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DELEGATED LEGISLATION: EVALUATION OF EVOLUTION

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ABSTRACT:

“Legislation is either supreme or subordinate. The former proceeding directly from the sovereign, the latter flowing from an authority other than a sovereign and is therefore dependent on its continuance on the supreme authority.

As stated by Salmond “An act of the legislature proceeds from the supreme power of the state and has no rival in the field. It also does not derive its authority from any other organ of the state. Subordinate legislation, on the other hand, is framed by the executive and owes its existence to the supreme authority.

Now an inference can be drawn over the fact that if the legislature were to enact not policies but in addition to it all the necessary details as well. The work would be blatantly too cumbersome for them and as a remedy of it; the legislature is freed from the task of formulating the details so that it can better devote its time to the formulation of policies which hold sheer importance.

Another factor which has supplemented its growth is the very fact that most of the present day activities are concerned with that of socio-economic matters and this adds to the technicality and complexity and thus it requires a greater amount of expertise in administration and in order to ensure its implementation and this can be done better by administrators who are an expert and unlike the legislature which has generalists another factor supplementing its growth is the very fact that it aids the executive to experiment. This gives a considerable amount of room for using experience and implementation of the necessary changes in application of provisions in the light of such experience.”

I. DEFINITIONS OF DELEGATED LEGISLATION

According to Justice Mukherjea¹ “Delegated legislation” is an expression that covers a multitude of confusion. *“from an excuse for the legislators to a shield for administrators and a provocation to the constitutional jurists...”*

It is imperative on our part to be well acquainted with the viewpoint of yet another renowned jurist “SALMOND” who stated:

*“Legislation is either supreme or subordinate. The former proceeding directly from the sovereign, the latter flowing from an authority other than a sovereign and is therefore dependent on its continuance on the supreme authority”.*²

II. NASCENT STAGE

Delving a little into the traditional theory pervading the domain of the topic. It is imperative on our part to know that the work of the executive is to administer the law as enacted by the legislature who is directly responsible for the electorate. Now it must be noted that just apart from the pure administrative functions of the executive they also have to perform some legislative functions too. Thus it can be rightly stated that delegated legislation is so multitudinous that a statute would not only be incomplete but misleading unless it is read with delegated legislation which amplifies and supplements the law of the land.³ Now a little amount of light must be shed over the two very important concepts which remain the “Sine Qua Non” of the topic in the discussion that is “Subordinate and Supreme Legislation”. It is important to note that both the above-stated topics are the products of “legislative functions” of the state having the “forces of law” in their application to subjects. As stated by SALMOND⁴ “An act of the legislature proceeds from the supreme power of the state and has no rival in the field not deriving its authority from any other organ of the state”. Subordinate legislation, on the other hand, is framed by the executive and owes its existence to the supreme authority. An executive body can make subordinate legislation only if such power is

¹Chakravarti, Administrative law (1970) 166.

² Salmond on Jurisprudence (12th edition) 116.

³ Takwani, C. (2012). Lectures on Administrative Law. 5th ed. Eastern Book company, p.62.

⁴ Salmond on Jurisprudence, (17 ed.).

conferred upon it by a competent legislature, not otherwise. Again a subordinate law-making body is bound by the terms of its derivative authority.

For a better understanding, it is important to take into acquiescence, in the case of **Chief settlement commissioner v. Om Prakash**⁵ the Supreme Court stated that:

“It is essential to emphasise over the sheer importance of our constitutional system in which the law-making authority is vested in parliament and whatever powers that the executive shall derive must owe its origin to the legislature and the delegation must be done only within the prescribed limits. The very notion that empowers the executive to be autonomous and unfettered in its law-making power must be emphatically rejected”.

Where the supremacy of the parliament is considered paramount and its omnipotence results into its enthronement. The best example of it being the British parliament. It is important to take into account the much-used adage in the U.K. that “Parliament can do everything but make a man a woman and a woman a man.

A statute enacted by parliament is not open to Judicial Review and cannot be declared ultra vires or unconstitutional by a Court of law⁶ whereas in contrary to the system as followed in India, the “Delegated Legislation” has no such authority and this very lack of sweeping power entails two grounds over which it can be challenged:

- 1) *Ultra Vires;*
- 2) *Inconsistent with the Parent Act;*

Now it is important to lay stress on the fact that “Subordinate legislation” does not carry the same degree of immunity that is enjoyed by the SUPREME legislation. Besides it, yet another ground over which it can be challenged is that it lacks conformity with the Parent Statute. In a yet another landmark case of **Indian express Pvt. Ltd. v. Union of India**⁷ in which it was held that the subordinate legislation must yield to the plenary legislation.

⁵ A.I.R. 1969 S.C. 33,36, Par.7.

⁶ Salmond on Jurisprudence (17th edition) 116.

⁷ (1985) 1 SCC 641.

Delving a little more into the orthodox school of thought. It is imperative on our part to know that, they did not favour delegation of legislative power into the hands of the executive. Now it must be noted that:

“An insight into the administrative legislation in the traditional vein of thought is looked upon as necessary evil. An unfortunate but an inevitable infringement of the doctrine of separation of powers, there only exists a hazy borderline between administration and legislation”.

There are some obvious general differences, but the fact that a clean division can be made has merely remained a legacy from an older era of political theory. It can be better viewed as the very fact that “Legislative power is concerned with laying down the law for people in general, whereas administrative power is concerned with its application. Now it is important to see that delegated legislation as phenomena has seen the light of the day and there are many factors which can be attributed to its growth and development.

It must be noted that in today’s time it is an impractical step to follow the traditional vein of thought, which is of the view that only legislature can legislate. Now the function of the state has not merely ceased to be that of merely ensuring, Maintenance of Peace, the execution of law and maintaining the defence frontiers. Now we must know that there are certain objectives to be realized as enumerated in Part III and IV of the Constitution of India. The desire to attain these objectives has entailed intense legislative activities. It must be noted that the legislature is not endowed with a magic wand with which it can foresee all the future circumstances which are likely to occur in modern life. This thus becomes the *raison d’etre* for delegated legislation and thus in this manner, it is observed as the *sine qua non* for the proper functioning of the modern state⁸.

III. TRANSFORMATION

One must lay stress on the Laissez-faire era when the government in its domain only had limited functions and it was not a cumbersome job for them to legislate. But today this function cannot be fully performed without being aided and the very method of economising

⁸ Registrar, Co-operative societies V Kunjabmu, AIR 1980 SC 350, Para 3, P.351

legislative time is delegated legislation. The legislature lays down the policies and the task of shaping them was given to the administrative agency. Another factor which has supplemented its growth is the very fact that most of the present day activities are concerned with that of socio-economic matters and this adds to the technicality and complexity and thus it requires a greater amount of expertise in administration and in order to ensure its implementation and this can be done better by administrators who are an expert and unlike the legislature which has generalists another factor supplementing its growth is the very fact that it aids the executive to experiment. The legislative process lacks an effective way which would catalyse the effective implementation. Delegated legislation comes to rescue there and inevitably that is the only available remedy available. Therefore, in case of certain situations when the state machinery tends to crumble resulting in aggression, the breakdown of law and order and bandh etc. The executive has wide powers to deal with the situation.

The usage of Delegated Legislation was also seen as one of the very important events of human history that are World War I and World War II. The enactment of Statute War Measures Act, 1914, in which the power to legislate was given to the cabinet. This event entailed into the government in council to be so empowered that it could proclaim the state of “apprehended danger, invasion etc.”, and could also pass such orders and regulations.

The outbreak of World War II, it was urgent on the part of the government to take timely decisions and as a consequence of which the ministers, government, crown agencies were given the power to legislate to a greater extent. It was during this very period that a suggestion was made that to keep the power responsible the orders in council had to be tabled and had to be referred to the parliamentary committee for stricter scrutiny⁹.

IV. SCOPE

An important theme over which a greater amount of light must be shed is the scope of delegated legislation. Now, the very argument that not every matter can be tended to by the legislature and thus matters having minute details are given forth to that to the executive.

⁹ Robert Marleau Camille Montpetit, Delegated legislation-Historical perspective <http://www.ourcommons.ca>, <http://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Language=E&Sec=Ch17&Seq=2> (last visited Jul 27, 2018).

Now apart from the emergency provisions, parliament does delegate its powers and mostly it has been a common sight that it is more of a general nature. However, there have been instances where the conferment of power was to a great extent. One of the best example of it being, “The European Communities Act, 1972”, under which the governor in council was given so much of power that it could use the departmental regulations for altering the rule in any manner to the objective of implementing the community guidelines¹⁰.

Another factor that is ought to be taken into account is the power to vary the act of the parliament¹¹. Now it is an ascertainable fact that the parliament can delegate powers to have its own act amended. This has to be considered incongruous and the clause by which it was done was termed as “Henry VIII Clause”, as said the committee of 1932 that the king was regarded as the impersonation of executive autocracy. The objective was mainly to bring into effect the new act and particularly when it earlier had certain intricacies in it, now it must be noted that the more is the intricacy grows, the more tolerable should be the mechanism to reconcile or adjust the provisions.

Power to vary the acts of parliament, in particular, those go beyond the consequential changes places a great amount of power on the hands of ministers and thus raise constitutional issues over the supremacy of the parliament. There has been seen a natural response of the courts regarding this context. They tend to rely on strict construction and all the doubts are resolved by a restrictive approach¹². It must be noted that any modification must be well stated in the enactment and not merely inferred from its content¹³. The power to modify the act never gains supremacy over the express terms restricting modifications. Now it is imperative on our part to have an insight into the way in which delegation of powers fits into the Indian context. As it is a well known fact that law has the responsible for maintaining socio economic justice and has been more burdened with ever since, more imperative has become the duty of it maintain the rule of law.

¹⁰ Wade and Forsyth, Administrative law (10th edition, 2009).

¹¹ Ibid.

¹² R v. Secretary of the State for Environment (2001) 2 AC 349.

¹³ Mckiernon v. Secretary of State for Social Security(1990) Admin. LR 133.

As observed by Justice Subba Rao in Davidas v. state of Punjab¹⁴ that there exists an inherent risk in the process of delegated legislation for there is an overburdened legislature or one controlled by powerful executive may unduly overstep the limits of delegation. It was also an added observation that it may not lay down policies at all, may declare all policies as vague, May not set guiding standards for the executive on the other hand it may confer an arbitrary power on the executive to change the policy as laid by it without having sufficient control over subordinate legislation.

V. THE ACID TEST OF VALIDITY-INDIAN CONTEXT

This very self effacement as stated above is something that falls beyond permissible limits of delegated legislation. It is up to the court to have a generous and a liberal construction of an impugned statute or for ascertaining as to whether the limit got exceeded or not, the duty lies upon the court to strike down any such power conferred on the executive by the legislature.

The validity of delegated legislation can be ascertained by applying 2 tests:

- 1) *Substantive Ultra-Vires Test*;
- 2) *Procedural Ultra-Vires Test*;

Substantive Ultra-Vires Test:

It is imperative on our part to delve a little into the definition of substantive ultra vires test as per which if the delegated authority goes beyond the scope of power as conferred upon it by the parent statute is termed as substantive ultra vires. The very notion that they cannot act beyond the scope of its authority is the principle concept which stands behind it. If the authority acts beyond the scope of the act the court can strike down such an act for it is in contravention to the parent statute.

As observed in the case of GT Khanzada v. Reserve bank of india¹⁵ it was observed by Justice Chandrachud that:

¹⁴ AIR 1967 SC 1895.

¹⁵ AIR 1982 SC 917.

“Where a specific power is conferred without prejudice to the generality of a power already conferred the specific power is only illustrative and cannot restrict the scope of general powers”.

In the case of *Arbinda Das v. State of Assam*¹⁶ it was observed by the Guwahati High Court that “in order to ascertain that powers claimed by statutory authority are incidental or ancillary to the powers expressly conferred by statute, the court should see that whether it is derived from the reasonable implication from provision of statute but also that whether such powers were necessary to carry the act”.

The efficacy of judicial review in case of substantive ultra vires depends a great deal on the phraseology of the statute which confers the rule making power. If power is conferred in top broad terms the efficacy is to a great extent diluted for in such a case it becomes difficult for the courts to ascertain that this particular rule falls outside the ambit of powers delegated.

Procedural Ultra-Vires Test:

When the subordinate legislation fails to comply with certain procedural requirements as per the parent act it is termed as procedural ultra vires. While framing rules, regulations, bye-laws the enabling act i.e the parent act tends to prescribe certain procedural requirements which are to be duly complied with such as holding consultations, presenting before the parliament etc. And it is imperative on their part to comply with it. Lack of compliance would entail the invalidation of the rules. It must be observed that whether the procedure is mandatory or discretionary. Any act that would turn out to be in contravention of it would make it fall under procedural ultra vires.

It must be noted that there exists judicial review of administrative actions also as per articles 32, 226, 136 and 227. Article 32 confers the right to constitutional remedies as guaranteed by Part III of the constitution. As per article 32(2), it confers the Supreme Court the power through which it can issue writs of the nature-habeas corpus, mandamus, certiorari, prohibition etc. Article 32 can only be put into action in case of an administrative action if that is violative of the fundamental rights.

¹⁶ AIR 1981 GAU 18.

It was Observed in Ujjambai v state of UP¹⁷ that a mere misconstruction of the statute would not justify the application of Article 32. The quashing of the order would only take place when it is held to be ultra vires, if it misconstrues jurisdiction, fails to follow the natural principles of justice or fails to comply with a mandatory procedural requirement, but a mere error of law does not invoke Article 32 for curing it.

It must be noted that similar writ jurisdiction is conferred upon the high court also under 226. A notable feature being that it is not restricted under fundamental rights but its domain gets extended to various other matters also, thus an inference can be made that it has a wider domain. It is to be duly noted that through the power of judicial review conferred upon an independent institutional authority such as high court that the rule of law is maintained and every state organ is kept within its bounds, however, the action of the state any attempt made to subvert the exercise of judicial review is subversive of principles of natural justice.

In the case of PUDR v. Republic of India¹⁸ it was observed by Justice Bhagwati that the emergence of the doctrine of Locus Standi which has revolutionised the entire judiciary in a way not known to the western system of jurisprudence, the very peculiar economic condition of the country is such that if the previous doctrine that the one who is injured shall be adhered to is applied. It would be an ungodly denial of justice to the poor ones and those who are in need of it.

It must be noted that the liberalised form of the doctrine of Locus Standi is seen in cases like, Bandhua Mukti Morcha v. Union of India¹⁹, M.C Mehta v. Union of India²⁰, D.C Wadhwa v. Union of India²¹, these cases have been instrumental in shaping the concept of Locus Standi. However yet other phenomena which have been truly strengthened the bedrock of the judiciary that being the period of the 1970s when there was seen the introduction of Public interest litigation as the same conceptualised the introduction of certain inalienable rights which form an integral part of the natural rights as granted to a person²².

¹⁷ AIR 1962 SC 1621.

¹⁸ AIR 1982 SCC 1473.

¹⁹ AIR 1984 SC 802.

²⁰ AIR 1988 SC 1115.

²¹ AIR 1987 SC 579.

²² Chairman, Railway Board and other v. Chandrima Das and others, AIR 2000 SC 988.

VI. NATURAL JUSTICE & DELEGATED LEGISLATION

Another interesting facet of the same being the relation between Natural Justice and Delegated Legislation. For a comprehensive analysis of the same, the international perspective shall be taken into consideration with reference to the case²³, as the same calls for a far reaching dispute between Government and Roche group of companies over the price of latter's products. Roche, was involved in the manufacturing of drugs and tranquilisers, the bone of contention being the exorbitant price as charged, and the same was defended by stating that it was only for research purposes, when the matter was referred to the monopolistic commission they were of the view that the same is antithesis to the basic notions of public interest, and a price cut of 60-75 percent was recommended. It was contended that the report will not be considered as the same includes flouting of natural justice rules, and not being a report as per 1948 and 1965 rules.

VII. COMPARATIVE ANALYSIS

A comparative analysis is something which must be done to get a broader perspective of the same as in the exigencies of the states have impelled the state to transfer much of their law making powers to the administrative heads who uphold the executive power. Now, we must know that developments such as these have buttressed the foundation of administrative position of the state, thus proper channelization of the same is very imperative, save preservation of essential democratic legitimacy with it. For effectuation of the same, the very law governing subordinate legislation must be considered with respect to the U.S., Germany, UK. Now as per the cherished views of the constitutional purists, constant annoyance with the very deviation is a recurrent phenomena, as they have bemoaned the deviation from "*Delegatus-Non-Potest-Delegare*".

We must refer to the words of John Locke²⁴ who stated in 1690, that the legislature cannot pass the law making powers into any other hands, but the very hard lined notion gets readily bypassed by the welfare of administrative institution to exercise law making authority. The German constitution explicitly states in Article 80 Para 1, the federal minister, may by statute be authorised to issue orders having the force of law. The same mode of governance is seen

²³ F. Hoffman La Roche V Secretary of state of Trade, [1973] 3 W.L.R.

²⁴ J.Locke, Two treatises on Government(1690) Second treatise Chapter XI, 141.

in the British law, as with sheer reluctance it is accepted that the complexities of modern government requires the creation of greater legislative bodies as the same is cumbersome for the parliament. Also, European convention under Article 202, makes the same necessary as talks about implementing procedures conferred upon the commission, as primary legislation is not sufficient to govern a highly interventionist state. Delegated legislation matters increasingly as the same is pertinent with reference to the Henry VIII clauses. Also referring to the words of Montesquieu who cited the fear of tyranny, the very same view echoed in the commentaries of Blackstone, however, the democratic legitimacy has led to the end of these concerns.

Paying heed to the American approach, as a great deal of similarity exists between it and the German law. The Supreme Court once forced congress to set standards by means of delegating of statutes for executive regarding the extent of legislative powers²⁵. The parallel is striking but not surprising, since during the inception of German law during World War II, the American law was the very basis. In the meantime, American law has diverged from the German approach, as now the phenomena of delegating unlimited legislative powers to the executive has become a common fashion. In American law, there is no requirement that delegated legislation are exercised in an unlimited manner as are in Germany and in Britain answerable to parliament.

Considering the British approach as there the practice of delegating legislative powers seems to be similar to that of the British System, as there the very foundation of the constitutional law is nothing but unlimited parliamentary sovereignty. The power as given tends to be decisive upon matters of policy matters. A comparative assessment of the different approaches entails that adoption of American and British regulatory approach under German law nevertheless seems inappropriate. Also it places a limit on substantive predetermination on enabling legislation.

²⁵Wayman V Southard, (1825) 23 US.

VIII. CONCLUSION

After conducting a detailed research on the concept of Delegated Legislation, it can be well concluded that even if the legislature is well burdened with so many things, and indeed delegation has become an inevitable truth, still the same should be exercised within limits and the very phenomena of excessive delegation should be discarded right off the bat, in absence of which our democracy shall be in jeopardy. Even the Apex Court from time to time has tried to shape the concept of Delegated Legislation. Delegated Legislation is subjected to a Judicial Review only if violates the fundamental rights of the citizens provided by the Indian Constitution.