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Judicial Review of Delegated Legislation: Emerging Trends

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Abstract : Modern legislatures formulate the broad policy and delegate the details of its execution to the executive through rules, regulations, notifications and bye-laws. The bulk of today's legislation takes the form of delegated legislation, and the manner of judicial review of the instruments defines the degree of maintenance of the rule of law in the administrative state. The paper analyzes Indian judicial doctrines on the judicial review of delegated legislation, tracing its evolution. Applying the doctrinal method, it follows the evolution of the jurisprudence on excessive delegation from In re Delhi Laws Act (1951) to the recent Supreme Court rulings and evaluates the development from the vires-based test to the combination of vires and reasonableness. The results show that judicial review has evolved from evaluation of the power to the assessment of the quality of delegated legislation, with courts now willing to strike down rules of arbitrary nature. However, the doctrine of excessive delegation is hardly enforced, and the legislative control is inadequate as well. The paper recommends further steps in terms of clear guidelines, consultation and scrutiny of Parliament.

Keywords: delegated legislation; excessive delegation; ultra vires; manifest arbitrariness; judicial review; administrative law

Introduction

It is impossible for the legislature to anticipate every detail of life in the complex society and regulate it. Therefore, the legislature adopts statutes, in which it formulates the policy and authorizes the executive or another statutory body to enact rules implementing that policy. Delegated legislation, also known as subordinate legislation, represents that authorization. The delegated legislation takes the form of rules, regulations, orders, notifications and bye-laws and pertains to taxation, trade, environmental protection, education, telecommunications, and many other spheres. The volume of the delegated legislation exceeds the volume of the primary legislation significantly.

However, the problem arises in this practice, as the Constitution confers legislative power on Parliament and on the legislatures of the states. But rules promulgated pursuant to the authorization take effect with the same force as statutes. Excessive delegation, if

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permitted, entails transfer of the legislative power to the executive, bypassing the debate and the responsibility. The judicial review represents one of the mechanisms to constrain such a transfer, and the others include the parliamentary scrutiny and the procedural requirements.

Indian courts have reviewed delegated legislation in terms of the excess of delegation and conformity with the statute and the Constitution. In the recent decades, courts have expanded their review to consider whether the instrument in question is reasonable and non-arbitrary. The development is important, as it implies transformation of the judicial review of delegation from the assessment of the competence to the assessment of the quality. This paper analyzes the trend and poses three questions: What is the traditional framework of the review? How has it transformed, and why? What residual difficulties remain?

Literature Review

Traditional works on administrative law characterize the delegated legislation as a necessary element of modern state, and the review as a judicial mechanism to prevent the possible abuse. In particular, Wade and Forsyth (2014) define the ultra vires doctrine as the basic principle, according to which the delegate acting beyond the statute lacks the power, and his rule is void. Furthermore, the grounds of the judicial review have expanded to include unreasonableness and non-conformity to the mandatory procedures. Indian legal scholars adopt the same approach in distinction of review into the substantive and procedural ultra vires, as well as review for constitutionality (Jain, 2018; Seervai, 1993).

The question of permissible extent of the legislative delegation was considered for the first time in In re Delhi Laws Act (1951). The Court decided that the legislature could delegate ancillary or subsidiary powers but could not abdicate its basic functions or efface itself. Different opinions in this case included different formulations of the permissible extent of the delegation, and subsequent cases have attempted to elaborate the content of that doctrine. Thus, Harishankar Bagla v. State of Madhya Pradesh (1954) established that the legislature should declare the policy and the standards and that the legislative function could not be delegated in its basic part. Hamdard Dawakhana v. Union of India (1960) declared invalid a provision leaving the crucial issue to the executive, because the policy was not formulated in the statute.

Further scholarly attention has focused on the quality of the delegated rules. In Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India (1985) the Court recognized that the subordinate legislation, unlike the statute, could be challenged for unreasonableness or arbitrariness. This rationale was applied in State of Tamil Nadu v. K. Shyam Sunder (2011), where the validity of the delegated legislation was questioned for the manifest arbitrariness. In Cellular Operators Association of India v. Telecom Regulatory Authority of India (2016) the Court declared invalid the regulations for among other things arbitrariness. In Shayara Bano v. Union of India (2017) the Court used Nariman J's manifest arbitrariness test to plenary legislation (Jain, 2018).

Comparison reveals the similar trend in English administrative law: the shift from a narrow vires test to a broader test, which includes the grounds of irrationality, improper purpose and procedural unfairness, and parliamentary committees to review the statutory instruments (Wade & Forsyth, 2014). Overall, the literature indicates the need for the judicial review to be supplemented by the legislative oversight.

Thus, two gaps appear. Firstly, in the scholarly literature on the Indian law excessive delegation and arbitrariness are usually considered separately, without the discussion of the possible interaction between them. Secondly, the literature does not pay sufficient attention to the difference in reviewing of the statutes and subordinate legislation. The current paper attempts to fill in the gaps.

Research Methodology

The paper uses the doctrinal and analytical methodology. The primary sources include the Constitution of India, pertinent statutes and the reported decisions of the Supreme Court of India. The secondary sources are the standard textbooks and commentaries on the constitutional and administrative law. The cases, which dealt directly with the review of the delegated legislation, were chosen and analyzed to understand the reasoning and the level of the doctrine development in them. The method is chronological and critical: the cases are arranged chronologically, every principle

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stated is compared to the earlier ones, and the changes in reasoning are analyzed. No empirical data were collected; statistical information about the volume of the delegated legislation should be found in the official records in the final version of the paper.

Framework of Review

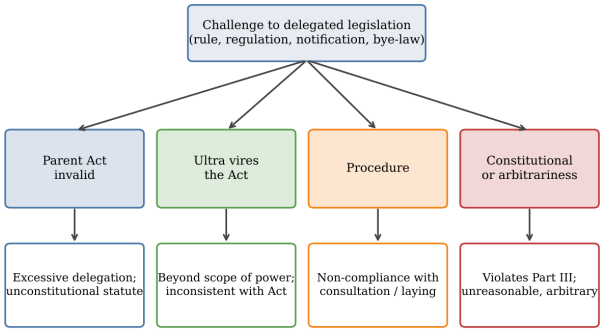
The challenge to the delegated legislation could rely on several grounds, as is shown in Figure 1 and Table 1 below. The first ground states that the parent Act is invalid, as it delegates the essential legislative functions without proper guidance or violates a fundamental right. The second ground suggests that the rule is ultra vires the Act, either due to excess of delegation or conflict with the Act. The third ground refers to the procedural defect: the delegate has failed to comply with certain requirements such as prior publication or consultation or laying before the legislature. The fourth ground is the violation of the Constitution or unreasonableness or arbitrariness.

Table 1. Grounds for challenging delegated legislation

Grounds and Illustrative Explanations

Ground	Meaning	Illustration
Invalid parent Act	The statute delegates essential legislative functions or violates the Constitution	Delegation without policy or standard (Hamdard Dawakhana)
Substantive ultra vires	The rule goes beyond the power given by the Act or conflicts with its provisions	Rule creating an offence the Act does not authorise
Procedural ultra vires	Mandatory procedure such as consultation or publication was not followed	Rule made without required prior publication
Constitutional invalidity	The rule violates fundamental rights or other provisions	Rule imposing an unreasonable restriction on trade
Unreasonableness or arbitrariness	The rule is manifestly arbitrary or irrational	Cellular Operators

Figure 1. Grounds on which delegated legislation may be challenged.



Excessive delegation

The doctrine of the excessive delegation sets the outer limit of the delegation. In In re Delhi Laws Act the Court has acknowledged that the delegation is an inseparable part of legislative power, but it has ruled that the legislature could not abdicate its essential function, which was formulation of legislative policy and crystallization of that policy in the rule of conduct. In Harishankar Bagla the Court specified that the legislature should articulate the policy and the standard, while the delegate should fill in the details. The test of the Hamdard Dawakhana was applied to the provision leaving the executive to decide the scope of the law. In practice, however, the Court has been liberal in deducing the policy from the preamble, the scheme and the purpose of the statute, resulting in few failures of the delegations to pass this test.

Ultra vires and procedure

The traditional test of ultra vires checks whether the rule falls within the authorized power and remains consistent with the statute. The rule exceeding the enabling statute or conflicting with it is void, as the delegate lacks the power to modify or amend the parent Act. In case the statute includes the procedures (for example, consultation and publication), courts distinguish between mandatory and directory requirements and find the rule to be void primarily due to violation of the former. Requirement of laying the rules before the

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legislature is treated as directory, reducing its effectiveness as a safeguard.

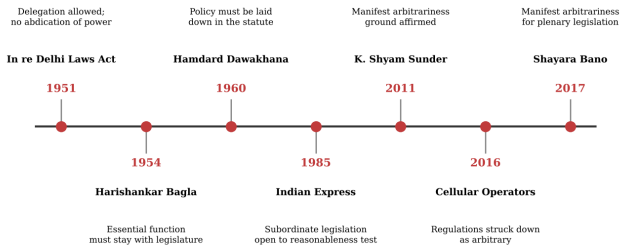
Emerging Trends

Key decisions are summarized in Table 2 and Figure 2 below, reflecting the shift from the narrow consideration of the vires to the consideration of the quality of the subordinate rules.

Table 2. (Text of the table and figure 2 omitted.)

Case	Principal holding
In re Delhi Laws Act, AIR 1951 SC 332	Delegation is permissible but the legislature cannot abdicate its essential functions
Harishankar Bagla v. State of M.P., AIR 1954 SC 465	Policy and standard must be laid down by the legislature; details may be left to the delegate
Hamdard Dawakhana v. Union of India, AIR 1960 SC 554	Provision leaving the core of the matter to the executive without policy was invalid
Indian Express Newspapers v. Union of India, (1985) 1 SCC 641	Subordinate legislation may be challenged for unreasonableness and arbitrariness
Vasu Dev Singh v. Union of India, (2006) 12 SCC 753	Delegated legislation must conform to the Act and the Constitution and is open to review
State of T.N. v. K. Shyam Sunder, (2011) 8 SCC 737	Delegated legislation may be struck down for manifest arbitrariness
Cellular Operators Assn. v. TRAI, (2016) 7 SCC 703	Regulations quashed as arbitrary and unreasonable
Shayara Bano v. Union of India, (2017) 9 SCC 1	Manifest arbitrariness applied as a ground to invalidate plenary legislation

Figure 2. Evolution of the law governing delegated legislation.



From vires to reasonableness

The trend reflects the shift from the assessment of mere competence to the assessment of the quality. In Indian Express the Court has held that the subordinate legislation stands on a different footing from the statutes. As the delegate lacks plenary legislative power, its rules could be challenged for unreasonableness, arbitrariness or lack of rational link to the purpose of the Act. Cases in K. Shyam Sunder and Cellular Operators have applied that reasoning to find the rules invalid, and the ruling in Shayara Bano has added the argument: if even a statute fails the manifest arbitrariness test, the rule adopted under it has little chance to pass that test.

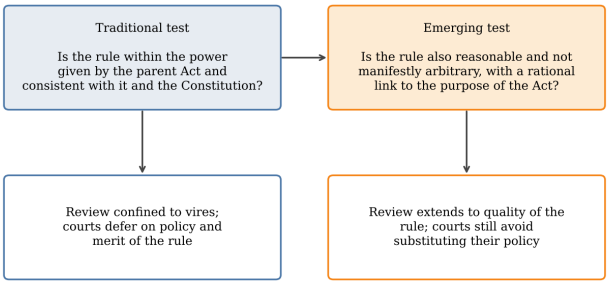
Table 3. Traditional and emerging approaches to review

Aspect	Traditional approach	Emerging approach
Main question	Does the rule fall within the power?	Is the rule also reasonable and non-arbitrary?
Standard	Vires and consistency with the Act	Vires plus rationality and proportion to the purpose
Role of the court	Confined to competence	Examines quality while respecting policy
Risk	Under-enforcement of limits	Intrusion into policy and technical judgment

Figure 3. Traditional and emerging standards for reviewing delegated legislation.

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Technical Regulators and Deference

Another trend concerns the review of regulations adopted by the technical regulators. In Cellular Operators the Court has scrutinized the regulations adopted by the telecommunications regulator and found them invalid on the grounds of arbitrariness, despite the fact that the contested judgments concerned technical and economic considerations. The decision shows that the regulatory expertise does not shield the actions of the regulator from judicial review. At the same time, the courts have made it clear that they will not substitute their preferences for those of the regulator. Drawing the line between an arbitrary rule and an imprudent one requires the case-by-case consideration, and the existing cases offer little guidance for it.

Analysis

The proponents of the reasonableness test claim that it is justified. The delegated legislation originates from the bodies lacking the democratic legitimacy of the legislature and subject to reduced scrutiny; therefore, a stricter standard of review is needed. Furthermore, the standard allows the procedural remedy in case the rule falls within the literal ambit of the power but is manifestly irrational or unfair.

However, three problems lessen the rationale. Firstly, the standard of manifest arbitrariness is vague. Courts use it to invalidate the rules, which are irrational, inconsistent or lack reasonable basis; nevertheless, no stable test of the standard has been developed, making the outcome of the litigation unpredictable. The approach could be more systematic, and it should check whether the rule maintains the rational link to the purpose of the Act, whether all relevant considerations were taken into account and whether the rule is disproportional to its purpose.

Secondly, the doctrine of the excessive delegation is poorly enforced. If courts accept any formulation of the policy as sufficient, the delegation lacking the sufficient guidance will continue, and the task of correcting the abuses will fall on the arbitrariness review after the fact. It would be better to impose the requirement of clear standards in the enabling statute, improving both the rule of law and the legislative accountability.

Thirdly, the judicial review represents the incomplete control mechanism. Courts will interfere only if the challenge was filed and succeeded; that leaves a considerable number of rules unchecked, as they are never challenged. Hence, the legislative control is inevitable. The parliamentary committees on the subordinate legislation exist, and the rules are generally required to be laid before the respective chambers; however, laying is often treated as purely formal and the committees have little capacity and influence. The same applies to consultation: in case it is not required by the statute, the rules are often adopted without any consultation.

Identified Gaps and Proposed Responses

Table 4. Identified gaps and suggested responses

Gap	Suggested response
Vague standard of arbitrariness	Structured test of rational link, relevant considerations and proportion
Weak enforcement of excessive delegation	Clear policy and guidelines in enabling statutes
Laying requirement treated as directory	Statutory consequences for failure to lay rules
Limited consultation	Mandatory pre-publication and reasoned response for significant rules
Limited parliamentary scrutiny	Strengthened committees with time, staff and follow-up powers

Findings

The research shows that Indian law on delegated legislation evolves along two paths. The traditional framework of the excessive delegation and ultra vires is still essential, but it has been supplemented by the reasonableness-and-arbitrariness test, applicable to the rules and regulations, including those adopted by

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technical regulators. The courts have been more active in applying the test than in enforcing the limits on delegation, and the arbitrariness test is not fully developed yet. The legislative control in terms of laying and committee scrutiny is ineffective too.

Suggestions

The following four measures are proposed. First, the legislature should formulate the clear policy and guidelines in the enabling statutes. Second, the definition of the arbitrariness test in terms of rational connection, relevant considerations and proportionality would increase the predictability. Third, there ought to be a law regulating the making of subordinate legislation which should require procedures before promulgation, consultation and providing reasons for important rules along with consequences for non-laying of rules before the parliament. Fourth, there should be adequate time and manpower available for parliamentary committees to examine rules systematically and to find out.

Conclusion

Delegated Legislation is essential but it has to be subject to control by the legislature and courts. Indian legal theory has moved from asking questions about whether a rule falls within the competence of the delegate to whether it is reasonable which is consistent with the rule of law. The new approach needs a better structure and should be supplemented with proper statutory drafting, consultation and legislative scrutiny. Judicial review alone cannot regulate the volume of sub-ordinate legislation; when it is supplemented with the latter, it can ensure that delegation is not abused.

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