

## **DELEGATED LEGISLATION: LAW MADE BY SUBORDINATE**

**Arpit Kumar Singhai\***

“Delegated Legislation is an example which covers a multitude of confusion. It is an excuse for the legislature, a shield for the administrators and a provocation to the constitutional jurists....”

- Justice Mukherjea

### **Introduction**

Not Every person has power to make law but the Sovereign and the one whom Sovereign delegates the power. Delegated Legislation is no more uncommon thing to any country. Almost every country has accepted the Doctrine of delegated Legislation and put it in practice if not in theory. Even Country like USA, which strictly follows “Doctrine of Separation Of powers” and the principle of “Delegatus non Potest Delegare” (A delegate cannot further delegate), has accepted this doctrine of Delegated Legislation in Practice. In the case *Field v. Clark*<sup>1</sup>, the American supreme court held that ‘the legislature cannot delegate its power to make law but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend’.

The courts were reluctant in accepting the formula of delegated legislation although there is no such provision in the Constitution of India which prohibits the legislature to delegate its legislative power but later on they gave green signal to it. The principle of Separation of powers also came into consideration in the case *Ram Javaya v. State of Punjab*<sup>2</sup> where Justice Mukherji (C.J.) observed that the prohibition is based on some sort of doctrine of separation of powers and pointed out that “The Indian Constitution has not indeed the doctrine of separation of powers in its absolute rigidity, but the functions of different parts or branches of the government have been sufficiently differentiated and consequently 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 power of the departmental or subordinate legislation when such powers are delegate to it by the legislature.”

---

\* Student, Government law College, Mumbai

<sup>1</sup> 143, U.S. 649

<sup>2</sup> A.I.R. 1955 S.C. 549

Delegation of powers means those powers, which are given by the higher authorities to the lower authorities to make certain laws, i.e., powers given by the legislature to administration to enact laws to perform administrative functions. The law legislature by the administration body with the powers given by the legislature is called delegated legislation. Or we can say that when an instrument being of legislative nature is made by an authority in exercise of power delegated or conferred by the legislature is called **subordinate legislation or delegated legislation**. Delegated Legislation is now also referred as **Legislative Instruments**.

According to **Sir John Salmond**, “Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.”

The delegated legislation is considered as subordinate legislation as it must correspond to the laws of parliament; the terms are interpreted the same as the terms of the act according to which the powers were delegated; the abolishment of the act of parliament leads to abolishment of all delegated acts adopted according to its provisions.

It should be kept in mind that the delegation is not of essential legislative powers but ancillary and incidental legislative functions are delegated. Legislative power such as supplying details, applications of existing laws, framing rules, Henry VIII Clause (removal of difficulties from the legislation) etc are permissible. Delegation of essential legislative functions, power to repeal any law or give retrospective effect to any law or power to ouster the jurisdiction of any Court of law is not permissible thus cannot be delegated. In *Jalan Trading Co. v. Mill Mazdoor Sabha*<sup>3</sup>, where the Constitutional validity of Section 37 of the Payment of Bonus Act, 1965 was challenged, the Supreme Court while declaring the said provisions of the Act ultra vires on the ground of excessive delegation observed:

“The section authorizes the Government to determine for itself what are the purposes of the Act and to make provisions for removal of doubts or difficulty arises, normally it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority.”

---

<sup>3</sup> AIR 1967 SC 691

The term Delegated legislation is used in two senses i.e. the exercise of power of rule making by the executive under the authority delegated to it by legislature and the output of the exercise of that power. Delegated legislation may be in the form of rules, regulations, bye-laws, orders, schemes, directions, circulars or notifications. Delegated legislation becomes **imperative and inevitable** due to fundamental changes in the theory and practice of the government. For the performance of their executive and administrative functions, the government required legislative power in their own fields. Thus power is delegated to other departments but sometimes the power which is delegated is not properly used (i.e. misused) by the executive and other authorities. This results in need of certain safeguards which can control such misuse of delegated powers. That is why our constitution provides three measure safeguards i.e. **procedural control** which needs prior consultation, prior publicity and publication of laws made by delegated authorities, **parliamentary control** i.e. to lay the law before parliament and **judicial control**.

### **Forms of Delegated Legislation**

Delegated Legislation covers variety of legislation made by government agencies and the Governor-General under authority of Acts of Parliaments which delegate this power to agencies. Delegated Legislation can be classified on following basis such as

- **Title Based Classification:** Such as Rules, Regulations, Ordinances, bye-laws, Notifications, Schemes, Directions, and Decisions etc.
- **Discretion Based Classification:** Such as Conditional/Contingent Legislation
- **Authority Based Legislation:** i.e. Sub-Delegation
- **Purpose Based Classification**

### **Growth And Need of Delegated Legislation**

Growth of Delegated Legislation i.e., why it is needed and how it grow?

Going back to 19<sup>th</sup>&20<sup>th</sup> century, the growth of Delegated legislation was inevitably due to fundamental changes in the theory and practice of the government. For the performance of their executive and administrative functions, the government required legislative powers in their own fields. Thus, Delegated legislation has become imperative and in evitable due to following reasons:-

A) Pressure of work on the parliament

There is tremendous increase in the work of the government due to newly evolved concept of **welfare state** which necessitated a huge bulk of legislation. Also parliament is so much occupied with matters concerning foreign policy and other political issues that the parliament has no time to enact social legislation in all its details. Thus parliament pass only the “**skeleton law**” and the flesh and blood is left to be supplied by the departmental authorities i.e., it provides broad rules and principles and the departments are left to make rules and to fill in details.

B) Lack of adequate technical knowledge

As society is progressing, the things have become more complicated and technical. Legislator being a common man cannot have expertise on each and every technical matter. Parliament found it difficult to lay down details in this field of technical nature therefore parliament entrusted this task to the departments and ministers concerned.

C) Emergency:

The delegated legislation is also needed to deal with unforeseen contingencies, emergencies i.e., natural calamities such as floods, earthquake etc, Human made calamities such as war like condition, bomb blasts etc. insurrection, economic depression, epidemics etc.

Thus due to such condition the executive must be armed with rule making power so that it may initiate appropriate remedial action immediately without waiting for law to be passed by the legislature which is lengthy process.

D) Local matters:

There are matters which concern only a particular locality or a particular group of profession. So there is a need of consultation with the people of that particular locality, groups of profession. Thus powers are delegated to such concerned persons.

E) Experimentation:

Some acts parliament provided for their coming into operation in different localities on different dates according to their suitability and as a matter of experiment

The need and importance of subordinate legislation has been underlined by the Supreme Court in the **Gwalior Rayon Mills Mfg. (Wing.) Co. Ltd. v. Asstt. Commissioner of Sales Tax and Others** thus:

Most of the modern socio-economic legislations passed by the legislature lay down the guiding principles and the legislative policy. The legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State.

Other reasons such as:-

- Expanding dimensions of the socio-economic functions of state.
- Specific areas such as rationing scheme, imposition of import or export duties, exchange regulations etc expediency demands that law should not become public till it finally comes into operation.
- The close links between legislature & executive, the organization of the political party in new lines & emphasis on party discipline.

### **Controls Over Delegated Legislation And Why It's Needed??**

The primary object of controls over delegated legislation is to safe Delegated Legislation i.e. any law made by delegated authority should not be such that it is against public policy statutory law or it should not be immoral, inconsistent, against policy, ultra vires the parent act and also Should not be illegal. The laws that delegated authority makes are not clear and can be misused by person for whom these were made and by persons who made it. Also the delegated authority may assume a wider legislative competence than what the parliament has granted. Ex Lord Chancellor Hewart in his book “**New Despotism**” wrote

“A mass of evidence establishes the fact that there is in existence a persistent and well contrived system intended to produce , and in practice producing, a despotic power which at one and the same time places th government departments above the sovereignty of parliament and beyond the jurisdiction of the courts”.

In this way, he very vigorously (rather in magnified shape) exposed the “insidious encroachments of the bureaucracy upon civil liberty and representative governments”. Another example may be Lord Atkin’s judgment in **Liver Sidge V. Anderson** where he discouraged delegated legislation.

There are three measure kinds of Controls. These are as follows:

- Parliamentary Control
- Procedural Control
- Judiciary Control

Now let's discuss all these three in details

- **Parliamentary Control**

Every delegate is subject to the authority and control of the principal and the exercise of delegated power can always be directed, corrected or cancelled by the principal. Hence parliamentary control over delegated legislation should be living continuity as a constitutional necessity. The fact is that due to the broad delegation of legislative powers and the generalized standard control also being broad; there is need of raising the desirability and the necessity of parliamentary control.

Parliamentary control over administrative rule is admittedly weak because the legislators are sometimes innocent of legal skills.

In the USA, the control of congress over delegated legislation is highly limited because neither is the technique of laying extensively used nor is there any congressional committee to scrutinize it.

In England due the concept of parliamentary sovereignty the control exercised over delegated legislation is very broad and effective.

The Special Committee on Statutory Instruments<sup>4</sup> in its report said that

“The central problem relating to legislative review of executive and administrative law-making is the degree to which Parliament should involve itself in attempting to influence and control the course of administration. If Parliament goes too far into the substance of day-to-day administration, it defeats many of the underlying reasons for delegating powers to make laws in the first place....”

In India the parliamentary control of delegated legislation is implicit as a normal constitutional function because the executive is responsible to the parliament. This control is exercised through the committee on subordinate legislation of both the houses of parliament which maintains vigilance on governments rule making power and scrutinizes the rules framed by the executive.

The principle underlying Parliamentary control is to keep watch over the rule making authorities and provide an opportunity to criticize them if there is abuse of such power on their part.

---

<sup>4</sup>*Third Report(Journals, October 22, 1969, p. 1482)*

The control exercised by parliament may be in following forms:

- a) Proceedings in parliament
- b) Requiring the offending provision in the delegating statute to be laid on the table of the legislature
- c) Exercise of control by parliament through scrutiny committees<sup>5</sup>.

The scrutiny Committee (also known as the Joint Select Committee) is responsible for reviewing statutory instruments and drawing the attention of parliament to any delegated legislation which requires special further consideration before the committee stage of the bill. Possible problems that the scrutiny committee could go through that may force them to inform parliament could be that a statutory instrument is going beyond its powers (i.e. ultra vires), a statutory instrument is imposing a tax which it is not allowed to do- only an elected body has the right, a statutory instrument is producing legislation which is unclear or a statutory instrument is producing retrospective legislation (backdating an offence), which was not provided for by the enabling Act. A major criticism of the Scrutiny Committee is that the committee may not consider the merits of any piece of delegated legislation (only whether the delegated legislation has been correctly used) and has no power to alter any statutory instruments. As the scrutiny committee's report has no binding effect it can sometimes be seen as a waste of parliamentary time as well as the committee's time.

The Hansard Society in their 1992 report found that some of the critical findings of the committee were ignored by ministers; however despite this it makes an important contribution, and has been able to secure changes to a number of important pieces of legislation.

▪ **Procedural Control**

There is a necessity of Procedural Safeguards so as to keep a constant watch over the exercise of power by the executive or administrative authorities.

There are three methods of Procedural Control which are as follows:

a) **Prior Consultation:**

---

<sup>5</sup> *The Lok Sabha Committee on subordinate legislation was established under the constitution of India in 1953 and the Rajya Sabha Committee came into existence in 1964.*

Prior Consultation with the persons whose interest likely to be affected by the proposed delegated legislation. Ministers have the benefit of further consultation before regulations are drawn up. Those who make delegated legislation often consult experts in those relevant fields as well as those bodies who are likely to be affected by it. An example of a consultation process could be given under road traffic regulations, where ministers are likely to seek the advice of police, motoring organizations, vehicle manufacturers and local authorities before making the rules.

**b) Prior Publicity**

Prior publicity of proposed rules and regulations

**c) Publication**

Publication of delegated legislation is mandatory under Section 23 of General Clause Act, 1897 which says

“Where, by any (Central Act) or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely:-

The authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of person likely to be affected thereby”.

Etc.

Similarly Section 2 of the Statutory Instrument Act, 1946 makes it mandatory that a statute must be published as soon as it is laid before the House of Parliament. Publication of delegated legislation has been taken by the Courts as a corollary of natural justice.

Guidelines were formulated in the case of State of Maharashtra v. M.H. George<sup>6</sup> regarding the mode of publication. These are as follows:

a) Where there is statutory requirement as to the mode or form of the publication and they are such that in the circumstances , the court holds it to be mandatory, a failure to comply with those requirements might result in there being no effective order , the contravention of which could be the subject of prosecution.

---

<sup>6</sup> A.I.R. 1965 S.C. 722

b) Where there is no statutory requirement, it is necessary that it should be published in usual form, i.e., by the publication with in the country as generally adopted to notify all the persons of making of rules.

c) In India, the publication in the official Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned. The rules made under a statute come into force from the date Gazette was released and not from the date it was published.

In the case of *Raja Buland Sugar Co. v. Rampur Municipality*<sup>7</sup>, the Supreme Court held that the statutory provisions requiring publication of rules before imposition of tax was mandatory but the manner in which the rules were required to publish was directory, and as there was sufficient compliance with the requirement of publication, the rules were held to be valid.

#### ▪ **Judiciary Control**

As there are limits beyond which the legislature cannot delegate its legislative power. Thus where the legislator goes beyond these limits, the legislation has frequently being struck down by the courts. In *Re Delhi law's case*<sup>8</sup>, the Supreme Court by majority held that the exercise of delegated law making powers was invalid because the enabling act exceeded the constitutional limits in permitting the executive to repeal the law existing in the area. The Supreme Court laid down the grounds on which judicial control is exercised. The Supreme Court in this case made delegated legislation subjected to two limitations which are

- i) The executive cannot be authorized to repeal a law in force.
- ii) By exercising the power of modification, the legislative policy should not be changed.

In India the judicial review of administrative rule making is subject to the normal rules governing the review of administrative action. This judicial review of administrative rule making cannot be foreclosed in any manner by the enabling act. In *State of Kerala v. K.M.C. Abdullah & Co.*, the Supreme Court held that the phrase as “shall not be called in question in any court” in the enabling acts is not valid. In *G.O.C. v. Subash Chandra Yadav*, the Supreme Court held that an act providing that rules made there under on publication in official gazette would be ‘as if enacted’ in the act and cannot take away judicial review.

Grounds of invalidity may arise on the following counts:

---

<sup>7</sup> *A.I.R. 1965 SC 895*

<sup>8</sup> *A.I.R. 1951 S.C. 347*

1. That the Enabling Act is Ultra-vires or inconsistent with the Constitution  
In *Deepak Sibal v. Punjab University*<sup>9</sup>, The Supreme Court held that the Punjab University rules for admission to the evening L.L.B classes were discriminatory and violates Article 14 of the Constitution because they restricted admission only to the employees of government, semi government and similar institution and excluded the employees of private sector and meritorious students.
2. The Administrative Legislation is ultra-vires the Constitution
3. That the Administrative Legislation is ultra-vires the Enabling Act or Parent act from which the law making power has been derived, it is declared null and void by the court.

The power of examining delegated legislation is vested in the Supreme Court and The High Court. In the case *Staden vs. Tarjanyi* (1980), By-law quashed for uncertainty. The by-law made it unlawful to fly a glider "in the pleasure ground".

It was held uncertain because it must mean in or over, but for it to mean this there must be "some lower level below which the glider must not fly."

In another case i.e. *Air India v. Nargesh Meerza*<sup>10</sup>, The Supreme Court struck down the delegated legislation on the ground of non-conformity with the provisions of Article 14 of the constitution. The regulation provided that the service of an air hostess will be terminated if she marries within first four years of her service or on the first pregnancy. The Supreme Court found the first conditional reasonable but so far as second condition of pregnancy was concerned, it was clearly most unreasonable and arbitrary and an open insult to womanhood.

In the case of *Delhi Municipal Corporation v. Birla Cotton Sp and W. Mills*<sup>11</sup>, It was observed that "The guidance may take the form of providing maximum rates of tax up to which a local body may be given the discretion to make its choice, or it may take the form of providing for consultation with the people of the local area, and their fixing the rates after such consultation. It may also take the form of subjecting the rate to be fixed by the local body to the approval of the government which acts as a watching dog on the action of the local body in this matter on behalf of the legislature. The purpose of the guidance, whatsoever may be the manner thereof, is to see that the local body fixes a reasonable rate of taxation for the local area connected. "

---

<sup>9</sup> AIR 1989 SC 909

<sup>10</sup> AIR 1981 SC 1829

<sup>11</sup> A.I.R. 1968 S.C. 1232

In Kerala State Electricity Board v. Indian Aluminum Co.<sup>12</sup>, The Supreme Court Observed that “We do not think that where an executive authority is given power to frame subordinate legislation within stated limits, rules made by such authority if outside the scope of the rule-making power should be deemed to be valid merely because such rules have been placed before the legislature and are subject to such modifications, amendment or annulment, as the case may be, as the legislature may think fit.”

The supreme court in the case State of Maharashtra v. Chandra Bhan Tale<sup>13</sup> struck down Rule 151(1)(ii)(b) of the Bombay Civil Services Rules on the ground that they were unreasonable. The rules provided that the convicted government servant shall be paid rupees one as subsistence allowance even during the pendency of his appeal. The court observed that “it was mockery to say that subsistence is awarded when the award is rupee one a month”. The rule therefore was held void.

Some **other Controls** may be

**-Control by Expert Opinion**

In matters of technical nature opinion of experts will minimize danger of vague legislation.

**-Control by Public Opinion**

Public opinion is also a good check on the arbitrary exercise of Delegated Statutory Powers.

**-Internal Control**

Internal control of Delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

**Conclusion**

Thus we reach the conclusion that in India the principle and power of delegation is clearly defined. It has a Constitutional basis. There are effective checks against the abuse of Delegation. Here there is no possibility of delegated legislation assuming such terrifying shape as it has in England (as in England there does not exist any material and substantial control on the enormously growing delegated legislation and the controls have been proved illusory and ineffective in actual practice). Also the control exercised by judiciary is very effective and to a great extent they have prevented the abuse. The successful execution of the plans and for the rapid socio-economic development, a considerable amount of delegated legislation has taken place. The courts in a number of cases have

---

<sup>12</sup> A.I.R. 1976 S.C. 1031

<sup>13</sup> AIR 1983 2 SCC 387

laid down the principles which govern the delegated legislation. Delegated legislation in this shape is not unreasonable and is rather necessary.

As we come to conclusion that “the principle and power of delegation is clearly defined. It has a Constitutional basis. There are effective checks against the abuse of Delegation.” So if we talk about suggestions there is hardly any suggestion but just that the checks over delegated legislation i.e. controls must remain powerful. These controls should not become weak at all so that no legislation goes beyond the constitution as well as must not harm general people.

