of the Administrative Law can be summarised in the following three stages:

1. **Laissez Faire:** It resulted in the minimal control of government on the economic matters, that further caused deterioration of the labor class due to the concentration of wealth and widening of the financial gap between poor and rich.
2. **The dogma of Collectivism:** It provided for synchronized functionality of the state and the individuals to achieve economic growth.
3. **Social Welfare State:** The Dogma of Collectivism ultimately resulted in the establishment of the welfare state wherein the state occupied a dominant position in working for the welfare and betterment of the society. This was to be exercised by the means of various laws, legislation, regulations, ordinances etc. that empowered the executives as responsible heads.

The establishment of British rule in India witnessed an increase in power of the formal government setup that was exercised through acts, statutes, and legislation enacted by the British government. These laws were meant to regulate labor relations, health, safety etc. Through the State Carriage Act 1861, the practice of granting the administrative license began. The Bombay Port Trust Act 1879 established the first public corporation. Indian Explosives Act 1884 regulated the trade and traffic of the explosives.

² Kenneth C. Davis, *Administrative Law Text*, (West Publishing Company, St. Paul, 1959)

³ I.P. Massey, *Administrative Law* (Eastern Book Company, Lucknow, 5th edn., 2001).

During the Second World War, there was a tremendous increase in executive power in India. Defense of India Act, 1939 imposed martial law in India and it was further extended by various ordinances issued by the government to take the matters under the administrative control.

The independence of India saw an increased role of the Indian government, as it was mandated to be the welfare state by the Constitution of India. Laws like the Industrial Disputes Act 1947 and the Minimum Wages Act of 1948 sought to regulate the social securities of the employed people. In order to shape the provisions of the Constitution like the Fundamental Rights and the Directive Policy of State Principles, the Parliament enacted several laws like Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955, The Companies Act 1956, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (Ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

The exercise of these acts leads to the involvement of the Judiciary in which the Judiciary provided with reasons and clarification over the disputes, like in *Vellunkunnel v. Reserve Bank of India* (AIR 1962, SC 137), the Supreme Court provided the Reserve Bank of India with the sole rights of deciding the affairs of a Banking company under the Banking Companies Act, 1949. Further in *State of Andhra Pradesh v. C. V. Rao*, [(1975) 2 SCC 557] in which the issue of departmental inquiry was raised, the Supreme Court held that issue of the writ of certiorari under article 226 is supervisory in nature and that the adequacy or sufficiency of the evidence is within the exclusive jurisdiction of the tribunal. In the recent case of *State of Gujarat v. M. I. Haider Bux* (AIR 1977 SC 594), the Supreme Court held that the government is the sole authority to define whether a particular motive is for the public good or not and that the occupation of a property can be made if the government decides it to be used for public purpose.

Thus, the increase in participation of the government not only witnessed the increase in the number of legislation and acts but also the involvement of the judiciary to provide the legal interpretation to make sure that the general public interest is kept safe along with fulfillment of the purpose of the government. The statutes made by the government authorities contain a clause of appeal or revision, other than the Constitutional provisions of Article 32, 226, and 227 that confer special rights to the citizen and judiciary to review the legislation passed by the government. If the rules, regulations, by-laws or orders passed by these authorities are not within their powers, they can be declared ultra vires, unconstitutional, illegal or void.

DEFINITION- DELEGATED LEGISLATION

Delegated legislation (additionally alluded to as secondary legislation or subordinate legislation or subsidiary legislation) is a law made by the official authority under powers given to them by essential legislation so as to actualize and control the prerequisites of that principal legislation.

The term delegated legislation is complex to elucidate. It is an intricate term, even if defined, it is equally strenuous to determine with certainty the scope of delegated legislation. Mukherjee, J.⁴ rightly observes: "Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists....."

As put into words of Salmond delegated legislation means 'that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority'⁵.

Generally, 'delegated legislation' means the law made by the executive under the powers delegated to it by the legislature. A simple definition of the term 'delegated legislation' may be given as follows:

"When the function of legislation is entrusted to organs other than the legislature itself, the legislation made by such organs is called delegated legislation."⁶

EVOLUTION OF DELEGATED LEGISLATION

The discussion can be divided into two stages-

- (a) Pre-Constitution period; and
- (b) Post-Constitution period.

⁴ Quoted by Suranjan Chakravarti, *Administrative Law*, 166 (1970)

⁵ John W. Salmond, *Jurisprudence*, 129 (Stevens and Haynes, London, 4th edn., 1913)

⁶ Dr. J.J.R. Upadhyaya, *Administrative Law*, 68(Central Law Agency, Allahabad, 9th edn., 2014)

Pre- Constitution Period:⁷

As regard to the pre-Constitution period regarding delegated legislation in India, *Queen v. Burah*⁸ By Act XXII of 1869, Garo Hills was removed from the jurisdiction of civil and criminal courts, and by Section 9, the Lieutenant- Governor was empowered to extend *mutatis mutandis* all or any of the provisions of the Act applicable to Khasi, Jaintia and Naga Hills in the Garo Hills and to fix the date of such application. By a notification order dated October 14, 1871, the Lieutenant-Governor extended all the provisions of the Act to the District of Khasi and Jaintia Hills. The appellants who were convicted of murder and sentenced to death challenged the notification.

The High Court of Calcutta⁹, by a majority, upheld the contention of the appellants and held Section 9 of the Act as ultra vires the powers of the Indian Legislature. According to the Court, the Indian Legislature was a delegate of the Imperial Parliament and, therefore, the further delegation was not permissible.

On appeal, the Privy Council reversed the decision of the Calcutta High Court. It held that the Indian Legislature was not an agent or delegate of the Imperial Parliament and it had plenary powers of legislation as those of the Imperial Parliament itself. It acknowledged that the Governor-General in Council could not, by legislation, create a new legislative power in India not created or authorized by the Council's Act. That was not done. It was only a case of conditional legislation, as the Governor was not authorized to make new laws, but merely to extend the provisions of the Act already passed by the competent legislature upon completion of certain conditions.

The decision of the Council is receptive to two completely different interpretations. One interpretation is that since the Indian legislature is not a delegate of the British Parliament, there is no limit on delegation of legislative power. But the converse interpretation is that since Council has upheld only conditional legislation, therefore, the delegation of legislative power is not permissible.¹⁰

The question constitutional validity of delegation of powers came for consideration before the Federal Court in *Jatindra Nath Gupta v. Province of Bihar*. It was in this case that the legality of Section 1(3) of Bihar Maintenance of Public Order Act, 1948 was challenged on the ground that it empowered the Provincial Government to extend the lifetime of the Act for one year with such modification as it may consider necessary. The Federal Court held that the power of expansion with the adjustment is not a valid delegation of legislative power because it is an essential legislative function which cannot be delegated. In this way, for the first time, it was decided that in India Legislative power can't be delegated.¹¹

Post- Constitution Period:

(a) Constitutionality of Delegated Legislation - As the decision in *Jatindra Nath* case had created confusion, the question of permissible limits of the delegation of legislative power became significant. In this way, so as to get the situation of law illuminated, the President of India looked for the opinion of the Supreme Court under Article 143 of the Constitution. The topic of law which was alluded to the Supreme Court was of incredible Constitutional significance and was first of its sort. The provision of three Acts, viz.,

- (i) Section 7 of the Delhi Laws Act, 1912;
- (ii) Section 2 of the Ajmer-Mewar (Extension of Laws) Act, 1947; and
- (iii) Section 2 of the Part C States (Laws) Act, 1950, were in issue in Delhi Laws Act Case¹²

b) Principles laid down in the Reference Case

In Re Delhi Laws Act case may be said to be "Siddhanatawali" as regards constitutionality of delegated legislation. The importance of the case cannot be under-estimated inasmuch as on the one hand, it permitted

⁷ Takwani C.K., *Lectures on Administrative Law* (Eastern Book Company, Lucknow 3rd edn., 2006)

⁸ (1878) ILR 3 Cal 64

⁹ *ibid*

¹⁰ *Jatindra Nath Gupta v. Province of Bihar*, AIR 1949 FC 175.

¹¹ Indian Law Institute, *Delegated Legislation in India*, 81(ILI Delhi 1964).

¹² AIR 1951 SC 332.

delegation of legislative power by the legislature to the executive, while on the other hand, it distinguished the scope of such permissible delegation of power by the legislature. In this case, it was propounded:¹³

(a) Parliament cannot abjure or efface itself by creating a homologous legislative body.

(b) Power of delegation is auxiliary to the power of legislation.

(c) The endless supply of authoritative power is that the legislative can't part with the fundamental administrative power that has been explicitly vested in it by the Constitution. Basic administrative power implies setting down approach of law and establishing that strategy into a binding rule of conduct.¹⁴

(d) Power to abrogate is legislative and it cannot be delegated.

The concept of *Re Delhi Laws Act* case is that crucial legislative function cannot be devolved whereas inessential can be delegated.

SEPARATION OF POWER

It is broadly acknowledged that for a political framework to be steady, the holders of power should be adjusted off against one another. The principle of separation power manages the common relations among the three organs of the administration, in particular, legislature, executive and judiciary. This regulation endeavours to acquire restrictiveness in the working of the three organs and thus a strict boundary of intensity is the point looked to be accomplished by this rule. The Doctrine of "Separation of Powers", a vintage result of logical political theory is firmly associated with the idea of "judicial activism". "Separation of Powers" is embedded within the Indian Constitutional set up as one of its essential highlights. In India, the wellspring head of power is the Constitution. The sovereign power has been dispersed among the three-wings:

- Legislature
- Executive
- Judiciary

The doctrine contemplate a tripartite system. The Constitution devolves the power into the three organs, and delineating the jurisdiction of each.¹⁵

The historical development of the doctrine can be traced back to Aristotle.¹⁶ It was the French philosopher John Bodin and British politician Locke respectively who expounded the doctrine of separation of powers in the 16th and 17th centuries. But it was Montesquieu who for the first time gave it a systematic and scientific formulation in his book '*Esprit des Lois*' (The Spirit of Laws) published in the year 1748.¹⁷

Montesquieu's Concept

As per this hypothesis, powers are of three sorts: Legislative, executive and judicial and that every one of these forces ought to be vested in a different and particular organ, for if every one of these forces, or any two of them, are joined in a similar organ or individual, there can be no freedom. If, for example, legislative and executive forces join together, there is angst that the organ concerned may establish oppressive laws and execute them in a domineering way. Once more, there can be no freedom if the judicial power is not isolated from the legislative and the executive. Where it joined the legislative, the life and freedom of the subject would be presented to discretionary control, for the judge would then be the lawmaker. Where it joined with the executive power, the judge may carry on with brutality and mistreatment.

¹³ M.P.Jain and S.N. Jain, *Principles of Administrative Law*, 38(Wadhwa, Nagpur 4th edn.,1986).

¹⁴ Indian Law Institute, *Cases and materials on Administrative Law in India*, 220(ILI Delhi 1966).

¹⁵ The Doctrine of Separation of Power, available at: https://www.lawctopus.com/academike/doctrine-of-separation-of-powers/#_edn2 (Visited on March 07, 2019).

¹⁶ Vanderbilt, *The Doctrine of separation of Powers and its Present Day Significance*, 38-45 (1953).

¹⁷ Dr. J.J.R.Upadhyaya, *Administrative Law*, 45(Central Law Agency, Allahabad, 9th edn., 2014).

Montesquieu stated the doctrine of separation of power in the following words:

*"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."*¹⁸

As the idea of Separation of Powers' clarified by Wade and Philips¹⁹, it implies three distinct things:-

- i. That the one single person should not form part of various organs of Government, e.g. the Ministers should not sit in Legislature (Parliament);
- ii. That one organ of the Government ought not to control or meddle with the activity of its capacity by another organ, for example, the Judiciary ought to be free of the Executive or that Ministers ought not be responsible to Parliament; and
- iii. That one organ of the Government ought not to practice the elements of another, for example, the Ministers ought not have administrative forces.

In India, the doctrine of separation of powers has not been accorded constitutional status. Apart from the directive principle laid down in Article 50 which provides for separation of judiciary from the executive, the constitutional scheme does not incorporate any formalistic and dogmatic division of powers.²⁰ The Apex Court of the nation in *Ram Jawaya Kapur v. State of Punjab*, the Court through Mukherjee J. held that:²¹

"The Indian Constitution has without a doubt not appreciated the principle of separation of power in its completely strict nature, yet the elements of various parts or wings of the legislature have been adequately separated and as a result it can in all likelihood be said that our Constitution does not cogitate about supposition, by one organ or part of the state, of capacities that basically have a place with another."

In India, the legislature and executive are closely connected. The head of the executive as per the constitution is President but in practice, he is only a nominal head and the real power resides with the Prime Minister and its cabinet of Ministers. The President in this capacity has the power to promulgate Ordinances, when both the houses of the Indian Parliament are not in session. However, the ordinance so promulgated require the approval of Parliament for its sustenance but it surely is the legislative power of the executive expressly mentioned in the Constitution. A similar power of promulgating an ordinance in State(Federal Structure) is vested in the governor under article 213 of the constitution of India when both the houses of State Legislature is not in session. The Parliament itself perform judicial functions, for example, impeachment of President and Vice-President, and judiciary can be seen to exercise legislative function when it formulates policies and guidelines on a particular matter in absence of any concrete law, which is commonly termed as judicial activism. Thus, the three organs of the Government in India work in coordination and cooperation of each other with regard to not encroaching the essential function of one another. So it can be said that separation of power in its strict sense is not followed in India but its essence can be observed in day to day functions of governmental organs.

In *AK Roy v. India*²², it was argued that the ordinance-making power was executive and not legislative in nature and therefore an ordinance was not 'law' within meaning of Art. 13 of the Constitution. The Court rejected that plea on the following grounds:

- (i) the heading of Chapter III of Part V in which Article 123 is contained is 'Legislative Powers of the President';
- (ii) Clause (2) of Article 123 clearly states that an ordinance promulgated under it 'shall have the same force and effect as an Act of Parliament';
- (iii) Article 13(3) provides that 'law' includes, *inter alia*, an ordinance; and
- (iv) Article 367(2) provides that any reference to Acts or laws of, or made by, Parliament shall be construed as including a reference to an ordinance promulgated by the President.

India has a parliamentary form of government wherein Parliament is sovereign lawmaking body, and executive is collectively responsible to the legislature. The separation of power is rather blurred in the Indian context and due to the sovereignty of legislature, it can delegate its lawmaking power to the executives within the permissible boundaries of the constitution. In a democratic set-up like India, the organs of government cannot be alienated from each other but the principle of separation of power will always remain a guiding principle.

¹⁸ C.K. Thakker, *Administrative Law*, 31(Eastern Book Company, Lucknow, 2nd edn.,2012).

¹⁹ Wade E.C.S. and G. Godfre Phillips, *Constitutional Law*, 22-34(Longmans, London U.K. 6th edn., 1960).

²⁰ A.G. Noorani (ed.), *Public Law In India*, 136 (Vikas Publishing House, New Delhi, 1982).

²¹ AIR 1955 SC 549.

²² AIR 1982 SC 710,(1982) 1 SCC 271

It is for this cause the legislative power delegated by the legislature is not set free on the hands of administrative authority but legislature keep records and checks on power so delegated, and further judicial review of administrative action is resorted to examining the constitutionality of delegated legislation.

JUDICIAL CONTROL OF DELEGATED LEGISLATION

The constitution of India is the *Suprema lex* (supreme law) of the Nation. It confers powers, rights, and duties and there distribution. The constitution has made the Supreme Court and the High Courts (higher judiciary) the guarantor and the protector of the constitution. By virtue of this power, the Supreme court under Article 32 and High court under article 226 can issue writs for the enforcement of Fundamental Rights however the High courts have wider power in respect of issuing writs i.e, they can issue writs for the enforcement of legal rights as well.

Judicial Review

The Judicial review is the power of the judiciary to examine the legislation(statutes, enactments) made by legislature and actions of administrative authorities or executive order of Central and State Governments that whether they are in compliance with the constitution or not. On examination, if they are found to be in violation of the Constitution i.e. Ultra vires (beyond the scope of the Constitution), the judiciary can declare them illegal and invalid and struck them down making them ceased to be operated.

Originally, the doctrine of Judicial Review was developed in the USA²³ by John Marshall, Chief Justice of the American Supreme Court.

In India, the Constitution expressly confers the Power of Judicial Review on Higher Judiciary (Supreme and High Courts) by virtue of Article 13 of the Constitution.

Justice Syed Shah Mohammad Quadri²⁴ has elaborated the application of judicial review in the following ways:

- 1) Judicial review of the amendments of the constitution enacted by the Parliament.
- 2) Judicial Review of the laws made by Parliament and State Legislatures.
- 3) Judicial review of actions of administrative authorities working under Union and State.

Further, the Judicial Review has been declared by the Supreme Court as the Basic Structure of the Constitution²⁵. Which means that this power of the judiciary cannot be curtailed or taken away by the legislature by way of amendment or otherwise and it holds the spirit of the constitution and upholds the principle of the supremacy of the Constitution.

The subordinate legislation enacted by the administrative authority by virtue of the power given to them by the legislature in this regard is not immune to the judicial review meaningly, the judiciary can check and review the constitutionality of Acts so enacted by the authorities and can declare them null and void if they are found inconsistent with the consistent.

The question thus arises is not whether delegated legislation is necessary or required but the essential safeguards and controls that can be applied so that the power of delegated legislation is not abused to the public inconvenience or opposed to the concept of the welfare state. As observed by Hon'ble Justice Subba Rao²⁶ that "there is danger that inherently exist in the power to delegate legislative authority as legislature due to over-burden or powerful control of executive government may not make policy or may delegate arbitrary power to executive or legislature may confer essential legislative power to executive authority which strictly is not permissible by the Constitution so the responsibility lies upon the judiciary to check the fairness and liberally interpret the impugned statute and judiciary should not hesitate to strike down arbitrary power conferred upon executive.

Since Article 13(3) of the Constitution of India defines "Law" as to include order, bylaws, rules, regulation, and notification, the subordinate legislation like general legislation is subject to the provision of Article 13(2)²⁷. Hence, Delegated legislation can be attacked on the following grounds namely:

- 1) The doctrine of Ultra Vires
- a) Ultra vires the enabling Act (Substantive ultra vires)
- b) ultra vires the Constitution

²³ *Marbury v. Madison* (1803), 5 US 137.

²⁴ "Judicial Review of Administrative Action" 2001,6 SCC (J),p.3.

²⁵ *Keshavananda Bharti v. State of Kerala*, AIR, 1973, SC 1461

²⁶ *Devidas v. State of Punjab*, AIR 1985 SC 1967

²⁷ The Constitution of India, 1950, Article 13(2)

- 2) Procedural irregularities and noncompliance of mandatory provisions in the framing of Rules. (Procedural Ultra Vires)
- 3) Other grounds viz.,
 - a) Excessive Delegation
 - b) Unreasonableness

1) The Doctrine of Ultra Vires.

Ultra vires mean (beyond the ambit or powers or scope) and when the subordinate legislation goes beyond the authority conferred to the delegate to enact laws it is called substantive ultra vires. The doctrine of ultra vires suggests that any act which is done in the excess of power than what is conferred upon the delegated authority it shall be void and invalid. It has been described as, "the central principle" and "Foundation of a large part of administrative law"²⁸

a) When Delegated Legislation is Ultra Vires the Parent Act.

Subordinate legislation can be challenged on the ground that it is ultra vires the Parent Act or enabling statute(the statute which confers power on the authority to enact a law) or any general law. It is therefore well-accepted principle that the delegate cannot make a rule for which it is not authorized by the Parent Act and it cannot act beyond the scope of authority given to it. The delegated legislation can only be held valid if it is in conformity to the power conferred by the Parent Statute. The Parent Statute delegates the power in express terms and the delegate is expected to comply with the reason and terms of the enabling statute. Making any rule which defeats the purpose of the enabling act in totality will yield an unwanted result. The courts apply this doctrine to uphold the intent of the legislature delegation power and keep the delegated authority within the bounds of the power conferred to them.

In case of *Additional District Magistrate v. Sri Ram*²⁹ the Supreme court held that the delegation of rule-making power by an Act does not mean that rulemaking authority can make a rule which goes far beyond the scope of the enabling act and such an exercise of power will be prejudicial to the public and arbitrary in its nature.

The same observation was held in the case of *Kunj Behari Lal Butel v. State of H.P*³⁰ (the court held that the administrative authority cannot bring within the net of the rules what has been excluded by Act itself.)

The Court can quash the delegated legislation if it is in excess of the Power endowed by the Parent Act.

The instance of it can be seen in the Case of *Dwarka Nath v. Municipal Corporation*³¹. In this Case section 23(1) of the Prevention of Food Adulteration Act, 1954 empowered the Central Government to make rules regarding the packing and labelling of any food article with a view to preventing the public from being deceived and misled as to the quantity and quality of the food item. Rule 32 made by the government for this purpose specified that on every food article there shall be label name, business, the address of the manufacturer, batch number or code number, either in English or in Hindi. The Proceedings were started against one Mohan Ghee company for violation of this rule as it provided on the packaging only " Mohan Ghee Laboratories - Delhi 5 ". It was pleaded on behalf of the Mohan Ghee Company that Parent Act restricted the rule making power to "quality and quantity" only. Hence the rule enacted by the government was in excess of the power conferred. The Supreme Court accepted the contention and held Rule 32 as ultra vires of the Act.

Further in case of *Ibrahim v. Regional Transport Authority*³² the Parent Act empowered the administrative authority to make rules for the control of transport vehicles instead the authority made rules for fixing sites for the Bus stand. The rule was held to be ultra vires of the Parent Act.

In the case of *DTO v Hajel*³³ Section 95 of the Delhi Corporation Act, 1957 provided that no employee can be dismissed by any authority subordinate to the appointing authority which herein is General Manager who delegated this power by making a rule to the Assistant Manager. The rule was held in conflict with the Parent Act and hence invalid.

b) Ultra Vires the Constitution of India.

A delegated legislation will not sustain in its entirety if it is inconsistent with the Constitution. The rules so made can be challenged in the Court of law as they are infringing the inviolable provisions of the Constitution. The court can check the validity of delegated legislation on two grounds:

²⁸ Henry William Rawson Wade and William Wade, *Administrative Law*, 39(Clarendon Press, New York 6th edn., 1988)

²⁹ (2000)5 SCC 452

³⁰ (2000)3 SCC 40

³¹ AIR 1971 SC 1844

³² AIR 1953 SC 79

³³ AIR 1972 SC 2452

i) When the Parent Act is ultra vires the Constitution

The Constitution prescribes limits and defines boundaries within which the legislature can act. It distributes the powers and functions expressly and allows delegation of legislative power up to a permissible extent. Thus, if the Parent Act or enabling Act is ultra vires the Constitution, the rules and regulations made thereunder shall also be invalid and void ab initio.

In *Re Delhi Laws Case Act*,³⁴ which was Presidential reference under Article 143, the court laid down rules for delegated legislation. It permitted delegation of legislative Power to the executive by the legislature as power ancillary to the power of legislation and on the other hand, it formulated restrictions for the delegation of such power within permissible limits. It was held that Parliament cannot delegate essential legislative function to any authority and if it delegates so, the Parent Act will be held Ultra Vires the Constitution. In this case, the Supreme Court laid down rules for permissible delegation of legislative power and Conferring power on administrative agency to repeal a law inter alia held to be the essential legislative Power which cannot be delegated.

In case of *Chintaman Rao v. State of Madhya Pradesh*³⁵ the Parent Act conferred power on the Deputy Commissioner to prohibit the manufacturing of India in certain notified areas during the agricultural season. The Deputy Commissioner in the exercise of this power imposed a total ban on the manufacture of the bidis. The order passed by the Deputy Commissioner has held ultra vires as it violated the Fundamental right given under Article 19(1)(g) of the Constitution of India which guarantees to every citizen the right to carry on trade, business, profession, and occupation.

ii) When delegated legislation is ultra vires the Constitution.

Delegated legislation may be in conformity of Parent Act or enabling statute or the Parent Act which conferred legislative power to the delegate may be in conformity with the constitution yet the delegated legislation can be held ultra vires if the rules made in exercise of this power violates the provision of the Constitution. The Supreme court observed that even if the Parent Act is constitutional there is no restriction on challenging the validity of the delegated legislation on the ground that law cannot be presumed to authorize anything which may be in contravention of the Constitution and hence constitutionality of the delegated legislation can be checked.

A rule laying down that students passing the XII standard examination from schools and colleges within the jurisdiction of one university were not eligible for admission to medical colleges falling in the jurisdiction of another university, was held be infringing Article 14 of the Constitution which guarantees every person the right to equality and absence of arbitrariness.³⁶

A rule of the Bar Council of India barring the law student to pursue another professional course was held violative of Article 14 of the Constitution of India.³⁷

2) Procedural irregularities and non- compliance of mandatory provisions in the framing of Rules.

The Legislature sometimes delegating legislative power by the Parent Statute specifies certain procedures which must be followed by the administrative body while exercising lawmaking power under the delegation. The rules, regulations, and orders so made can be challenged in the court of law if they are found to have not complied with the procedural requirement of the statute and can be declared invalid on this ground.

In the case of *Banwari Lal Agarwalla v. State of Bihar*³⁸, Section 12 of the Mines Act, 1952, the Central Government is required to consult the Mining Board as constituted under the Act before making rules. The Central Government made rules without consulting with the Mining Board, the rules framed were declared as invalid as the central government failed to fulfill the essential procedural requirement provided by the statute. In considering the questions of the validity of delegated legislation on the ground of procedure, the court looks to the intent rather than the form of law.³⁹ In case of *Raza Buland Sugar Co. v. Rampur Municipality*⁴⁰ the Municipalities Act, 1961 provided that the rule in draft form must be published in Local Hindi daily, but, the rules were published in Urdu daily. It was contended that rules formed were invalid due to none compliance of procedure, the court rejected the contention and held that what was required essentially was publication and held the rules valid.

³⁴ AIR 1951 SC

³⁵ AIR 1951 SC 118

³⁶ *N. Mahesh Kumar v. State of Maharashtra*, (1986) 2 SCC 534.

³⁷ *Deepak Sibal v. Punjab University* (1989) 2 SCC 145.

³⁸ AIR 1961 SC 849.

³⁹ Dr. J.J.R. Upadhyaya, *Administrative Law*, 103 (Central Law Agency, Allahabad, 9th edn., 2014).

⁴⁰ AIR 1965 SC 895.

3) Other grounds for Judicially reviewing the Delegated Legislation.

a) Excessive Delegation

The Supreme Court of India has formulated the principle of non delegation of Essential legislative Function. The legislature is primarily entrusted with the lawmaking function and it has to make laws on several aspects encompassing an individual's life and though the practice of delegated legislation has been accepted as the need of the hour and linked with the fulfillment of the objectives of the welfare state as legislature cannot enact laws on every sphere and it need technical expertise for formulating laws and thus it can delegate legislative power to administrative authority to dispense with the issues and complexity that the legislature faces every day but this does not give freehand to the legislature to escape from their primary responsibility and it cannot delegate its essential legislative function such as repealing of laws⁴¹. If the delegation of power is uncontrolled and unguided it can be said to be an excessive delegation⁴². Justice Krishna Iyer has laid down the test for a valid delegation of legislative power viz.,

- 1) The legislature cannot extinct itself.
- 2) Parliamentary Control over delegated legislation is a constitutional necessity and it must be exercised on effective regular basis.

b) Unreasonableness

Delegated legislation can be held ultra vires on the ground of unreasonableness. The basis of unreasonableness is not as such defined but it is viewed in respect with the Articles 14, 19 and 21⁴³ of the Constitution of India. The Indian Judiciary follows the test of reasonableness which was given by Lord Russell in *Kruse v. Johnson*.⁴⁴ The rules can be said unreasonable if they are found:

- Partial and discriminatory between different classes in their implementation.
- Utterly unjust;
- Malafidely made;
- Oppressive to an extent that they could not be justified by a reasonable mind.

In India, Article 14 ensures the right to equality and the absence of arbitrariness. It was held by the Supreme Court that "equality is antithetic arbitrariness"⁴⁵.

This law made by legislature and administrative authority in the exercise of delegated legislative must pass the test of reasonableness which upholds the spirit of the Constitution and Courts have provided several criteria to test the reasonableness of the statutes or rules.

Instances of unreasonableness can be witnessed in following decisions rendered by Court.

In case of the *Council of Legal Aid and Advice v. Bar Council of India*⁴⁶. The Supreme Court struck down the rule framed by the Bar Council of India which debars the persons who have attained the age of 45 years from being enrolled as an advocate as it was arbitrary and unreasonable.

Further in case of *Meenakshi v. The University of Delhi*,⁴⁷ the rule for getting admission to medical college in Delhi condition precedent was that two years of schooling from any school in Delhi was mandatory. The Supreme Court held this requirement to be arbitrary and unreasonable.

The rules providing for reservation of seats in medical college for eminent sportsmen but without any guidelines for determining such eminence, the rules were held to be unreasonable.⁴⁸

A rule of Gujarat Judicial service providing the rule that a judge who had crossed the age of 45 years could not be considered eligible for the post of the assistant judge was held to be arbitrary and void⁴⁹.

The Constitution of India states that all the laws existing or made after the enactment of the Constitution shall be invalid if they are violative of the Fundamental Rights⁵⁰. Since Nationalisation of land occurred to be the necessity of the hour after independence for acquiring lands from the zamindars and distribute them among marginalized section to the society. But because the right to property was fundamental rights, questions were raised regarding this step of the Government and judiciary interfered by declaring any such law as illegal because of the constitutional mandate. The first constitutional amendment Act of 1951 added Ninth Schedule

⁴¹ In Re The Delhi laws Act case, AIR 1951, SC 332

⁴² *Air India v. Nergesh Meerza*, AIR1981 SC 1829

⁴³ The Constitution of India, Article 14- Right to equality; Article 19- Right to freedom; Article 21- Right to Life.

⁴⁴ (1898) 2 QB 91, p.99-100.

⁴⁵ *E.P. Royappa v. State of Tamil Nadu* (1974)4 SCC 3.

⁴⁶ (1995)1 SCC 232.

⁴⁷ AIR 1989 SC 1568.

⁴⁸ *Khalid Hussain v. Commissioner and secretary, Govt. Of Tamil Nadu Health Department*, AIR 1987 SC 2074.

⁴⁹ *Indravadan v. Gujarat* AIR 1986, SC 1035

⁵⁰ The Constitution of India, Article 13(2).

in the Constitution to shield act of the government of acquiring property as not discriminatory and excluding judicial review on acts listed in Ninth Schedule. Thus the inclusion of Article 31 B in the Ninth Schedule protected the statute or Parent Act enacted by the legislature from being questioned in the court of law on the basis of the Constitutionality. Since First amendment in 1951 several laws and Acts were placed in the Ninth Schedule to protect them for judicial review. In the Landmark Judgment of the Supreme Court in the case of *IR Coelho v. State of Tamil Nadu*⁵¹ The Supreme Court held that the laws placed under Ninth Schedule after 24 April 1973 shall be open to challenge in the Court if they are found violative of Articles 14, 19 and 21 of the Constitution i.e., Part III of the Constitution. The question that was left open was whether the rules made under the Parent Act placed in the Ninth Schedule would be immune from Judicial Review. The earliest view of the Court was affirmative to the immunity as evident in the case of *Latafat Ali Khan v. State of Uttar Pradesh*⁵² where the

Supreme Court held that if the Parent Act is saved under Article 31 B, the delegated legislation made thereunder cannot be challenged as they got derivative protection.

The same rule was departed from by the Court in the case of *Prag Ice and Oil Mills v. Union of India*⁵³ where the Essential Commodities Act, 1955 (Parent Act) was placed in Ninth Schedule and was therefore protected from judicial review. The question that came before the court was whether the orders and notification issued under this Act can be challenged on the ground of violation of fundamental rights. The Court held that even though the Parent Act is immune from judicial review because of its placement in Ninth Schedule, the rules made under delegated legislation can still be challenged if they are violative of any constitutional provisions.

Liberal approach of the Court - When rules were held, Intra Vires.

The courts have not always taken a strict view while reviewing the delegated legislation. Rather the actions were held valid by the court on seeing the Substance and intention behind them.

In the case of *Tata Iron and Steel Co. v. Workmen*⁵⁴ Section 5 of the Coal Mines Provident Fund and Bonus Scheme Act, 1948 authorized the Central Government to make Bonus Scheme for Employees. The Central Government established Quasi-Judicial Tribunal to solve certain disputes in the exercise of this authorization. This action was challenged before the Court that tribunal can only be created by the legislature and not by the executive body. The Supreme court rejected the Contention and upheld the constitution of the tribunal as ancillary to the main purpose of the legislation.

A rule Providing compulsory wearing of a helmet by two-wheelers helmets under the Motor Vehicles Act was held to be a valid and reasonable restriction on the Fundamental right guaranteed by Article 19(1)(d) I.e. right to move freely throughout the territory of India.⁵⁵

Similarly, the rule made by the Bar Council of India under the Advocates Act, 1961 providing demarcated dress code for Senior advocates and advocates on record was upheld as not violative of Article 14 of the Constitution⁵⁶.

Effect of Ultra Vires Act.

If any action, rule, regulation or order is declared Ultra Vires it shall have no legal effect whatsoever and is null and void in its entirety. The action is *ab initio* void and cannot be rectified by amendment or saving clauses. Thus, it serves as the reminder for authorities who are further indulged in the delegated legislation to make laws as judicially accepted and recognized as good law.

Exclusion of Judicial Control

The legislature while delegating its legislative powers to the subordinate authority deliberately puts a clause to exclude the judicial review of particular Act or any rule, regulation or order made thereunder by Delegated authority. In England, the Committee on Ministers Power observed that clauses which are designed to exclude the jurisdiction of the court or eluding the Jurisdiction of the court shall not be made except in most exceptional circumstances. The Courts in England always acted on the assumption that the supervisory jurisdiction of Courts should not be ousted, no matter the circumstances.

⁵¹ AIR 2007 SC 861

⁵² AIR 1973 SC 2070

⁵³ AIR 1978 SC 1296

⁵⁴ AIR 1972

⁵⁵ Ajay Canu v. India (1988) 4 SCC 156.

⁵⁶ JR Parashar v. Bar Council of India AIR 2002 Del. 482

In America, even though the legislature is silent on the judicial review of the administrative action, the courts are empowered to review such actions.

In India, the power of Judicial review is expressly mentioned in the Constitution and legislatures have to act within the limits of power defined by the Constitution. Furthermore, Judicial Review is declared as the basic structure of the Constitution⁵⁷ and hence it cannot be taken away or curtailed by the legislature by means of an amendment to the Constitution.

However, insertion of Ninth Schedule along with Article 31A and 31B in the Constitution attempted to exclude judicial review of certain Acts enacted by the legislature at that time and it got succeeded on doing so but the restriction has been dispensed by the Court in the latest judgment of *IR Coelho v. State of Tamil Nadu*⁵⁸. The administrative action in India whether in the form of directions, discretions or delegated legislation are not immune from judicial review in India.

ANALYSIS

With the emergence of Welfare State and overburdening of Legislature the Delegated legislation has become an indispensable and safe refuge for the formulation of policies and rules having the force of the law. The technicalities and other obstacles are dispensed with the flourished system of delegated legislation. But the concept behind delegation of legislative power by the legislature is to get an auxiliary hand in lawmaking and not the foundation of Parallel Legislature which defeats the purpose of welfare state and Constitution.

Hence, the legislature is given responsibility along with the power to keep check and control on administrative authorities exercising this power. But in Democratic State where majority rule prevails, legislature gives little less attention to check the rules so formed meticulously which increased the scope of abuse of power by such administrative authorities. Judicial Control comes into play post-legislative Control where neither the Parent Statute nor any delegated legislation can escape from the court's jurisdiction to check validity, constitutionality, and legality of such actions.

The judiciary has succeeded in keeping a check over administrative actions by virtue of delegated legislation but in contemporary world which is advancing day by day and complexities of subject matter increasing at the rapid rate, judicial control rather seems to be ineffective on every turning point. It is without a doubt that judiciary has formulated Rules, measures, and guidelines to be kept in mind while formulating laws or while legislature exercises its power to delegate legislative Function but to keep a watching eye whether they are minutely followed has become a humongous task.

1) Although the Judicial control is pivotal in preventing the administrative authorities from usurping the legislative position or abusing the power it has a certain limitation which can be pointed as follow:

This is, however, the accepted principle that judicial review of administrative or legislative actions cannot be excluded, still, there is certain administrative Action where judicial review is not applied. E.g., In the Evacuee Property Act, 1950 vests final judicial power in custodian general of Evacuee Property and law courts have no say in this matter.

However, pertaining to the finality clauses in the Parent Statutes the Supreme Court in India has explained that exclusion of law courts if interpreted would mean to include jurisdiction of ordinary law courts and not High Courts under Article 226 and Supreme Court under Articles 32, or 136 of the Constitution. But this creates the conflict as to which jurisdiction should be invoked and what court should be approached directly as the common person becoming a victim of direct administrative action might not know the interpretation of languages used by the Courts.

2) Judicial control can be invoked only when request or petition in this regard is made in court. It cannot take cognizance of examining the validity of an Act, rule or order by itself and due to the severity of legal procedure people rarely resort to judicial processes and keep on bearing the minor injustices caused to them which gives shelter to the misuse of power by the administration.

3) No matter how effective and penetrative the judicial control is on administrative actions, the process is cumbersome, lengthy and unpredicted. Sometimes a pending case in court take decades to become a final judgment and till then the damage caused become irreparable as it is said: "Justice Delayed is Justice denied". It is not that courts take pleasure in the pendency of cases but because of heavy workload on courts, the pendency of cases for a long period of time is unavoidable.

4) Sometimes, the remedy given by the court is ineffective and inadequate, this may happen mostly because of the force of administrative action which requires immediate action and unfortunately, legal procedure cannot help one in getting so and in other cases, the judges may not be well acquainted with the technicalities and

⁵⁷ *Supra* note 26 at 12

⁵⁸ *Supra* note 52 at 20

complexities of the administrative problems. Sometimes the judges fail to understand the real problem and rather shift their focus on another area which might not be as prejudicial as it seems and further judicial review is not immune to the human weakness, the judges may have their own mindset and whims and following of procedure may not allow them to arrive at the right decision.

5) The legislature may deprive the person of the remedy granted to him by the Court by changing laws or rules subsequently. The legislature has ultimate authority to make laws and enact them, thus temporary remedy granted by the Court in absence of any concrete law may be taken by the legislature by providing any such rule as law. E.g., the Supreme Court said that action against Public servant under SC/ST Prevention of Atrocities Act, 1989 can be taken only after written permission from their appointing authority and for private citizens action can be taken after Superintendent of Police allows it and also there is no bar in anticipatory bail of *prima facie* no case is registered under this Act or if malafide case is registered. The Legislature brought the bill which expressly removed the directions so issued by the Supreme Court to prevent the aim and objective of the SC/ST Atrocities Act.

6) Sub-delegation means the administrative authority to whom power has been delegated by the legislature further delegates its power to others. This makes the control over the rules so rudimentary and origin of the abuse become hard to find while complexities multiply many times.

This has become a trend in delegating legislative power that the legislature delegates power in very wide and general terms such as "to carry out the purpose of this Act" "to do acts for the achievement of the object of this Act", this confers a very wide discretionary power on the administrative authority while acting under the exercise of power. It eventually becomes difficult for the courts to interpret the intent of the legislature and accord with the actions of administrative authorities.

CONCLUSION

Delegated legislation has become indispensable in the contemporary times and so is the Control that is imposed upon the practice of Delegated legislation. The rules laid down by judiciary as safeguards and guidelines should be codified with already existing norms so as to give substantive impetus to the mechanism of control. The legislature while delegating legislative power should see that it is not delegated in general or wider terms which makes interpretation difficult and open scopes for abuse of power. Further, all administrative actions whatsoever should go through scrutiny before they become enforceable as law as to see that they do not jeopardise the concept of welfare state for which the Delegated legislation is justified. Judges should be highly trained in dealing with technicalities of administrative action so that the loopholes escaping from apparent cause can be apprehended. At last, rule of law can only be established and survive only if powers given to authorities in howsoever manner is exercised judicially.