JUDICIAL REVIEW OF POLICY DECISIONS OF THE GOVERMENT: NEW CHALLENGES AND DIMENSIONS OF JUDICIARY IN INDIA

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I. Introduction

Judicial review is the cornerstone of constitutionalism which implies limited Government. It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

The Constitution of India invests our independent judiciary, especially the Apex Court with extensive jurisdiction over the acts of the legislature and the executive. Judicial review is part of the basic structure and cannot be altered even by amending the Constitution. It is the judiciary which ensures the effectiveness of Judicial Review. The independence and integrity of our judiciary is therefore of the highest importance not only to the judges but also to people at large who seek judicial redress against perceived legal injury or executive excess.

In India the power to enforce the fundamental rights was conferred on both the Supreme Court and the High Courts. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.

In recent years the judiciary has widened its field of operation by declaring judicial review as a basic feature of the Constitution. Supreme Court has not merely interpreted the language of the Constitution but also pronounced on issues which involve matters of policy.

The power of judicial review has in itself the concept of separation

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of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf by the courts.

II. Delegated Legislation in Welfare State and It's Scope in India

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled.

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting.

In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions. The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights would be void. Besides, there are

number of judicial pronouncements by the courts where they have justified delegated legislation[2].

While commenting on indispensability of delegated legislation Justice Krishna Iyer, has rightly observed in the case of *Arvinder Singh v. State of Punjab*[3], that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plenitude, proliferation and articularisation. Delegation of some part of legislative power becomes a compulsive necessity for viability.

III. Judiciary and Policy Decisions: Does Judiciary Interfere in the Policy Decisions of the Government in India

The Indian judiciary was given the uphill task of upholding the right of constitutional remedies. Chairman of the Drafting Committee of the Constitution, Dr B.R. Ambedkar, aptly quoted this recourse to judicial authorities for upholding the right to constitutional remedies as the heart and soul of the Indian Constitution[4].

The magic wand of judicial review calls for an interference only when patently manifest farce is played on the Indian Constitution. Powers, when used on the stilts of justification, result in redefinition of its ambit, whereas, inappropriate use of its refulgence departs the sheen of its glory.

Constitution of India is based on the basic principle of "separation of powers", though there is some overlapping. There are mainly three wings of the State, namely, legislature, executive and judiciary. Each wing of the State has the power to act in its own sphere of activity. Legislature is to make laws. Executive is to make policies (subject to law), implement them, and run the administration. Judiciary is to apply laws, interpret laws, and to decide disputes and deliver justice. This is only a basic description of their activities.

Therefore, making policies and executing them comes within the sphere of activities of the executive. It is not within the power of the judiciary. Moreover, the judiciary does not have the expertise and the domain knowledge to make policies or to amend them. On the other hand, the executive has experts, professionals, administrators, advisors, etc., in a

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2 *In re Delhi Laws Act case,* AIR 1961 SC 332*; Vasantlal Magan Bhai v. State of Bombay,* AIR 1961 SC 4*; S. Avtar Singh v. State of Jammu and Kashmir,* AIR 1977 J&K 4

3 AIR 1979 SC 321

4 H.R. Khanna*, Making of India's Constitution*, Eastern Book Company, 2008.

given field and has the expertise to make policies after taking into consideration all aspects of a matter.

Generally, the judiciary does not interfere in the policy decisions of the Government which are in the domain of the executive. However, there are situations where the courts may interfere in the policy decisions of the Government. For example, if a policy decision is in violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution, the courts may intervene. Likewise, if a policy decision violates an Act of the Parliament or the Rules made thereunder, the courts may again intervene.

In the case of *Col. A.S. Sangwan v. Union of India*[5], the Supreme Court held as under (in the words of Justice V.R. Krishna Iyer):

> "*A policy once formulated is not good for ever; it is perfectly within the competence of the Union of India to change it, rechange it, adjust it and readjust it according to the compulsions of circumstances and the imperatives of national considerations. We cannot, as court, give directives as to how the Defence Ministry should function except to state that the obligation not to act arbitrarily and to treat employees equally is binding on the Union of India because it functions under the Constitution and not over it*."[6]

Though this judgment is in respect of the facts of a particular case, the legal principles laid down in it are applicable in other similar situations where policy decisions are taken or changed by the Government from time to time.

In the case of *DDA v. Joint Action Committee, Allottee of SFS Flats*[7], the Supreme Court held as under:

> " *An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review*."[8]

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5 AIR 1981 SC 1545
6 *Ibid*.
7 AIR 2008 SC 1343
8 *Ibid*.

"Broadly, a policy decision is subject to judicial review on the following grounds:

(*a*) if it is unconstitutional;

(*b*) if it is dehors the provisions of the Act and the regulations;

(*c*) if the delegatee has acted beyond its power of delegation;

(*d*) if the executive policy is contrary to the statutory or a larger policy."[9]

Above two decisions of the Supreme Court are only representative of a large number of decisions on this issue. The basic principle remains the same. Judiciary will generally not interfere in the policy decisions of the Government.

A policy decision taken by the Government is not liable to interference[10], unless the Court is satisfied that the rule-making authority has acted arbitrarily or in violation of the fundamental right guaranteed under Articles 14 and 16[11]. Dealing with the powers of the Court while considering the validity of the decision taken in the sale of certain plants and equipment of the Sindri Fertilizer Factory, which was owned by a public sector undertaking, to the highest tenderer, the Supreme Court in *Fertilizer Corpn. Kamgar Union (Regd.), Sindri v. Union of India*[12], while upholding the decision to sell, observed that:

> " … *We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquieu system of separation of powers. The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration*."[13]

In *Premium Granites v. State of T.N.*[14], while considering the court's powers in interfering with the policy decision, it was observed that:

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9 *Ibid*.
10 *Akhil Bharat Goseva Sangh v. State of A.P.*, (2006) 4 SCC 162
11 *K. Narayanan v. State of Karnataka*, AIR 1994 SC 55
12 (1981) 1 SCC 568
13 *Ibid*.
14 (1994) 2 SCC 691, 714, para 54 : (1994) 1 SCR 579

> "*It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be……"*[15]

The validity of the decision of the Government to grant licence under the Telegraph Act, 1885 to non-government companies for establishing, maintaining and working of telecommunication system of the country pursuant to government policy of privatisation of telecommunications was challenged in *Delhi Science Forum v. Union of India*[16]. It had been contended that telecommunications was a sensitive service which should always be within the exclusive domain and control of the Central Government and under no situation should be parted with by way of grant of lance to non-government companies and private bodies. While rejecting this contention, it observed that:

> " … *The national policies in respect of economy, finance, communications, trade, telecommunications and others have to be decided by Parliament and the representatives of the people on the floor of Parliament can challenge and question any such policy adopted by the ruling Government*…."[17]

The reluctance of the court to judicially examine the matters of economic policy was again emphasised in *Bhavesh D. Parish v. Union and India*[18] and while examining the validity of Section 45-S of the Reserve Bank of India Act, 1934, it was held that the services rendered by certain informal sectors of the India economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation station of the infirmities in the economy can

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15 *Ibid*.
16 AIR 1996 SC 1356
17 *Ibid*.
18 (2000) 5 SCC 471

be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

In *Narmada Bachao Andolan v. Union of India*[19], there was a challenge to the validity of the establishment of a large dam. It was held by the majority that:

> "*It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution…*"[20]

Buttressing the same point in *Balco Employees' Union (Regd) v. Union of India*[21], it was held that in a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court.

Faith reposed on the judiciary demands recognition of its limits. In *Printers (Mysore) Ltd. v. M.A. Rasheed*[22], the Supreme Court drawing from Dawn Oliver in Constitutional Reforms in the UK under the heading "The Courts and Theories of Democracy, Citizenship, and Good Governance" at p. 105 stated that:

> *" … . However, this concept of democracy as rights based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risks for the Judges and for the public. Courts may interfere inadvisedly in public administration*."[23]

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19 (2000) 10 SCC 664
20 *Ibid*.
21 AIR 2002 SC 350
22 (2004) 4 SCC 460
23 *Ibid*.

The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same[24].

In *Ugar Sugar Works Ltd. v. Delhi Admn*.[25], quoting law laid down in an English Court, the Supreme Court said that:

> "It would also be prudent to recall the following observations of Lord Justice Lawton in *Laker Airways Ltd. Deptt. of Trade*[26], while considering the parameters of judicial review in matters involving policy decisions of the executive: In the United Kingdom aviation policy is determined by Ministers within the legal framework set out by Parliament. Judges have nothing to do with either policy making or the carrying out of policy. Their function is to decide whether a Minister has acted within the powers given him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his powers, he must stop doing what he has done until such time as Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."[27]

Apart from the decisions rendered by the Supreme Court in the supra cited judgments, in catena of other cases, the court has dithered to indulge itself with matters involving domains of the executive and the legislature. The courts have also refused to interfere with regard to the establishment of Company Law Board[28], education policy[29], economic policy or directions given by Reserve Bank of India[30], price fixation[31], inclusion of a particular language in the Eighth Schedule[32], administration of

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[24] *Federation of Railway Officers Assn. v. Union of India*, (2003) 4 SCC 289 : AIR 2003 SC 1344

[25] (2001) 3 SCC 635

[26] 1977 QB 643 : (1977) 2 WLR 234 : (1977) 2 All ER 182 (CA)

[27] *Supra* at n.24.

[28] *Satish Chandra v. Union of India*, (1994) 5 SCC 495 : AIR 1995 SC 138

[29] *English Medium Students Parent Assn. v. State of Karnataka*, (1994) 1 SCC 550 : AIR 1994 SC 1702

[30] *Peerless General Finance and Investment Co. Ltd. v. RBI*, (1992) 2 SCC 343 : AIR 1992 SC 1033

[31] *Pallavi Refactories v. Singareni Collieries Co. Ltd*., AIR 2005 SC 744

[32] *Kanhaiya Lal Sethia v. Union of India*, (1997) 6 SCC 573

cooperative societies[33], fixing of criteria for admission to a University[34], amongst others.

IV. Judicial Review of Policy Decisions in India: Restraint Exercised by the Judiciary

In our country, restraint consistently exercised by the Judiciary when it came to the review of policy decisions. In *Rustom Cavasjee Cooper v. Union of India*[35] (commonly known as "Bank Nationalization Case") the Supreme Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories.

In *Delhi Science Forum v. Union of India*[36], a Bench of three learned Judges of the Supreme Court held while rejecting a claim against the opening up of the telecom sector, reiterated that the forum of debate and disclosure over the merits and demerits of a policy is the Parliament. It re-stated that the services of the Supreme Court are not sought till the legality of policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions.

In 2012, with regard to the legality on allocation of 2G spectrum on first time serve basis, the Apex Court held as follows:[37]

> *"To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the Executive for such matters".*[38]

In the recent past, the Supreme Court has adjudicated upon various decisions which have had a detrimental effect on the political motives of the Executive. In case of *U. P. power Corpn. v. Rajesh Kumar*[39], the controversy

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[33] *Bhandara District Central Cooperative Bank Ltd. v. State of Maharashtra*, AIR 1993 SC 59

[34] *Jawaharlal Nehru University Students' Union v. Jawaharlal Nehru University*, (1985) 2 SCC 32 : AIR 1985 SC 567

[35] AIR 1970 SC 565

[36] AIR 1996 SC 1356

[37] *Centre for Public Interest Litigation v. UOI,* (2012) 3 SCC 1

[38] *Id.*

[39] (2012) 7 SCC 1

was pertaining to reservation in promotion for the Scheduled Castes and Scheduled Tribes with consequential seniority as engrafted of relaxation grafted by way of a proviso to Article 335 of the Constitution of India. Such reservation had always withstood judicial scrutiny by the dictum in *M. Nagaraj v. Union of India*. The more specific question involved in the present case was the validity of the provisions contained in Rule 8-A of the U. P. Government Servants Seniority Rules, 1991 for brevity 'the 1991 Rules') that were inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules, 2007. The Court observed that:

> "*In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8A of the 2007 Rules are ultra vires as they run counter to the dictum in M. Nagaraj case. The appeals arising out of the final judgment of Division Bench at Allahabad are allowed and the impugned order is set aside."*

In 1995, T.N. Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations.1 The Supreme Court expanded the *Godavarman case*[40] from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy. In its first order on the Godavarman case, the Court suspended tree felling across the entire country, paralyzing wood-based industries.

Despite a series of subsequent orders with far-reaching implications, the case is still pending in the Supreme Court. In the process of hearing over 800 interlocutory applications since 1996, the Court has assumed the roles of policymaker, administrator of policy, and interpreter of law. The Supreme Court's vast assumption of powers concerning environmental issues has no precedence from past cases, neither in India nor in other developing countries. The Godavarman case opened a Pandora's Box that continues to affect industries and forest dwellers across the country.

The Hon'ble Supreme Court, In *B.A.L.C.O. Employees Union (regd.) v. Union of India* quoted[41]

"In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issues.

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[40] *T.N. Godavarman Thirumulpad v. Union of India,* Writ Petition No. 202 of 1995

[41] (2002) 35 SCL 182

Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters".

Much of judicial review's utility exist because it is highly flexible, and when a statute does not provide for a review or appeal, judicial review's inherent flexibility provides the citizen with a remedy where one might otherwise not exist. However, judicial review will not normally be permitted if there is alternative appellate provision.[42]

Then in the *Vodafone International Holding BV v. Union of India*[43], the Supreme Court ruled against tax demand to the tune of 11000 crores rupees and held that the transaction involved was a commercially planned transaction and was not a case of tax evasion or tax mitigation.

Moving in this direction, the apex Court in *Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*[44], was of the opinion that normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution.

Therefore, it was held that grant of concession, exemption, incentive and rebate is a matter of policy with the government under the Central Excise Act, 1944, and hence, Court should not interfere unless found violative of law and Constitution. The Court was quick to add that this principle of judicial review is not a matter of exclusion of the power of judicial review but of judicial "self-restraint". Before us there are various instances where serious administrative actions lapses in government department.

V. Concluding Remarks

Faith reposed on the judiciary by the people of India, stands on a much higher rung than on any other organ of the State. This is because of the judiciary being considered as the land of last resort.

Judicial review of administrative actions is now a well-established norm. It is permissible on the ground of illegality or irrationality or procedural impropriety. But it is also well settled that administrative decisions involving policy considerations have been put on a different pedestal. Though they are not totally immune from judicial review, yet certain grounds, which are available in the case of administrative decisions

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42 *R. v. Brighton Justices,* ex parte Robinson [1973] 1 WLR 69

43 (2012) 6 SCC 613

44 (2005) 3 SCC 369

not involving policy considerations, are not open for challenging the policy decisions.

By and large the courts observe restraint in deciding the validity of issues involving policy. Since, Courts do not sit as an appellate authority over the policy considerations, it cannot examine the correctness, suitability and appropriateness of the policies. The executive has the authority to formulate a policy and the courts can interfere with it only if it violates the fundamental rights enshrined in the Constitution or is opposed to any provision of the Constitution or law. A court cannot interfere with a policy either on the ground that it is erroneous or that a better and fairer alternative was available. The administrative actions and policies of the government which relate to the enforcement of fundamental rights of the people and are of public importance, must be framed in consonance with the principles of policy and mandate of the Constitution.

The adoption of such an all-powerful attitude by the judiciary does not augur well for a healthy democracy. This is underscored by the fact that judiciary as an institution is not accountable to the people in the same way as the legislature and the executive. The actions of the executive are subject to judicial review when there is social, economic or political injustice – or departure from the provisions of law and the constitution. When the legislature makes laws beyond constitutional bounds or acts arbitrarily contrary to its basic structure, the highest court examines and corrects. When the judiciary is guilty of excesses, only a larger Bench or a constitutional amendment can intervene. Even today, the only mode of removal of judges as prescribed in the constitution is impeachment, which is too Herculean a task to be easily undertaken.

However, in certain situations, some of which are mentioned above, the courts can and do interfere in the policies made by the Government and, in fact, there are a very large number of instances when the policies made by the Government have been struck down by courts on grounds such as the policy being unconstitutional, being against laws made by legislature, being arbitrary, etc. For example, in 2G scam, Government policy decision to allocate 2G spectrum was struck down. So was the case in coal scam case.