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Administrative Law and Doctrine of Excessive Delegation

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ABSTRACT

There is nothing inherent in a system of administrative justice that renders it either superior or inferior to the system of legal justice administered by courts. It is important, however, to recognize the intrinsic differences between administrative and legal justice. The cornerstone of legal justice is due process. Outcomes are considered just to the extent that they were attained by way of fair procedures. In a very real sense, having one's day in court is the essence of legal justice. Administrative justice, by contrast, is arrived at by way of a more open-ended and fluid process. Though the fairness of administrative process is often an important consideration, the principal justification for administrative action is its rationality. A responsible and honest system of administrative justice is as capable of serving the interests of a free people as a federal "judiciary of high competence and character." By the same token, an unaccountable system of administrative justice is as dangerous as an unprincipled judiciary. Safeguards are needed to ensure the faithful prosecution of the people's business by agencies and courts alike. The author believes that institutional safeguards of a nation's system of administrative justice have been seriously weakened by excessive delegation and that judicial review by the court is played out like a cynical shell game, in which the government always wins, and the institutional checks and balances of administrative power are proven to be ineffectual, thereby stressing upon the need of ensuring the doctrine of excessive delegation to ensure due process.

Keywords: Administrative Law, Courts, Delegation, Due process, Judiciary, Justice.

I. INTRODUCTION

*"Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences."*²

—Justice Samuel Alito

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² Dep't of Transp. v. Association of Am. R.Rs., 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

In this modern Welfare State, governmental activity has pervaded almost every field of human Endeavour, thus, necessitating enactment of multifarious laws to regulate this ever-widening activity.³ The Legislature does not have enough time to deliberate upon, discuss and approve all the regulatory measures required to implement the enacted law and here comes the requirement of delegated legislation. Moreover, law-making has now become a complicated and technical matter, and law must be flawless in technical details. Delegated legislation is nothing, but the law made by a person or body other than the legislature but with the legislature's authority. In India, the legislature is vested with wide powers of delegation, but this delegation is restricted to certain limitation, to curb the issue of excessive delegation. The question of controls of delegated legislation therefore assumes importance if the executive is not to be allowed to act arbitrarily. The doctrine of excessive delegation is applied by the courts to adjudge the validity of the provision delegating the power. Therefore, too broad power ought not to be vested in the Executive as it leads to dilution of both accountability and oversight of the original administrative authority. The question today that lies, is not whether there should be delegated legislation or not, but to ensure that power given to the Administration is exercised properly, under proper controls, so that benefits to the administrative institutions may be minimized.

II. RESEARCH QUESTION:

Q. How doctrine of excessive delegation is an immediate corollary of doctrine of separation of powers and whether this approach of preventing excessive delegation is suitable for the purpose of ensuring due process?

“Power corrupts and absolute power tends to corrupt absolutely.”

The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs should be separate, distinct, and sovereign in its own sphere so that one does not trespass the territory of the other. The doctrine of separation of powers was based on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons⁴.

Under the U.S. Constitution, this theory has been applied to a certain extent, giving judiciary a unique position. As Hughes C.J., once said, “We are living under a Constitution, but the Constitution is what the judges say it is.” The framers of the U.S. Constitution have strictly

³ Kumari A, *Control Mechanism over Delegated Legislation*, 6 (2) IJCRT, 1 (2018).

⁴ Rao, P. *Separation of Powers in a Democracy: The Indian Experience*, 37(1) Peace Research, 113-122 (2005).

adhered to this doctrine of separation of powers. But, in actual practice it has been seen that this rigidity in the form of watertight compartments is not possible. Therefore, functionally the constitutional provisions are premised on the principle of checks and balances.⁵

The doctrine of non-delegation of legislative power which is the direct corollary of the doctrine of separation of powers is based on the eternal truth that concentration of political power in the hands of very few public authorities is a danger to the individual liberty of the inhabitants. The following words of Montesquieu is worthy of frequent repetition:

"Miserable indeed would be the case, where the same man or the 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 that of judging the crimes or differences of individuals⁶."

It was the great truth underlying the above statement that persuaded the Supreme Court of India to accept in the case of *In re Delhi Laws Act*⁷, that under the Republic, India has parted with *Queen v. Burah*⁸ and adopted the American view that somewhere in the background there is a limit to the power of the legislature, to delegate law-making to the executive. In the case of *Queen v. Burah*⁹, the Privy Council observed that Indian legislature was not an agent or delegate, but was intended to have plenary powers of legislation, and of the same nature of the parliament itself. It was observed that Indian legislature had exercised its judgment as to the place, person, law, powers and what the governor was required to do was to make it effective upon fulfilment of certain conditions. This was called conditional legislation which was upheld by the court. But on the practically important question of delegating power to make substantive law to other bodies short of general total self-effacement but without any standard or safeguard, the privy council did not seem to have expressed any opinion.¹⁰ There was a lot of confusion regarding delegated legislation after these cases. The question of moot was whether the legislature of Independent India should be restricted to such rules or should it be given greater freedom? The next step of confusion was whether India should follow American model where unlimited power cannot be delegated or like that of England where, as much power can be delegated¹¹?

⁵ William Marbury v. James Madison [(1803) 2 Law Ed 69: 1 Cranch 138].

⁶ JUSTICE, THAKKER, C.K. (TAKWANI) & MRS. THAKKER, M.C. *LECTURES ON ADMINISTRATIVE LAW*. (Eastern Book Company. Lucknow, 4th Edition) (2010).

⁷ AIR 1951 SC 332.

⁸ (1878) LR 3AC 889.

⁹ Ibid.

¹⁰ *Supra* note 10.

¹¹ Shukla, V. *Judicial Control of Delegated Legislation in India*. 1(3) Journal of the Indian Law Institute, 357-374 (1959).

Further, Indian constitution was silent on the issue whether legislature can delegate or not. Moreover, in *Jatindra Nath v Province of Bihar*¹², the court invalidated provision in question, on the ground that the power conferred on the executive to extend the life of the Act was delegation of legislative power and not conditional legislation because the impugned delegation in that case was found to amount to abdication and the creation of a parallel legislature¹³. It was this decision that had necessitated the reference in the Delhi Laws Acts¹⁴ case in which the court was of the view that:

- There is a limitation on delegation of power. Legislature cannot delegate its essential functions.
- Only ancillary functions can be delegated.
- Parliament completely cannot abdicate itself by creating a parallel authority.

The attempt of the majority in the Delhi Laws Act¹⁵ case, it appears, was to free the Indian Legislature from the artificial shackles put on it by the Privy Council through its pronouncement in *Queen v. Burah*¹⁶. The case further clarified that since the legislature derives its power from the Constitution, excessive freedom like in the case of British constitution cannot be granted and limitations are required and thus USA model would be adopted in India and since legislature is very much under the thumb of the executive, thus India is not ready for unlimited delegation of power.¹⁷ Thus, even though the framers of the Indian Constitution did not recognize the doctrine of separation of powers in a rigid sense it is not completely alien to our Constitution. As we retrospect, relevant classic jurisprudence like *Ram Jawaya v. State of Punjab*¹⁸, clearly elucidates this principle. Chief Justice Mukherjea in the instant case said: “*It can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way*”. Thus, it can be inferred from the above that these organs of the government are allowed to exercise their functions but within certain limits. These limits were silver lined constitutionally and the

¹² AIR 1949 FC 175 (A).

¹³ Aggarwal C., *In Re Delhi Law Acts Case: Landmark in Concept of Delegated Legislated in India*. <http://www.manupatra.com/roundup/333/Articles/In%20re%20Delhi%20Laws%20Act%20Case.pdf> (last visited on 20th September 9:15 AM).

¹⁴ *Supra* note 9.

¹⁵ *Supra* note 9.

¹⁶ *Supra* note 10.

¹⁷ *Gwalior Rayon Silk Manufacturing Co. v Assistant Commissioner of Sales Tax* (1974) 4 SCC 1660.

¹⁸ A.I.R. 1955 S.C. 549.

same also guaranteed limitable encroachments in the form of doctrine of excessive delegation that was based upon the legal maxim of '*delegatus non protest delegare*', which in simple language means that a delegated authority cannot be redelegated, or, in other words, one agent cannot lawfully appoint another to perform the duties of agency. The Constitution of India has been founded upon the fundamental principle of Rule of law and therefore it must be remembered that the quality of excellence of governance is evaluated on the touchstone of efficacy and the strength of Judicial mechanism¹⁹.

The author is of the view that with the abandonment of laissez faire and advent of modern philosophy of a "welfare" state, legislature can hardly find time and expertise to enter into matters of detail. Sub-ordinate legislation within a prescribed sphere is a practical necessity and pragmatic need of the day, but at the same time it is essential to maintain an optimal balance between the powers given to different organs of the government because the state is "Parens Patriae" and thus it is the duty of the state to intervene against any abusive of power. Thus, doctrine of excessive delegation is important for ensuring due process because it highlights the importance of delegation while also emphasizing upon the negative effects of unwarranted and excessive delegational powers exercised by administrative authorities.

A. Anti-delegation Policies

- 1. Democratic Accountability.** - The most prominent argument advanced by the proponents of strict nondelegation is the desirability of having public policy made by actors who are accountable to the people²⁰. For the proponents of strict nondelegation, accountability refers to "the relationship between government and citizens and whether the person who actually exercises policymaking authority "can be monitored and controlled.
- 2. Policy Drift** - Another concern that has loomed large in the delegation literature is the danger that agencies will promote policies that diverge from those intended by the enacting legislature. This problem of "agency capture"²¹ is based on the interest group theory of politics, which posits that different groups have different degrees of influence on policymakers based on their costs of organizing for effective political action, thus, powerful interest groups will enjoy greater influence on the policy making.

¹⁹ Ganguly, B. *Administrative Legislation in Modern India: A Preface*, 29(1) The Indian Journal of Political Science, 36-43 (1968).

²⁰ Posner, E., & Vermeule, A. *Interring the Nondelegation Doctrine*, 69(4) The University of Chicago Law Review, 1721-1738 (2002).

²¹ Manning, J. *The Nondelegation Doctrine as a Canon of Avoidance*, The Supreme Court Review, 223-234 (2000).

3. **System of Checks and Balances-** The system of checks and balances is one of the most salient features of our constitutional scheme. Democracy dictates a system in which every citizen can, without fear of retribution, breathe, express himself, and pursue his or her interests. It enables him to live a life of his choice to the extent he does not encroach upon the rights of the other people. It is in this context that it can be presupposed that a system of balances and counterbalances exists among the three organs of the government to ensure a strong nurtured democratic system. The Legislature, the Judiciary and the Executive are the pillars of democracy. Thus, all the three organs are expected to work in harmony instead of giving primacy to only one of the organs. Bestowing absolute power is anathema to democracy²².
4. **Facilitating Judicial Review:** Strict nondelegation is that it is necessary for full and effective judicial review of administrative action. Courts review agency actions in order to determine whether they are contrary to law. The denser the backdrop of statutory law, the more opportunities there will be for judicial review of agency action based on alleged conflicts with the agency's statutory mandate²³.

B. Pro-delegation Policies-

1. **Pressure upon Parliamentary Time:** As a result of the expanding horizons of State activity, the bulk of legislation is so great that it is not possible for the legislature to devote sufficient time to discuss all the matters in detail. Therefore, legislature formulates the general policy and empowers the executive to fill in the details by issuing necessary rules, regulations, byelaws, etc. In the words of Sir Cecil Carr, delegated legislation is “*a growing child called upon to relieve the parent of the strain of overwork and capable of attending to minor matters, while the parent manages the main business*”²⁴.
2. **Technicality:** Sometimes, the subject-matter on which legislation is required is so technical in nature that the legislator, being himself a common man, cannot be expected to appreciate and legislate on the same, and the assistance of experts may be required. Members of Parliament may be the best politicians, but they are not experts to deal with highly technical matters which are required to be handled by experts.
3. **Flexibility in case of emergency or unforeseen situations:** At the time of passing any legislative enactment, it is impossible to foresee all the contingencies, and some

²² Ibid.

²³ *Supra* note 4.

²⁴ *Supra* note 5.

provision is required to be made for these unforeseen situations demanding exigent action. A legislative amendment is a slow and cumbersome process, but by the device of delegated legislation, the executive can meet the situation expeditiously

4. **Experiment:** The practice of delegated legislation enables the executive to experiment. This method permits rapid utilization of experience and implementation of necessary changes in application of the provisions in the light of such experience.
5. **Complexity of Modern Administration:** The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions.

III. CONCLUSION

Justice P.B. Mukherjee has stated; *“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. It is praised as a necessity and felt as inevitable in our world where social economic technological psychological and administrative speed outstrips the spacious and placid traditional legislative ideals and processes. It is criticized as an abdication of power by legislators and an escape from the duty imposed on them by voters of democracy.”*

In conclusion, while laying down the importance of doctrine of excessive delegation in ensuring both separation of power as well as due process, the researched would like to enunciate that the entrustment of legislative power without laying down policy is inconsistent with the basic concept on which our constitutional scheme is founded. Our Constitution-makers have entrusted the power to legislate to the elected representatives of the people, so that the power is exercised not only in the name of the people, but by the people. The rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of the people. It is not claimed to be nor intended to be a panacea against the shortcomings of public administration. Governance of the State in manner determined by the people through their representatives being of the essence of our form of government, the plea that a substitute scheme for governance through delegates may be more effective is destructive of our political structure.
