

## Judicial Control over Delegated Legislation

By

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1.1. The Indian Constitution has established a Welfare State<sup>1</sup> which mandates that the State shall legislate on innumerable activities touching human lives in order to promote the ‘maximum happiness of the maximum number of people’.<sup>2</sup> Consequently the State has to undertake legislation on a variety of subjects. In view of this increasing legislative activity, the legislatures will not find adequate time to legislate on every minute details and limit themselves to ‘policy matters and leaving a large volume of area to executives to frame rules to carry out the purposes of legislation. Thus, the need for delegation became indispensable and it was sought to be justified on grounds of ‘speed’, flexibility and adoptability’.<sup>3</sup> The application of law to changing circumstances was made feasible through the instruments of ‘rules’ framed by the executive. It is not a surprise to find that during the years (1973-77) spanning a period of 4 years Parliament enacted 300 statutes but the rules

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<sup>1</sup> Bharat Bank Vs. Employees of Bharat Bank, AIR 1950 SC, P.306. See the observations of Justice Mukherjee.

<sup>2</sup> Bentham’s theory of Utility. (theory of legislation) – P.1.

<sup>3</sup> See for details Erskire May, ‘Parliamentary practice’ 24<sup>th</sup> edition Lexis Nexis P.669.

framed by the executive exceeded 25000. This has been observed by the apex court in the Arvind Singh's case.<sup>4</sup>

1.2. Legislatures having delegated their powers, have to bear the responsibility to ensure that the delegatee shall not over-step the legitimate domain and commit a violation by exceeding or abusing the powers delegated. Thus, the legislatures have to control the delegated legislation and if not, executives may exercise the delegated power to become a potential dictator or even becoming a parallel legislature. This legislative control over delegated legislation has become a 'living continuity as a constitutional necessity'.<sup>5</sup> The rule of majority in democratic systems have virtually made legislative controls ineffective. A similar statement is found in Wade & Forsyth.<sup>6</sup> A more serious observation has been made by Mr. Lloyd George to the effect that 'legislatures have no control over the executive'. All these observations are pointers to the view that had the Parliamentary control over delegated legislature been effective, the need for judicial control would not have arisen or probably reduced to the minimum. This has not been so, hence, judicial control has

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<sup>4</sup> AIR 1979 SC P.321.

<sup>5</sup> See Justice Krishna Iyer's observation in Arvind Singh's case, Supra P.175.

<sup>6</sup> See 'Administrative Law' (2009) 764-765.

become an inevitable necessity to prevent executives acting as super-legislatures or potential dictators.<sup>7</sup>

1.3. Pre-constitutional control to post-constitutional judicial control found a big shift from the scrutiny of delegated legislation confined to the area of sub-delegation from British Parliament to Indian legislature<sup>8</sup> and laying down a fundamental principle of delegation in the post-constitutional era<sup>9</sup> which can be stated as follows:-

“Legislatures cannot delegate their essential legislative powers. Essential legislative powers relate to the determination of the policy of the legislature and of rendering that policy into a binding rule of conduct”.<sup>10</sup>

In other words, delegation of legislative power can be confined to ‘non-essentials’ or subsidiary matters. Delegation of legislative powers of essential nature would be invalid. This has come as a first principle laid down in the area of judicial control and subsequently expanded to a number of rules laid down by the judiciary. These principles can be stated as follows:-

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<sup>7</sup> See for details C.K.Takwani ‘Lectures on Administrative Law’, 5<sup>th</sup> Edition 2012, P.172.

<sup>8</sup> Empress Vs. Burah (1877)3 Cal P.63 and Jitendranath Gupta Vs. Province of Bihar, AIR 1949 FC P.175.

<sup>9</sup> In Re Delhi Law Act case AIR 1951 SC P.332.

<sup>10</sup> Ibid

- i) If the law is ex-facie unconstitutional it cannot be legalized by a Parent Act which is constitutional. In other words, an unconstitutional legislation cannot be legalized by a valid Parent Act;<sup>11</sup>
- ii) Rules framed violating Parent Act are illegal;<sup>12</sup>
- iii) Rules framed violating any other Statute or inconsistent with any other law are also illegal and void;<sup>13</sup>
- iv) Delegated legislation must be reasonable or do not suffer from unreasonableness.<sup>14</sup> This has been ruled in Chandra Bhan's case;<sup>15</sup>
- v) Delegated legislation shall not be arbitrary or suffer from arbitrariness.<sup>16</sup> This is necessary to protect the "rule of law";
- vi) Delegated legislation made with malafides or improper motives are held illegal;<sup>17</sup>
- vii) Forbidding sub-delegation and the powers being delegated<sup>18</sup> or delegatee exceeding the powers<sup>19</sup> are equally held void;

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<sup>11</sup> Narendra Kumar Vs. Union of India, AIR 1969 SC P.430.

<sup>12</sup> Municipal Corporation of Greater Bombay Vs. Nagpal Printing Mills AIR 1988 Sc P.1009.

<sup>13</sup> Hindustan Times Vs. State of U.P. AIR 2003 SC P.250.

<sup>14</sup> During the pendency of an appeal against conviction of a police constable, the reduction of subsistence allowance of Rs.1/- was held illegal.

<sup>15</sup> Ibid, AIR 1983 SC P.803.

<sup>16</sup> Indian Express Newspaper Vs. Union of India, AIR 1985 SC P.525.

<sup>17</sup> D.C.Wadhwa Vs. State of Bihar, AIR 1991 Sc P.526. Issuing large number of ordinances was viewed as 'colorable exercise of powers by the executive', disapproved by the apex court.

- viii) ‘Finality clauses’ in Statutes or rules made thereunder, exclusive evidence, clauses<sup>20</sup> or ‘as if enacted clauses’,<sup>21</sup> were also reviewed on the basis of their compliance with the principles of natural justice and also in the light of Art 226 and Art 32 of the constitution vesting powers in the High Courts and Supreme Court respectively. Constitutionally vested jurisdiction cannot be taken away by ordinary legislation;<sup>22</sup>
- ix) ‘Retrospective effect’ clauses giving effect to the law<sup>23</sup> or rules with retrospective effect.<sup>24</sup> Such clauses not only reverses the reasonable anticipation of the people and may also deprive people of their accrued rights;<sup>25</sup>
- x) Delegated legislation exercised being against public standards or public morality.<sup>26</sup> (In this case marks sheets of the daughter of CM were altered);
- xi) Doctrines like ‘Proportionality’,<sup>27</sup> legitimate expectations,<sup>28</sup> and public accountability,<sup>29</sup> have become grounds of judicial review of the law and rules framed; and

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<sup>18</sup> Ajaile Singh Vs. Gurubachan Singh AIR 1965 SC P.1619.

<sup>19</sup> Radhakrishnan Laxminarayan Vs. State AIR 1952 Nag P.387.

<sup>20</sup> Union of India Vs. Tarachand Gupta, AIR 1971 SC P.1558.

<sup>21</sup> Latest decision of Keshavananda Bharati Vs. State of Kerala AIR 1961 Kerala P.23.

<sup>22</sup> Chief Inspector of Mines Vs. Karam Chand thaper AIR 1961 SC P.838.

<sup>23</sup> Art 20(1) of the Constitution.

<sup>24</sup> B.S. Yadav’s Vase (1981) SCC (L&S) P.343.

<sup>25</sup> See A.V.Nachane’s case AIR 1982 SC P.1126.

<sup>26</sup> Shivaji Rao Nilangekar Patel Vs. Mahesh Madhav Gosavi AIR 1987 SC P.294.

xii) Cases have also been reviewed on the grounds of procedural 'ultra vires' i.e., not following the procedures which are mandatory in framing the rules;

1.4. Since 'Judicial review' forms an important feature of the basic structure of the Constitution, it cannot be taken away even by an amendment to the Constitution.<sup>30</sup> This has now raised a few problems relating to judicial control over delegated legislation, such as:

- i) How to make the Judiciary responsible for exceeding its legitimate limits?
- ii) How to ensure that judiciary acts only in cases where the delegated legislation assumes the character of its being a super-legislatures or parallel legislature?
- iii) How to ensure that Judicial Control to preserve the 'rule of law' and
- iv) How to ensure proper exercise of power by Judiciary.

2. In the fitness of things, it would be proper to suggest that the rules laid down by the Judiciary may be codified, so as to confine its powers to the norms already laid down. It is also necessary that the Supreme Court must frame rules under Art 141, which would be law

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<sup>27</sup> Jitender Kumar Vs. State of Haryana (2008)2 SCC P.161.

<sup>28</sup> State of M.P. Vs. Hazarilal (2008)3 SCC P.273.

<sup>29</sup> State of Bihar Vs. Subesh Singh AIR 1997 SC P.1390.

<sup>30</sup> See Foot Note 21.

binding under Art 144 limiting its powers judiciously and not to overstep its legitimate sphere. In other words, self-imposed rules by the supreme court may be a good solution to the problems of Judicial control being made accountable, legitimate and confined to constitutional limits to protect and preserve the Constitution and 'rule of law'. It would be worthwhile to remember the famous observation of Justice Frankfurter<sup>31</sup> which is in these words: "Judicial review is not immune 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". It is hoped that the apex court will frame rules relating to its power of review in the sphere of delegated legislation, so that it could serve as guidelines to all High Courts and also to the Govt., to keep in mind while framing rules as well to the legislatures, while enacting laws. It will go a long way in preserving the constitutional powers and the rule of law in a democratic society like ours.

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<sup>31</sup> Trop Vs. Dulles 356 US 86 (1958) and also considered in Union of India Vs. Hindustan Development Corporation (1993)3 SCC 499.