



JUDICIAL CONTROL OVER DELEGATED LEGISLATION AND JUDICIAL ACCOUNTABILITY IN INDIA

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1. ABSTRACT

This paper comprehensively deals with “Judicial Control over Delegated legislation in India”. It focuses on the necessity to have a judicial control upon the delegated legislation and the effectiveness of the judicial control. The paper also highlights the need for accountability of “judicial control over delegated legislation” while recommending solutions to implement the same. Throughout the paper, the relevant points have been substantiated with credible sources and authorities from renowned scholars.

2. KEYWORDS: judicial control over delegated legislation, judicial review, judicial accountability, delegated legislation, separation of powers

3 INTRODUCTION

3.1 BACKGROUND

The Constitution of India enshrined a “Welfare State”¹, which requires the government to legislate upon a wide range of activities affecting human lives in order to achieve utilitarianism². As a result of this, the government has to undertake legislation on innumerable subjects. Considering the

spectrum and variety of legislative activity that the legislatures would have to undertake, it would become a huge burden on the legislators to address all the little details and restrict themselves to ‘policy issues’ and allowing the executives to focus on framing rules in order to have better implementation to fulfil the entire purpose of the legislation. Therefore, delegation became an absolute necessity which was justified on the reasoning of “*speed, flexibility and adoptability*”.³ To adopt to the fast-changing times, the executive had to frame new sets of rules for the same legislations which can be observed in the phase of 1973-1977 wherein the Parliament passed almost 300 legislations but the executive framed more than 25000 sets of rules.⁴

The role of the legislators does not end with only delegating their powers, but they also have to assure that the delegatee does not exceed the legitimate limits of its delegation and abuse or violate the powers delegated. Therefore, there is a necessity for “*control over the delegated legislation*”. If the delegated legislation is not controlled, the executives may become dictators or a parallel legislature. Hence, “this legislative control upon delegated legislation becomes a constitutional requirement”.⁵ However, the legislative control over delegated legislation have become ineffective due to the *majority ruling* in democratic systems like India. *Had the “legislative control over delegated legislation” been efficient and effective, the necessity to have “judicial control over delegated legislation” would have become*

¹ Bharat Bank Vs. Employees of Bharat Bank, AIR 1950 SC 306.

² JEREMY BENTHAM, ETIENNE DUMONT, RICHARD HILDRETH, THEORY OF LEGISLATION (Elibron Classics 2005).

³ ERSKIRE MAY, PARLIAMENTARY PRACTICE, (Lexis Nexis 24th ed. 2011)

⁴ Avinder Singh v. State of Punjab, AIR 1979 SC 321.

⁵ *Ibid.*



negligible. Due to the ineffectiveness of parliamentary control, it becomes an indispensable necessity to have judicial control over delegated legislation.

3.2 STATEMENT OF PROBLEM

1. The paper raises the holistic issue of the effectiveness and impact of “judicial control over delegated legislation”.
2. The paper raises the issue of holding the judiciary accountable for exceeding its legitimate limits while exercising its power of “judicial control over delegated legislation”.

3.3 RESEARCH QUESTIONS

1. Where is the accountability of “judicial control over delegated legislation in India”?
2. Is there a need to hold the Judiciary accountable for exceeding its power?
3. How should the Judiciary be held accountable for exceeding its legitimate boundaries beyond the scope of power delegated to it?
4. How to ensure that the power exercised by the judiciary is proper and adequate?
5. How to ensure that the Judiciary preserves the rule of law?

3.4 RESEARCH OBJECTIVE

1. The objective of this paper is to make an analysis of the effectiveness and efficiency of “judicial control over delegated legislation”.
2. Based on the same analysis, the paper aims to make an analysis on why the Judiciary should be held responsible for exceeding its limits while exercising its power of judicial control over delegated legislation
3. The paper also aims to make suggestions on how to hold the Judiciary accountable and ensure proper exercise of power.

3.5 RESEARCH METHODOLOGY

The method adopted by the researcher in this paper is “*Doctrinal Research Method*”, bearing analysis and references from credible resources such as books, journals and scholarly writings. written by renowned scholars.

4. LITERATURE REVIEW

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

The concept of delegated legislation has been explained in this book with accuracy and precision. The authors have bifurcated the topic into subtopics and also highlighted how checks and balances such as that of the judiciary operate in India. The writing has been elaborately explained and sufficiently substantiated with credible authorities.

2. “Dr. Mukund Sarda, **JUDICIAL CONTROL OVER DELEGATED LEGISLATION**”

This paper has comprehensively dealt with the issue of Judicial Control over Delegated Legislation focusing on a spectrum of issues ranging from the necessity to have judicial control to comparing the same in other governmental structures to detailing the checks and balances which are imposed by the Indian Judiciary and can be imposed on the Indian Judiciary.

3. “V.N. Shukla, Project Director of the Institute on 'The Problem of Delegations, **JUDICIAL CONTROL OF DELEGATED LEGISLATION IN INDIA, Journal of the Indian Law Institute, Apr., 1959, Vol. 1, No. 3 (Apr., 1959), pp. 357-374, JSTOR**”



This paper is an in-depth and detailed analysis of Judicial Control over Delegated Legislation. The paper sophisticatedly explains each sup-topic and grounds of invalidity under judicial control and provides logical arguments under the same. The entire paper is substantiated with credible resources and scholarly writings.

4. “Pankhuri Swarnim, **JUDICIAL, LEGISLATIVE AND OTHER DELEGATED LEGISLATION IN INDIA**, *International Journal of Law Management and Humanities*, 2020, Vol. 3, Issue 3, pp 1362-1380. ISSN 2581-5369”

This paper briefly explains the concept, significance and the need for having delegated legislation in India. It also points out the need to safeguard and impose checks and balances on the delegated legislation. The paper argues about the effectiveness of the various controls over delegated legislation while recommending solutions to resolve them at the same time.

5. ANALYSIS

It has already been discussed above how in the absence of Judicial Control over delegated legislation, the executives would become super-legislatures or dictators. Due to the changing times, the judicial control prior to the constitution enactment and post constitution enactment has witnessed a huge and significant shift from the British Parliament confined to sub-delegation to the Indian legislature⁶ laying down a fundamental principle⁷ that the essential

legislative powers cannot be delegated by the legislatures as they deal with the determination of policy matters.⁸

Hence, the delegated powers can only be restricted to non-essential legislative powers relating to subsidiary matters. If legislative powers which are of essential nature are delegated, it would stand invalid. This was established as one of the first concepts in the field of “judicial control over delegated legislation”, and it was later expanded to include under its ambit a variety of principles established by the judiciary.

The principles established by the judiciary to determine the invalidity of a delegated power are as follows:

If the legislation is unconstitutional prima-facie, the same cannot be made lawful by a parent act even if the parent act is constitutional and valid.⁹

If the legislation or rules framed violate or contradicts the provisions of the Parent act, the same are illegal.¹⁰

If the legislation or rules framed violate any other legislation or is in contradiction to or inconsistent with any other statute, then the same are illegal and void.¹¹

The legislation must not be unreasonable and must pass the test of reasonableness.¹² An administrative rule can be challenged within the purview of “Article 14 of the Indian Constitution”¹³ on the grounds of reasonableness.

⁶ *Empress v. Burah*, (1877) 3 Cal 63; *Jitendranath Gupta v. Province of Bihar*, AIR 1949 FC 175.

⁷ *In Re Delhi Law Act case*, AIR 1951 SC 332.

⁸ *Ibid.*

⁹ *Narendra Kumar v. Union of India*, AIR 1969 SC 430.

¹⁰ *Municipal Corporation of Greater Bombay v. Nagpal Printing Mills*, AIR 1988 SC 1009.

¹¹ *Hindustan Times v. State of U.P.*, AIR 2003 SC 250.

¹² *Mulcand v. Mukund*, AIR. 1952 Bom. 296.

¹³ INDIA CONST, art. 14.



- v. The legislation must not suffer from arbitrariness to ensure the protection of 'rule of law'.¹⁴
- vi. If the legislation is made with malafide intention or malicious motive, then they are illegal.¹⁵
- vii. Sub-delegation is prohibited¹⁶ and if the subordinate authority exercises its power beyond the principles and scope as established in the statute¹⁷, they are illegal.
- viii. If the legislation is enacted without following the requisite procedure requirements in framing the law as per the parent act or the general law, then they are procedural *ultra vires*.
- ix. If the legislation must comply with the principles of natural justice. For instance – The legislations with 'finality clauses' under exclusive evidence¹⁸ or 'as if enacted clauses'¹⁹ have been reviewed). Jurisdiction which has been vested constitutionally (for instance – under Art. 32 and Art. 226) cannot be affected by ordinary legislation.²⁰
- x. The legislation must not deprive people of their rights or reverse their reasonable anticipation. For instance – 'Retrospective effect clauses' have been subject to review.²¹
- xi. The legislation must not be against public standards and public morality²².
- xii. Several other doctrines have come under the purview of judicial review with regards to the enactment of legislations like doctrines of

'proportionality'²³, 'public accountability'²⁴ and doctrine of 'legitimate expectations'²⁵.

India being a country with parliamentary system, the "legislative control" exercised over the administration is less practical and more theoretical. The ineffectiveness and inefficiency of "legislative control over delegated legislation in India" is due to several factors. The insufficiency of time and workforce of the Indian parliament coupled with lack of expertise to manage an administration which is huge and voluminous can be a major factor for rendering the legislative control over delegated legislation ineffective. Also, it becomes unmanageable to get a parliament as big as the Indian Parliament to be unanimously effective. Furthermore, since the Executive has such a strong majority in Parliament, the likelihood of critical criticism is reduced. With the fast rise in delegated legislations, the role of the Indian Parliament in shaping diligent laws and instruments has diminished, and bureaucracy's powers have vastly increased. It is also worth noting that Parliament lacks a powerful and united opposition, which has resulted in increased legislative ineffectiveness over Indian administration. Finally, and unfortunately, the Parliament as a whole lacks automatic equipment for automatic inspection; however, the size and complexity of the Parliamentary system

¹⁴ Indian Express Newspaper v. Union of India, AIR 1985 SC 525.

¹⁵ D.C.Wadhwa v. State of Bihar, AIR 1991 SC 526.

¹⁶ Ajaile Singh v. Gurubachan Singh, AIR 1965 SC 1619.

¹⁷ Radhakrishnan Laxminarayan v. State, AIR 1952 Nag 387.

¹⁸ Union of India v. Tarachand Gupta, AIR 1971 SC 1558

¹⁹ Keshavananda Bharati v. State of Kerala, AIR 1961 Kerala 23.

²⁰ Chief Inspector of Mines v. Karam Chand Thaper, AIR 1961 SC 838.

²¹ A.V.Nachane's case, AIR 1982 SC 1126.

²² Shivaji Rao Nilangekar Patel v. Mahesh Madhav Gosavi, AIR 1987 SC 294.

²³ Jitender Kumar v. State of Haryana, (2008) 2 SCC 161.

²⁴ State of Bihar v. Subesh Singh, AIR 1997 SC 1390.

²⁵ State of M.P.v. Hazarilal, (2008) 3 SCC 273.



precludes effective reliance on such scrutiny. Hence, Judicial control becomes an inevitable necessity.

Judicial Review forms one of the features of the “basic structure of the Indian Constitution”. Time and again, the Apex Court has scrutinized the scope of Judicial Review and opined that judicial review ought not to play a supervisory role or be the most powerful.²⁶

For instance - It could be difficult to comprehend why and how the lapses in the execution of planning laws in Delhi is within the direct supervision of the Apex Court. The Judiciary here is trespassing into the executive's functions. In the guise of 'Judicial Review,' the court has attempted to put unenforced rules into effect and implementation, despite being aware of the fact there is no accountability for these actions. The court can, to some extent, enact the parliament's proposal, but it cannot obviate the legislature's land use planning for Delhi. A few years ago, the court had also ordered the cleaning up of the Yamuna and the Ganga and prohibited habitations within 300 meters from Yamuna.²⁷ These instances along with a lot others gives indications towards judicial dictatorship

The court while exercising judicial review should restrict its power within the principles laid down above but should not exceed its power and abuse it. Within the scope of judicial review, the court should ensure to keep checks and balances in order to ensure that the government official are performing

their statutory duties properly and not arbitrarily. However, while exercising the same power, the Court should not itself function in the shoes of these Government officials thereby exceeding its legitimate limits. Hence a few questions arise related to “judicial control over delegated legislation”:

- Where is the accountability of Judicial control over delegated legislation?
- How should the Judiciary be held accountable for exceeding its legitimate boundaries beyond the scope of the power delegated to it?
- How to ensure that the Judiciary acts within the purview of its power of “judicial control over delegated legislation” by only reviewing the delegated legislations which have taken the form of a parallel legislature?
- How to ensure that the power exercised by the Judiciary is adequate and proper?
- How to ensure that the Judiciary preserves the rule of law?

In *Chandler v. Judicial Council*²⁸ in the US, the judge opined that judicial self-regulation or self-imposing measures fall within the ambit of ‘*administration of justice*’ and is a process derived from the judicial branch’s general power to increase its efficiency.

Justice Frankfurter has made a famous observation²⁹ that power of Judicial review being exercised by the judges is not free from human errors. It is not unheard of how there has been instances where several doubts have arisen if the judiciary has political inclinations or is influenced by politics. Hence there is a need and necessity that the

²⁶ M P JAIN, S N JAIN, PRINCIPLES OF ADMINISTRATIVE LAW (Lexis Nexis 7th ed.)

²⁷ *Manoj Mishra v. Union of India & Others*, (2013) 6 SCC 313.

²⁸ *Chandler v. Judicial Council*, 398 U.S. 74 (1970).

²⁹ *Trop v. Dulles*, 356 US 86 (1958); *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499.



Judicial review must be wary of exceeding its domain beyond its boundaries, all the more so because it is only governed by only one form of restraint *i.e.*, self-restraint.³⁰ It is high time that Judicial review must come within the purview of accountability.

6. SUGGESTIONS AND CONCLUSIONS

In order to hold the judiciary accountable for its exercise of power such that it acts within the purview of its legitimate limits, the rules established by the judiciary may be codified. A separate codified legislation should be enacted in India like the Statutory Instruments Act³¹ to make uniform norms for framing rules as well as their publication and notification.

In order to restrict the power of judicial review of Courts judiciously thereby not exceeding its legitimate domain, the Apex Court must frame rules under Art. 141 of the Indian Constitution that would have a law-binding impact under Art. 144 of the Indian Constitution.³²

The Apex Court should frame and impose rules on itself governing its power of judicial review with respect to delegated legislation as a result of which the rules will act as guidelines for the High Courts across the country, to the Govt. to bear in minds for framing/drafting rules and to the legislatures for enacting laws. In a democratic system like India, it will have a long-standing impact and significance towards upholding the legislative powers and the rule of law.

It is incumbent on the Indian Parliament to increase its legal expertise and knowledge in order to take an active role in reducing the burden and strain on the judiciary, rather than over-depending on it, and to preserve doctrine of separation of powers and the rule of law so that the “wheel of governance” does not get clogged.³³

³⁰ Dr. Mukund Sarda, *Judicial Control Over Delegated Legislation*.

³¹ Statutory Instruments Act, 1946, an Act of the United Kingdom Parliament (UK).

³² *Ibid*.

³³ Pankhuri Swarnim, *Judicial, Legislative and Other Delegated Legislation in India*, 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES 1362, 1362-1380 (2020).