



DELEGATED LEGISLATION: A NECESSARY EVIL

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ABSTRACT

Delegated legislation is becoming a necessary evil in modern democratic countries. Due to the concept of welfare state, there has been a quantitative increase in the function of the government. In such a situation, it is not possible that he cannot do the work of legislation in all the points himself. It becomes a compulsion for the government to delegate this power to other organs of the government. But while doing so it should be kept in mind that the institution to which this power is being delegated should use it very carefully. There may be no public discussion, no press criticism and no public opinion on it. The system thus becomes undemocratic giving rise to the danger that the government may misuse its powers. For this the traditional methods of control (parliamentary, administrative and judicial) should be further strengthened. Considering the importance of the subject, there is a need of separate enactment for it. In which clearly such facts should be included as to which subject can be delegated, which cannot be delegated, under which condition the delegation should be done.

INTRODUCTION:-

A trend very much in vogue today in all democratic countries is that only a relatively small part of the total legislative output emanates directly from the legislature. The bulk of legislation is promulgated by the executive, known as “delegated legislation”. Usually, what happens is that the legislature enacts a law covering only the general principles and policies relating to the subject matter in question and confers rule-making power on the government, or on some other administrative agency. In no democratic country does the legislative monopolise the whole of the legislative power; it shares the power which the government and other administrative agencies. The delegated legislation is used in two senses:

- (a) The exercise by a subordinate agency of the legislative power delegated to it by the legislature, or

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- (b) The subsidiary rules themselves which are made by the subordinate agency in pursuance of the power delegated to it by the legislature.

The term delegated legislation is used here in first sense because lawyers are more interested with the “technique” rather than the actual rules made. In India, quite often the term employed is “subordinate legislation”; it conveys the idea that the authority making the legislation is subordinate to the legislature.

As stated in **Halsbary’s Laws of England** – “when an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is called “Subordinate Legislation.”

Black’s law dictionary defines delegation as “the act entrusting a person with power or empowering him to perform on behalf of the person who has provided him that power or to serve as his agent or representative.”

A simple meaning of the expression delegated legislation may be given as under: When the function of legislation is entrusted to organs other than the legislature itself, the legislation made by such organs is called delegated legislation.

CONSTITUTIONALITY OF DELEGATED LEGISLATION-

The fundamental legal question which arises in the study of delegated legislation is whether a legislature can delegate its law making power to other agencies?

UNITED KINGDOM:-

Parliament is supreme and performs unlimited power. It is free to make or amend any law, i.e., it may either make a law itself or may authorize an outside agency to do so. Within what limits, if any, it should delegate powers is a matter to be decided by the legislature itself and the courts have no say in the matter. The courts cannot question the validity of any act passed by the Parliament. It has often been suggested that Parliament should not confer power in too broad or general term, that is should define the limits of the power being delegated or define the norms or standards in the enabling statutes subject to which the delegated power may have to be exercised so that the delegate is not left free to use the power as he likes but may be restrained from misapplying the power. In countries with written constitution, where the legislature is not supreme and possesses only such powers as are given by the constitution, delegation has been held to be valid (of course, unless expressly prohibited by the constitution).

U.S.A. :- In the United States the position is substantially different. The U.S. Congress functions under a written constitution and the courts have power to interpret the constitution and declare a congressional statute unconstitutional. Under the Constitution of USA, delegated legislation is not recognized in theory because of two doctrines-

- (a) The doctrine of separation of powers- The US constitution is based on the doctrine of separation of power. By article 1 legislative power is expressly conferred on the congress,

and the courts have power to interpret the constitution and declare any statute unconstitutional if it does not conform to their views of the constitution.

- (b) *Delegatus non potest delegare* :- A delegate cannot further delegate- besides the doctrine of separation of powers the US supreme court has also invoked the doctrine of *delegation non potest delegare* against delegation by the congress. As the congress gets power from the people, and is a delegate of the people in the sense, it cannot further delegate its legislative power to the executive or any other agency.

Delegation in Practice- The congress lays down the general policy and standards that animate the law, leaving the agency to refine those standards, “fill in the blanks”, or apply the standards to particular cases.

The congress should not give a blank cheque to the executive to make any rules its likes. If this is done, it would mean to abdication of powers by the Congress. In the words of **Justice Cardozo-** “To uphold the delegation there is need to discover in the terms of the Act a standard reasonably clear whereby the discretion must be governed. In **U.S. Vs. Grimana 220 US 596** the court held that a complete denial of delegation of legislative power by Congress would be to stop the wheels of government. In **Panama Refining Co. Vs. A.D. Ryan 79 Led 446: 293 US 388 (1934)**, popularly known as the **Hot Oil case** the U.S. Supreme Court held that “the congress has declare no policy, has established no standard, has laid down no rule.” The delegation in favour of the President was, therefore, impermissible and the Act was unconstitutional.

AUSTRALIA :-

By section 1, 61 and 91 the commonwealth of Australian Constitution Act, 1960 the legislative, the executive and the judicial powers are vested respectively in the commonwealth Parliament, the queen, the high court and other federal courts of Australia. Thus, the constitution is regarded to have been founded upon the principle of separation of functions of Government. The separation does not, it has been held, prohibit delegation legislative powers to the executive. In **Victorian, etc. Co. & Meakes Vs. Dignan 8 CLR 626** case the question was whether section 3 of the Transport Workers Act, 198-29 was *intra vires* the constitution inasmuch as it delegated power to make regulations which were to have the force of law, notwithstanding anything in any other act. The high court held the provision valid.

CANADA :-

The first Canadian case on delegation of legislative power is **Russel Vs. The Queen 46 CLR 73**. In this case the validity of the Canadian Temperance Act was challenged on the ground that it unconstitutionally delegated legislative power to an external body. The Privy Council held that the act did not delegate any legislative power, and that what was conditional legislation. In **Hodge Vs. Queen (1882) 7 AC 829** the court reiterated the principle that the legislature was not a delegate or agent of Imperial Parliament but had, “authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power proposed and could bestow.” It was also said that a legislature committing important regulations to agents or

delegates did not efface itself since it retained its power intact and could, whenever it pleased, revoke the power.

POSITION IN INDIA :-

Under the constitution of India, Article 245 and 246 provide that the legislative power shall be discharged by the parliament and the state legislature. There is nothing in the constitution whereby it can be inferred that the legislature cannot delegate its legislative power to any one else. But it does not mean that the power of legislation includes the power of delegation. In the constitution itself we find several provision where the executive leads, i.e., the president and governors of the different states have been empowered to make laws under certain conditions. For instance- where the parliament or state legislatures are not in sessions, during the president's rule in any state the executive has been authorized to make laws for the state. It is clear from these provision that it was not the intention of the constitution-makers that the legislative functions should be carried out by the legislatures only. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution.

Secondly, Article 13(3) (a) of the constitution lays down that "law" includes any ordinances, order by-law, rule, regulation, notification etc. Which if found in violation of the fundamental rights, mentioned in the chapter III, would be void. It is well settled that the rules, regulations, bye-laws etc. are not made by the legislature but by the agencies other than the legislative, mainly the Executive and Local bodies, under the delegated authority. It these makes clear that our constitution indirectly envisages the delegated of legislative function the executive to a limited extent.

REASONS FOR THE GROWTH OF DELEGATED LEGISLATION –

There are some major causes for the growth of delegated legislation such as Pressure upon Parliamentary time, Technicality of subject matter, To meet unforeseen contingencies, Expediency and flexibility, To meet emergency etc..

1. Legislation an ever widening fronts of a modern welfare and service state it is not possible without the technique of delegated legislation. It is true but correct to say that even if today Parliament sits all the 365 days in a year and all the 24 hours, it may not give that quality and quantity of law which is required for the proper functioning of a modern government. Therefore delegation of rule making power is a compulsive necessity. It also given an advantage to the executive, in the sense that a parliament which an onerous legislative time may feel tempted to pass Skelton legislation with the details to be provided by making rules and regulation.
2. Today, Legislation has become highly technical because of the complexities of a modern government. Therefore it is convenient for the legislature to confine itself to policy statements only, as the legislators are sometimes innocent of legal and technical skills and leave the law making sequence to the administrative agencies.

3. In some situations it is necessary that the law must not be known to anybody till it comes in to operation. For example, in case of imposition of restrictions on private ownership, it is necessary that the law must be kept secret till it comes in to immediate operation, otherwise people could arrange their property rights in such a manner as to defeat the purpose of the law. This secrecy could be achieved only through administrative action because the ordinary legislative process is always very open.
4. Ordinary legislative process suffers from the limitation of lack of viability and experimentation, a law passed by the Parliament has to be in force till the next session of the parliament when it can be repealed. Therefore, in situations which require adjustments frequently and experimentation, administrative rule making is the only answer.
5. In situations where crises legislation is needed to meet emergent situations, administrative rule making is a necessity because the ordinary law making process is overburdened with constitutional and administrative technicalities and involves delay.
6. Where government action involves discretion, i.e., expansion of public utility services, administrative rule-making is the only answer.
7. Today there is growing emergence of the idea of direct participation in the structuring of law by those who are supposed to be governed by it because indirect participation through their elected representatives mere often proves a myth. Therefore, administrative rule making is a more convenient and effective way and provides for this participation.

Demerits of the growth of Delegated legislation-

There was a time when the growth of delegated legislation was criticized as ‘undemocratic’ and extension of despotic powers of administration. Now these ideas have changed, it is considered as-

- (a) Natural reflection of the limits of constitutional law.
- (b) Of the changes in the idea and views of government, resulting from changes in political, social and economic thinking.
- (c) Of the changes brought in our lives due to scientific and technological development .

TYPES AND CLASSIFICATION OF DELEGATED LEGISLATION :

RULE:- The general classes act, 1897 defines “Rule” as a law made in exercise of the power conferred by an enactment. The rules includes regulation also. These rules may be made applicable to a particular individual or general public. It includes rules of procedure under Atomic Energy Act, 1948 Consumer Protection Act, 1986, Administrative Tribunal Act, 1985 etc. The rules framed under the act, applicable like the statute itself. The rules prevail over the administrative directions, notifications, circulars etc. if there is any conflict among them.

REGULATION:- This is an instrument through which decision of the government are made known to the general public. Regulation are being made by the executive to notify the date of the Act, application of the act to areas or persons, or exemptions from the act, etc. A regulation is a rule

or order prescribed by the superior for the management of some business and implies a rule for general course of action.

BY-LAWS:- They are created by the local authority which is approved by the Central Government. There are many reasons for the delegation of the legislature.

SCHEME: - The term refers to a situation where the law authorizes the administrative agency to lay down a framework within the detailed administration action is to proceed.

DELEGATED LEGISLATION AND COURT'S VIEW:-

R. Vs. Burah (1878) 3 AC 889: (1878) 5 IA 178(PC) is considered to be the leading authority of the subject. Privy Council held that the Indian Legislature was not an agent or delegate of the Imperial Parliament and it had plenary powers of legislation as those of the Imperial Parliament itself. It agreed that that the Governor General-in-Council could not, by legislation, create a new legislative power in India not created or authorized by the council's Act. But in fact, it was not done. It was only a case of conditional legislation, as the Governor was not authorized to pass new laws, but merely to extent the provisions of the Act already passed by the competent legislature upon fulfillment of certain conditions.

In **Jatindra Nath Gupta Vs. Province of Bihar AIR 1949 FC 175:FCR 595** Federal Court held that the power to extend the operation of the act beyond the period mentioned in the act was a legislative power. Similarly, the power to modify an act of the legislature without specifying any limitation on such power can also be said to be an essential legislative function and therefore, could not be delegated.

This judgment had created confusion about the extent of the delegation of legislative power. Therefore, with a view to get the position of law clarified, the President sought opinion of the supreme court under article 143 in **Delhi Laws Act, 1912, re AIR 1951 SC 332: 1951 SCR 747**. It is the leading case as to the needs and limits of delegated legislation. In this case the supreme court was called upon to give its opinion on the validity of delegatory provisions contained in three central acts.

The supreme court was called upon to adjudge the validity of this provision. Seven judges gave seven opinion the limits of delegated legislation. Yet on two points there was unity of outlook amongst all the opinion.

First- Keeping the exigencies of the modern government in view, Parliament and the state legislatures in India need to delegate legislative power if they are to be able to face the multitudinous problems facing the country, for it is neither practicable nor feasible to expect that each of the legislative bodies could turn out complete and comprehensive legislation on all subjects sought to be legislated upon.

Second- since the legislatures derive their powers from the written Constitution which creates them, they could not be allowed the same freedom as the British Parliament in the matter of the delegation; some limits should be set on their capacity to delegate.

The Delhi Laws Act case achieved two ends:-

1. It Legitimized delegation of legislative power by the legislature to administrative agencies;
2. It imposed an outer limits on delegation by the legislature.

After the Delhi Laws Act case **Hamdard Dawakhana Vs. Union of India AIR 1960 S.C. 554** was probably the first case in which a central act was held ultra vires on the ground of excessive delegation.

In famous Demonetization case **Vivek Narayan Sharma Vs. Union Of India JLT (2023) SCJ Jan-Feb-5** section 26(2) of RBI Act, 1934 was challenged before supreme court on the basis that section 26(2) contains no policy guidelines on how the centre can exercise its power, thus it is arbitrary and unconstitutional. Under this section central government is empowered to notify ceasing a particular denomination of currency as legal tender. Parliament, here, has delegated the power to alter the nature of legal tender to the central government which the latter exercised by issuing a gazette notification. The Constitutional bench held that Centre's notification dated November 8, 2016 is valid and satisfies the test of proportionality. Justice B.V. Nagarathna in her dissenting view held that excessive delegation of power is arbitrary.

GENERAL PRINCIPLES :-

According to various judgment of supreme court following general principles should be apply in case of delegated legislation-

1. The constitution confers the power and function on the legislature to make laws and these function cannot be delegated by the legislature.
2. The legislature must retain in own hands the essential legislative function.
3. Once the essential legislative function is performed by the legislature and the policy has been laid down, it is open to the legislature to delegate his powers for effective, useful and complete legislation.
4. The legislative policy may be reflected as the legislature thinks fit. It may be both express or implied.
5. The authority to with delegation is made is also one of the factors to be considered in determining the validity of such delegation.
6. Safeguards against the abuse of delegated power do not make delegation valid.
7. The delegated legislation must be consistent with the parent Act.
8. Whether the all formalities has fulfilled by legislature the delegation is permissible or not it is depends upon the facts and circumstances of each case.
9. It is purely courts' jurisdiction to hold on a fair, generous and liberal construction of an impugned statute whether the legislature has exceeded his limits.
10. These principles apply to all forms of delegated legislation.

CONCLUSION:-

Many a time, the legislature passes Acts in “skeleton” form containing only the barest of general principles and thus leaves to the executive the task of not only laying down “details” but even that of formulating and determining policies and principles. The legislature often uses wide, subjectively worded provisions, giving power to the delegate to make such rules as appear to it to be “necessary” or “expedient” for the purpose of the act without laying down any standards to guide the discretion of the delegate and the delegate gets a blank cheque to do whatever it likes. The executive becomes powerful as it secures powers to affect the life, liberty and property of individuals without the democratic restraints of a debate in the legislature as happens when a statute is enacted through the legislature. Discussion on a bill in the legislature secures publicity; a lot of discussion takes place on the principles underlying the bill both within and outside the legislative chamber which can gauge the public mood. Legislation thus keeps harmony with the public sentiment. But this salient and democratic safeguard is not available in the case of delegated legislation which is drafted in government chambers by some anonymous civil servant and mostly promulgated all of a sudden without much publicity or notice. No one may come to know anything about it until it is notified.

Therefore the basic problem in the area of delegated legislation is that of devising suitable controls and safeguards so that advantages of the technique of delegated legislation may be available, while the dangers and risk of abuse inherent therein may be minimized. The focus of the inquiry is thus shifted from the question of desirability of delegated legislation to whether there should be delegated legislation, but subject to what safeguards it should be resorted to.

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