

Administrative Law-making

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I. Introduction

This is also known by the name of Delegated Legislation or Subordinate Legislation. In the Indian Context, the term Subordinate Legislation is more appropriate than the Delegated Legislation. Law making is a vital function of administration in a modern form of administrative/regulated state. The purpose of this change is to cloth the government with more functions /powers.

The Law can only be made by legislature but in practice, it is not possible for it to lay down the details of every law and consequently, Legislature has to entrust some of its legislative powers to subordinate law making bodies. Various government departments, local authorities, independent statutory corporations all are given power by their legislatures to make laws in many different areas and circumstances. Such legislation is known as 'Subordinate' or delegated legislation. The statute which authorises making of subordinate legislation is also known as the 'Parent Act' or 'Enabling Act'.

II. Reasons for Subordinate Legislation

The growth and justification of subordinate legislation can be attributed to fundamental changes in the theory and practice of government. The reasons for the growth of subordinate legislation may be mentioned as follows:

1. Pressure on Parliamentary time
2. Technicality of subject matter
3. Need for meeting unforeseen contingencies. (Police regulations and economic regulations are instances of such situation)
4. Need of experiments.

III. Constitutional Limits of Legislative Delegations

A. Position in U.K

During the period of World War I the prevailing practice of delegation of

legislative power was very much opposed and criticised. {Lord Heward: The New Despotism (1929)}. Matter was referred finally to the Committee on Minister's power. It was observed by the committee that delegated legislation has come to stay not because the Parliament wants it but because Parliament would be unable to pass the kind and quantity of legislation which, modern government requires. However, the trend accepted as necessity and to regulate it in consonance with the traditional constitutional principle certain limitations have been imposed (Statutory Instrument Act 1946).

B. U.S.A.

In U.S.A. the practice of delegation of legislative power was criticised on the ground that it offends the Constitutional Principle of Separation of Power and *delegatus non potest delegare*; (once power delegated, it can not be re-delegated.) However, the controversy was resolved by judiciary by way of evolving a limitation that "essential legislative functions" which includes policy and the standards for the guidance of the delegates, must be performed by the legislature. "Non-essential legislative functions" may be delegated. This position may be illustrated with the help of following cases.

1. ***Panama Refining Co. Vs. Ryan (1935) U.S. S.C.*** it is popularly known as the Hot Oil Case. National Industrial Recover Act, 1933. S.9.
2. ***Schechter Vs. U.S.*** (1935) U.S. S.C.
3. ***Carter Vs. Carter Coal Co.*** (1936) U.S. S.C.

In all the above cases delegation of legislative power was declared by the U.S. Supreme Court as unconstitutional and void by majority of 5:4 judges.

4. In ***Yakus Vs. U.S. (1944) U.S. S.C.*** the delegation of legislative power was upheld subject to the principle evolved by the judiciary of "essential" and "non-essential legislative functions". Office of the Price Administrator having power to fix maximum prices of essential commodities keeping in view the prices prevailing within stipulated time frame.

C. Indian Position of Delegated Legislation

When Privy Council was the highest court of appeal, it was the terminology of conditional legislation.

1. **Queen Vs. Burah** (1878) S.I.A. 178.
2. **Emperor Vs. Benoari Lal** AIR 1945, P.C. 48

The question of delegation of legislative power and its permissible limits became important in Independent India. Just on the eve of independence, the Federal Court had held in **Jatindra Nath Vs. Province of Bihar** (AIR 1949 F.C. 175) that there could be no delegation beyond conditional legislation. It was a hangover of the colonial days.

IV. Constitutional Limits of Legislative Delegation

(a) General Principles

Consistent with their sovereign character, Legislatures in India have been held to possess wide power of delegation. This power is however, subject to one important limitation. The legislature cannot delegate the uncanalised and uncontrolled power. The power delegated must not be essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The power delegated must not be "unconfined and vagrant" but must be "canalised within banks that keep it from overflowing". The "banks" that set the limits of the power delegated, are to be constructed by the legislature by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. So the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guideline laid down by the legislature.

What is permitted, therefore, is the delegation of ancillary or subordinate

legislative functions or, what is fictionally called, a power to fill up details. The Legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. The Legislature's ability to delegate these functions is derived from an implied conferral of that authority for the effective exercise of the legislative power granted by the Constitution on the principle that everything necessary to the exercise of a power is implicit in the grant of the power, the limits of this ability to delegate i.e. the inhibition against delegation of essential legislative functions, is also impliedly derived from the Constitution which confer the power to make laws on the legislature. It is reasoned that the Constitution entrusts the duty of law making in Parliament and the Legislatures of States, and thereby impliedly prohibits them to throw away that responsibility on the shoulders of some other authority.

(b) Case Laws Discussion

The Supreme Court of India was faced with the question of permissible limits of delegated legislation in the famous case in **re Article 143, Constitution of India, AIR 1951 S.C. 332** (Popularly known as **re-Delhi Laws Act case**). The Part C States (Laws) Act, 1950 authorised the Central Government to extend to any Part C State with such restrictions and modifications as it thought fit any enactment in force in a Part A State, and while doing so it could repeal or amend any corresponding law (other than a central law) which might be operative at the time in part C State concerned. The Supreme Court was called upon to adjudge the validity of the provision on the question of delegation of legislative power. It was held that the legislature should not delegate its essential legislative function which comprised the formulation of policy and enacting it into a binding rule of conduct. That meant that the legislature should lay down standard or policy in the delegating Act and the delegate may be left with the power to execute the policy. The Delhi Laws Act Case achieved two ends: (i) it legitimized the delegation of legislative power by the legislature to administrative organs; (ii) it imposed an outer limit on delegation of legislative power by the legislature.

The decision of the Supreme Court in *re Article 143, Constitution of India*, AIR 1951 SC 332, may be analysed with reference to section 2 of Part C states (now Union Territories) Laws Act, 1950, which confers authority on the Central Government to extend to Part C states, laws in force in other states. The analysis of section 2 of this Act and the decision is as follows:

- (i) Power is conferred to extend not only existing but also future laws. This has been upheld.
- (ii) Parliament has conferred the authority on the Central Government not only to extend laws enacted or to be enacted by it but also laws enacted or to be enacted by legislatures which have no legislative jurisdiction in Part C States. This has also been upheld.
- (iii) Power is conferred to extend these laws "with such restrictions or modifications" as the Central Government may think fit. This has been upheld subject to a qualification that "the Central Government cannot modify the law in any essential features". Further, the "restrictions and modifications" must be those which are necessary to bring into operation the law in the union territory and they can be introduced only at the time when the law is extended after which the power is exhausted.
- (iv) Power was also conferred to make provision in any enactment so extended for the repeal or amendment of any corresponding law already in force. This portion was held to be bad as a delegation of essential legislative function and has not been omitted by the Repealing and Amending Act, 1952.

The question sought to be settled in the Delhi Laws Act Case and subsequent cases was again opened in ***Gwalior Reyon Co. Vs. Asstt. Commissioner of Sales Tax*** AIR 1974 S.C. 1660 Mathew J. argued that so long as Parliament retains the power to repeal the delegating provision, it does not abdicate its legislative function and therefore, there should be no objection to delegation howsoever broad its extent. The majority did not agree with this view. It reiterated the proposition that when a legislature confers power on an authority to make subordinate legislation, it must lay down policy, principle or standard for the guidance of the authority concerned. A manifest flaw in Mathew, J's approach is that after delegating the power Parliament cannot, in a practical sense, control it through its power of repeal.

In ***M.K.Papiah Vs. Excise Commissioner***, AIR 1975 SC 107, the Supreme

Court validated a very broad delegation of Taxing power by applying the theory of repeal advocated by Mathew, J. In this case opinion was delivered by Mathew, J. His opinion was rejected by majority in Gwalior Rayon and majority view has been approved by the five judge bench of the Supreme Court in **K.S.E. Board Vs. Indian Aluminium, AIR 1976 S.C. 1031**, in which no reference was made to Papiiah. As a result of these pronouncements, doctrine of excessive delegation should be regarded as well established in India. Thus, while delegating legislative power the legislature should lay down legislative policy, standards or guidelines for the delegate to follow. In **Avinder Singh Vs. State of Punjab (1979) 1 SCC 137**, Krishna Iyer, J. laid down the following test for valid delegation of legislative power. These are:

1. The legislature cannot efface itself;
2. It cannot delegate the plenary or essential legislative function; and
3. Even if there be delegation, parliamentary control over delegated legislation should be a living continuity as a constitutional necessity.

It was further observed as under:

"While what constitute an essential feature cannot be delineated in detail it certainly cannot include a change of policy. The legislature is the master of legislative policy and if the delegate is free to switch the policy it may be usurpation of legislative power itself."

The Supreme Court has once again stated the principle of excessive delegation in **Registrar, Co-operative Societies Vs. K. Kunjabmu, AIR 1980 S.C. 350**, as follow:

The legislature cannot delegate its essential legislative function. Legislate it must by laying down policy and principle and delegate it may to fill in detail and carry out policy" (Ibid, 352).

It may be recalled that the Supreme Court in **Re Delhi Laws Act** (AIR 1951 SC332) had decided that the power to repeal an existing Act could not be delegated

since it was an essential legislative function. The Supreme Court, however, upheld a similar provision in ***A.V. Nachane Vs. Union of India AIR 1982 SC 1126***. It was argued in the instant case that section 48 (2) (CC) of the Life Insurance Corporation (Amendment) Act, 1981, in so far as it authorised the Central Government to make rules to carry out the purposes of the Act notwithstanding the Industrial Dispute Act or any other Law in force, was void because of excessive delegation of legislative power. While upholding that provision Court observed that the principle of implied repeal was by virtue of legislative declaration contained in Section 6 and was not by force of the order made by the delegate under the impugned Section. The power delegated was not unfettered because it was guided by policy, which was to secure the interest of the LIC and its policy holders and to control the cost of administration. Provision for laying the rules before both houses of Parliament was another factor which influences the court towards upholding the delegation of legislative power.

In ***Ramesh Birch Vs. Union of India AIR 1990 SC 560***, the Supreme Court considered the validity of a notification issued by the central government under Section 87 of the Punjab Reorganisation Act, 1966, which is identical with the provision of the East Punjab Urban Rent Restriction (Amendment) Act, 1985 to the Union Territory of Chandigarh. The court relied on many earlier decisions to uphold not only the delegation of power but also its exercise even subsequent to extension of the legislation. It was, however, emphasised that the power to make modifications and restrictions was a limited power which permitted only changes that the context required and not changes in substances. With regard to Section 87, the Court held that the provision only conferred power on the executive to determine, having regard to the local conditions prevalent in the Union Territory of Chandigarh, which one of the several laws approved by one or the other of the legislatures in the country, would be most suited to Chandigarh.

In ***Agricultural Market Committee Vs. Shalimar Chemical Works Ltd. (1997) 5 SCC 516*** it was held by the Supreme Court that to lay down legislative policy or principle for guidance of the delegate is the function of the legislature. It was further emphasised that the delegate while making subsidiary rules or regulations cannot widen or restrict the scope of the Act or the policy or principle. In the instant case Rule 74 (2) and Bye-law 24(5) framed under S.34 (1) of the Andhra

Pradesh (Agricultural Produce and Livestock) Markets Act, 1966, provide presumption of sale or purchase of a notified agricultural produce. The Act limited the rebuttable presumption to only one factor, namely, moving the notified agricultural produce out of the notified market area. On the other hand, the bye-laws additionally provided that such presumption would also be raised if the commodity is weighed, measured or counted within the notified market area. The additional presumption under the rule and bye-laws was held, *ultra-vires* the Act.

Similarly in ***Kunj Behari Lal Butail Vs. State of H.P. (2000) 3 SCC 40***, the proviso to Rule 3(1) of H.P. Ceiling on Land Holdings Rules 1973 framed under Sections 26 and 5(g) of the HP Ceiling on Land Holdings Act, 1972 was held *ultra-vires* the power under the Act. The Act provided exemption of tea plantation including areas subservient thereto from the operations of the provisions of the Act. However, the rules formulated thereunder particularly the proviso to Rule 3 (1) imposes prohibition on transfer in any manner of land subservient to a tea plantation and therefore going beyond the power of delegation.

In ***Quarry Owner's Association Vs. State of Bihar, (2000) 8 SCC 655***, delegation of power to the State Govt. to fix rate of royalty for minor minerals in absence of any statutory maximum limit of such rates under section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 on being questioned before the Court, held, does not by itself amount to absence of a purposeful guidance to the delegatee State Government. Delegation of power to fix rates of royalty for minor minerals was held valid in view of the provision of section 28(3) which requires laying of rules or notification before each House of legislature. However, in *State of Maharashtra Vs. Indian Medical Association and Ors. (2002) 1 SCC 589*, it was held by the Supreme Court that essential function of State Government in the matter of location of medical college could not be delegated.

Concluding Remarks

It is true that in theory the limitation by the doctrine of "essential legislative functions", "non-delegability" have been evolved by the Courts. But in practice difficulties arise in applying the doctrine of 'excessive delegation' in concrete

situation and that the judicial tendency is to uphold the power of delegation, and that it is only rarely that such a power may be struck down on the ground of "excessive delegation". It may finally be said that the judicial language of limitation on the delegation of legislative power by the legislature to the administrative organs is artificial. However, such a limitation on the power of the legislatures in a matter of delegation of legislative powers makes legislatures careful while delegating legislative powers.
