

# Control Mechanism over Delegated Legislation

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## Abstract

In this modern Welfare State, governmental activity has pervaded almost every field of human Endeavour, thus, necessitating enactment of multifarious laws to regulate this ever-widening activity. The Legislature does not have enough time to deliberate upon, discuss and approve all the regulatory measures required to implement the enacted law and here comes the requirement of delegated legislation. Moreover, law-making has now become a complicated and technical matter, and law has to be flawless in technical details. Delegated legislation is nothing but the law made by a person or body other than the legislature but with the legislature's authority. In India, the legislature is vested with wide powers of delegation but this delegation is restricted to certain limitation, to curb the issue of excessive delegation. It is mostly bureaucratic legislation and performed by the executives. The question of controls of delegated legislation therefore assumes importance if the executive is not to be allowed to act arbitrarily. This paper tried to discuss all the types of control mechanism over delegated legislation and the judicial approach towards it.

Keywords: Delegated Legislation, Constitution, Legislature, Executive, Judiciary, Control Mechanism.

## Introduction

The Constitution of Indian empowers Legislature to make laws for the country. One of the significant legislative functions is to determine a legislative policy and to frame it as a rule of conduct. Obviously such powers cannot be conferred on other institutions. But keeping in mind various multifarious activities of a welfare State, it is not possible for the legislature to perform all the functions. In such situation, the delegated legislation comes into the picture. Delegated Legislature is one of the essential elements of administration whereby the executive has to perform certain legislative functions. So, delegated legislation is a process by which the executive authority is given powers by primary legislation to make laws in order to implement and administer the requirements of that primary legislation.

Delegated legislation has been defined by *Salmond* as “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”<sup>1</sup> Explaining the meaning of the expressions “delegated legislation” and “delegating legislative power”, Fazl Ali, J. in Delhi Laws Act case observed:

*“...the expressions “delegated legislation” and “delegating legislative power” are sometimes used in a loose sense, and sometimes in a strict sense. These expressions have been used in the loose sense or popular sense in the various treatises or reports dealing with the so called delegated legislation... There can be no doubt that if the Legislature completely abdicates its functions and sets up a parallel Legislature transferring all its power to it, that would undoubtedly be a real instance of delegation of its power. In other words, there will be delegation in the strict sense if legislative power with all its attributes is transferred to another authority”.*<sup>2</sup>

As was observed by Lord Coleridge, C.J. in 25 QBD 304, the word delegation implies that powers are committed to another person or body which are as a rule, always a subject to resumption by the power delegating.<sup>3</sup> The word ‘delegate’ means little more than an agent. An agent exercises no power of his own but only the power of his principle.<sup>4</sup> In general, a delegating body will retain not only power to revoke the grant, but also power to act concurrently on matter within the area of delegated authority except insofar as it may already have become bound by an act of its delegate.<sup>5</sup> It is designate by various names, such as, rules, regulations, bye-laws, orders, schemes etc.<sup>6</sup> As pointed by Ray, C.J. in Sukhdev Singh v. Bhagatram<sup>7</sup>, Rules, Regulation, Schemes, Bye-laws, Orders made under Statutory powers are all comprised in delegated legislation.

Emphasizing the necessity of subordinate legislation, the Supreme Court in *Gwalior Rayon Mills Mfg. (Wvg.) Co. Ltd. v. Asstt. Commissioner of Sales Tax* observed: 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 modern welfare State.<sup>8</sup>

<sup>1</sup> Salmond, Jurisprudence, 12<sup>th</sup> Edn., p. 116

<sup>2</sup> Kania, C.J., In re. Delhi Laws Act, A.I.R. 1951 S.C. 332(338).

<sup>3</sup> As cited in Ishwar Singh v. State of Rajasthan, (2005) 2 SCC 334, 338 (para 8) : AIR 2005 SC 773

<sup>4</sup> Ibid

<sup>5</sup> *Battelley v Finsbury Boroughe Council*, 1958 LGR 165

<sup>6</sup> See, *Tata Iron & Steel Co. v Workmen*, Air 1972 SC 1918, *K.I. Shephard v. Union of India*, Air 1989 SC 568.

<sup>7</sup> AIR 1975 SC 1331, 1337: (1975) 1 SCC 421

<sup>8</sup> A.I.R. 1974 S.C. 1660 (1667).

This power of delegation is a constituent element of the legislative power as a whole.<sup>9</sup> So long as the Legislature indicates in the operative provisions of the statute the policy and purpose of the enactment, the mere fact that the legislation is skeletal or the fact that a discretion is left to those entrusted with administering the law, is no basis for a contention that there has been excessive delegation of legislative power, if the power or discretion has been conferred in a manner which is legal and constitutional.<sup>10</sup>

### Constitutionality of Delegated Legislation

In India, Legislatures, consistent with their sovereign character, have been held to possess wide powers of delegation. This power is, however, subject to limitations. The Legislature cannot delegate 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 Legislature cannot delegate 'unanalyzed and uncontrolled power'. The delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate only is empowered to carry out the policy within the guidelines laid down by the Legislature.

The question, whether any particular legislation suffers from excessive delegation, has to be decided having regard to the subject matter, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted.

In *Pandit Banarasi Das Bhanot v State of Madhya Pradesh*<sup>11</sup> it was held that the power to tax is a well recognized legislative power, ample latitude has been allowed to the Legislature to leave to a delegate the power to work out details of a tax policy. In upholding a power delegated to the State Government for amending the Schedule relating to exemptions in a Sales Tax legislation, Justice Venkatarama Aiyer observed that it is not unconstitutional for the Legislature to have it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be paid, the rates at which it is to be charged in respect of different classes of goods and the like.

In *Harishankar Bagla v State of MP*<sup>12</sup> the Supreme Court held that while sustaining the legality of section 3 of the Essential Supplies (Temporary Powers) Act, 1946, which gave wide powers to the Central Government to make orders for regulating or prohibiting the production, supply and distribution of essential commodities, was satisfied that it had laid a clear principle and offered sufficient guidance. It was held that the power conferred

<sup>9</sup> Vasanlal Maganbhai Sanjanwala and the Pratap Spinning and Manufacturing Co. Ltd. v. the State of Bombay, A.I.R. 1961 S.C. 4; M/s. Tata Iron and Steel Co. Ltd. v. Workmen of M/s. Tata Iron and Steel Co. Ltd., A.I.R. 1972 S.C. 1917.

<sup>10</sup> Jyoti Parshad v. Union Territory of Delhi, A.I.R. 1961 S.C. 1602

<sup>11</sup> 1958 AIR 909, 1959 SCR 427

<sup>12</sup> 1954 AIR 465, 1955 SCR 313

by the section therein is to be exercised for maintaining or increasing supplies of any essential commodity, or for, securing their equitable distribution and availability of fair prices.

The Constitution Bench of Supreme Court in *Kishan Prakash Sharma v Union of India*<sup>13</sup> the Supreme Court laid down the test of constitutional limit of delegated legislation. The Supreme Court in this case held that the Legislature must set the limits of the power delegated 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. Thus the delegation is valid only when the legislative policy and the guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the Legislature. The Legislature may, after laying down the Legislative policy, confer discretion on an administrative agency to work out the details within the frame work of the policy. When the Constitution entrusts the duty of law-making to Parliament and Legislatures of the States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. An area of compromise is that Parliament cannot work in detail the various requirements of giving effect to the enactment and, therefore, that area will be left to be filled by the delegate.

The Supreme Court in *State of Rajasthan v Basant Nahata*<sup>14</sup> held that the necessity of the Legislature's delegating its power in favor of the executive is a part of legislative function. It is a constituent element of the Legislative power as a whole under article 245 of the Constitution. Such delegation of power, however, cannot be wide, unanalyzed or unguided. The Legislature, while delegating such power is required to lay down the criteria or standard so as to enable the delegatee to act within the framework of the statute. The principle on which the power of the Legislature is to be exercised is required to be disclosed. It is also trite that essential legislative functions cannot be delegated. The procedural powers are, therefore, normally left to be exercised by the executive by reason of a delegated legislation.

There cannot be any doubt whatsoever that the court shall not invalidate a legislation on the ground of delegation of essential legislative function or on the ground of conferring unguided, uncontrolled and vague powers upon the delegate without taking into the preamble of the Act as also other provisions of the statute in the event they provide good means of finding out the meaning of the offending statute.

<sup>13</sup> (2001) 5 SCC 212 : AIR 2001 SC 1493

<sup>14</sup>(2005) 12 SCC 77: AIR 2005 SC 3401

The Supreme Court in *Delhi Race Club Limited V. Union of India*<sup>15</sup> held that there two broad principles in delegation of legislative functions:

- that delegation of non essential legislative function of fixation of rate of imposts is a necessity to meet the multifarious demands of a welfare State but while delegating such a function laying down of a clear legislative policy is pre requisite; and
- while delegating the power of fixation of rate of tax, there must be in existence, inter alia, some guidance, control, safeguards and checks of the Act concerned.

It is manifest that the question of application of the second principle will not arise unless the impost is a tax. Therefore, as long as the legislative policy is defined in clear terms, which provides guidance to the delegate, such delegation of a non-essential function is permissible

In *Holystar Natural Resources (P) Limited V. Union of India*<sup>16</sup> it was contended that Section 2(1)(o) of SARFAESI Act was violative of Article 19(1)(g) of the Constitution of India as it gave uncontrolled discretion and arbitrary power in the hands of financial institutions/RBI to declare any entity as an NPA. Under the SARFAESI Act, the borrower had a very limited to right to question the proceedings and the consequences provided in the Act were drastic. Consequently, by empowering the banks/financial institutions/RBI to determine what NPA is, there had been a disastrous effect on business, profession and trade of the borrowers. The court analyzed the provisions of Section 2(1)(o) of the Act which defines NPA as an asset or accountable receivable of a borrower, which has been classified by banks or financial institutions in terms or RBI guidelines as sub standard, doubtful and loss asset. Clause 4.1 of RBI guidelines classifies NPA into the above three categories. Once the account finds place in any of these categories, it becomes an NPA with respect to clause 2.1 RBI guidelines. The classification is done taking into account the degree of well defined credit weakness and extent of dependence on collateral securities for realization of dues. The Legislature has left it to RBI to identify, define and classify different assets in accordance with the current international best practices as well as the changing economic scenario of the country. The Court is of the opinion that the Legislature has defined NPA and the RBI issued guidelines to improve quality of assets of the bank and to recover public money speedily. There is no excessive delegation or scope for the banks to act upon basing on their whims and fancies, but they are governed by the guidelines issued by the RBI which is empowered to issue such guidelines under Section 21 of Banking Regulation Act, 1949.

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<sup>15</sup> (2012) 8 SCC 680

<sup>16</sup> 2014 (1) TMI 1639

## Control Mechanism over Delegated Legislation

Whatever prejudices there might have been in the past against delegated legislation, to-day it has come to be regarded as inevitable. Therefore instead of arguing against it, the more important thing would be to think of controls and safeguards subject to which delegated legislation should function in the country. There is no doubt that to some extent the practice of delegated legislation entails an abandonment of its legislative function by the legislature. Often, matters of principle are left to administrative legislation. The system of delegated legislation adds considerably to the powers of the executive, and, relatively, weakens the position of the legislature.<sup>17</sup> It needs no emphasis that the power of delegated legislation is a power of enormous consequence in the hands of the executive: it is scarcely less effective than the legislative power in the hands of the legislature in so far as it affects private rights and interests.

It is, to some extent, undemocratic in the sense that while legislation by the legislature is subject to the usual democratic safeguards of publicity, discussion within and outside the legislature, legislation by the administration is not subject to these safeguards, and thus is lost “that safeguard of liberty which depends upon the law-making power being exercised by the elected representatives of the people who will be affected by the laws that are made. Self government is endangered when the representatives of the people do not effectively control the making of the laws which the people must obey.”<sup>18</sup> Delegated legislation is mostly bureaucratic legislation. The question of controls of delegated legislation therefore assumes importance if the executive is not to be allowed to act arbitrarily.

Control over delegated legislation can be of various kinds, e.g., judicial, legislative<sup>19</sup> and of other types; the latter may include participation of the affected interests in the rule-making process, its due publication, etc.

### 1. Control of the legislature over delegated legislation:

In a parliamentary democracy it is the function of the legislature to legislate. If it seeks to delegate its legislative power to the executive because of some reasons, it is not only the right of the Legislature, but also its obligation, as principal, to see how its agent i.e. the Executive carries out the agency entrusted to it. Since it is the legislature which grants legislative power to the administration, it is primarily its responsibility to ensure the proper exercise of delegated legislative power, to supervise and control the actual exercise of this power, and ensure the danger of its objectionable, abusive and unwarranted use by the administration.

<sup>17</sup> M.P. Jain, Indian Constitutional Law 129 (1962).

<sup>18</sup> Wade and Phillips, Constitutional Law 26 (6<sup>th</sup> Edn 1960)

<sup>19</sup> See Jain, “Parliamentary Control of Delegated Legislation in India, Public Law 33 (1964), Also see The Indian Law Institute, Delegated Legislation in India 162-264 (1964)

In U.S.A., the control of the 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. This is due to the constitutional structurization in that country in which it is considered only the duty of courts to review the legality of administrative rule-making.

In England, due to the concept of Parliamentary sovereignty, the control exercised by Parliament over administrative rule-making is very broad and effective. Parliamentary control mechanism operates through “laying” techniques because under the provisions of the Statutory Instruments Act, 1946, all administrative rule-making is subject to the control of Parliament through the Select Committee on Statutory Instruments. Parliamentary control in England is most effective because it is done in a non-political atmosphere and the three-line whip does not come into operation.

A whole system of legislative supervision over delegated legislation has come into being in India. Two significant limbs of this mechanism are:

- (I) Laying of delegated legislation before the legislature (i.e Direct Control) ; and
- (II) Scrutiny of delegated legislation by a legislative scrutiny committee (i.e. Indirect Control).<sup>20</sup>

**(a) Memorandum on Delegation:** At the central level, the first step in the chain of Parliamentary control over delegated legislation is taken at the stage of delegation by Parliament. A rule of procedure of each House of Parliament requires that a bill involving proposal for delegation of legislative power shall be<sup>21</sup> “accompanied by a memorandum explaining such proposals and drawing attention to their scope, and stating also whether they of exceptional or normal character”. The rule is salutary, for the first stage of supervision arises at the stage of delegation. The purpose of memorandum is to focus the attention of the Member of Parliament to the provisions of the bill involving delegation of legislative power.<sup>22</sup>

The Speaker may also refer bills containing provision for delegation of legislative power to the committee to examine the extent of such powers sought to be delegated.<sup>23</sup>

**(b) Laying Procedure:** The second link in the chain of Parliamentary Control comes into play after the rules are made. This is achieved by the mechanism of the ‘laying procedure’. The basic purpose of this procedure is informational. The underlying idea is that if Parliament is to exercise any control, it is

<sup>20</sup> See M.P.Jain, Parliamentary Control of Delegated Legislation in India, 1964 Public Law 33, 152.

<sup>21</sup> Rules of Procedure and Conduct of Business in Lok Sabha , Rule 70; Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), Rule 65.

<sup>22</sup> See first Report(I L.S.), 1 (1954); Second Report (III L.S.), 1 (1954)

<sup>23</sup> Directions 103A of the Speaker in Direction by the Speaker of the Lok Sabha, 66 (III ed. 1980).

necessary that the House of parliament be informed of the content of the delegated legislation made by the Government from time to time under various statutes. According to Garner, the object of laying procedure is to bring the legislative measures to the potential notice of the Members of Parliament.<sup>24</sup> The notable use of this technique was made in the Reorganization Acts of 1939 to 1969, which authorized the President to reorganize the executive government by administrative rule-making. In England the technique of laying is very extensively used because all the administrative rule-making is subject to the supervision of Parliament under the Statutory Instruments Act, 1946 which prescribes timetable. The most common form of provision provides that the delegated legislation comes into immediate effect but is subject to annulment by an adverse resolution of either house.

By *Section 4* of the Statutory Instruments Act, 1946, where subordinate legislation is required to be laid before Parliament after being made, a copy shall be laid before each House before the legislation comes into operation. However, if it is essential that it should come into operation before the copies are laid, it may so operate but notification shall be sent to the Lord Chancellor and the Speaker of the House of Commons explaining why the copies were not laid beforehand. Under *Section 6* of the Statutory Instruments Act, 1946, the draft of any statutory instrument should be laid before the parliament. This act has somewhat formalized and systematized the laying procedure. Three main variants of this procedure are used in statutes:

- (i) *Simple Laying* : In almost all the Commonwealth countries, the procedure of 'Laying on the Table' of the Legislature is followed. It serves two purposes: firstly, it helps in informing the legislature as to what all rules have been made by the executive authorities in exercise of delegated legislation, secondly, it provides a forum to the legislators to question or challenge the rules made or proposed to be made.
- (ii) *Laying with immediate effect but subject to annulment*: Here the rules are laid in draft and can be annulled by a resolution of a House. This is known as negative laying. In this procedure, the legitimacy of delegated legislation precedes, not follows, the negative laying procedure. In this procedure the parliamentary function is ex post facto; it is negative rather than positive; it provides for disallowance rather than allowance.
- (iii) *Laying in draft subject to affirmative resolution*: here the rules are laid in draft before the houses. The rules come into operation when the houses pass resolution affirmation them. An act of parliament will normally requires that rules or regulation made under the Act shall be laid before both houses of Parliament. Parliament can keep its eye upon them and provide opportunities for criticism. Rules or regulation laid before Parliament may be attacked on

<sup>24</sup> Garner, Administrative Law, 60 (1985)

any ground. The object of the system is to keep them under general political control, so that criticism in Parliament is frequently on ground of policy. "Laying before Parliament is done in number of different ways. The regulations may merely have to be laid; or they may be subject to negative resolution within forty days; or they may expire unless confirmed by affirmative resolution; or they may have to be laid in draft. Occasionally, they don't have to be laid at all, because Parliament has omitted to make any provision."<sup>25</sup> If the instrument has merely to be laid or laid in draft, before Parliament, it will be delivered to the votes and proceedings office of the House of Commons. No opportunity is provided by parliamentary procedure for the instrument to be discussed, but its existence will at least be brought to the notice of the member and the Ministers is more likely to be questioned about it than if it is not laid before Parliament at all.<sup>26</sup> In India, for long, there was confusion on the question of laying. Many statutes did not contain any such provision; and the statutes mostly required laying simpliciter after the rules were made. But, now, a standard laying formula is used in practically each central statute.

(iv) *Legal consequences of non-compliance with the laying provisions:* In England the provisions of Section 4(2) of the Statutory Instruments Act, 1946 makes the laying provision mandatory for the validation of statutory instruments. In India, however, the consequences of non-compliance with the laying provisions depend on whether the provisions in the enabling Act are mandatory or directory. A laying requirement is regarded as directory when not coupled with the requirement of laying rules in draft form and approval by the House. In the latter case the requirement of laying is regarded as mandatory because the rules cannot come into force without being laid and approved by the houses of the Parliament as a pre-requisite.

In case of laying procedure subject to a negative resolution, it is also regarded as directory. In this case, the rules come into effect as soon as they are made and the laying procedure takes effect subsequently. In India also, the courts have taken a similar view<sup>27</sup> the question has been elaborately considered by the Supreme Court in *Atlas Cycle Industries Ltd. V State of Haryana*.<sup>28</sup> Section 3 (6) of the Essential Commodities Act, 1955 lays down that any order issued under Section 3 "shall be laid before both Houses of the Parliament as soon as may

<sup>25</sup> Wade & Forsyth, Administrative Law, 8<sup>th</sup> Edn., 878

<sup>26</sup> Stanley De Smith and Rodney Brazier, Constitutional and Administrative Law, 7<sup>th</sup> Edn., as cited in Quarry Owners' Assn. v State of Bihar, (2000) 8 SCC 655, para 47: AIR 2000 SC 2870

<sup>27</sup> Jan Mohammad Noor Mohammed v. State of Gujarat, AIR 1966 SC 385; Krishna Khanna v State of Punjab, AIR 1962 Punj 132; Mathura Prasad Yadav v Inspector General, RPF, Railway Board, New Delhi, 1974 Lab LC 1177

<sup>28</sup> AIR 1979 SC 1149. See also State of M.P. v Hukum Chand Mills Karamchari, (1996) 7 SCC 81, 82 (para 3 and 5)

be after it is made". An order issued under S. 3 was not laid in the Houses and it was challenged as being ultravires. Rejecting the argument, the Supreme Court ruled that S. 3(6) is only directory and not mandatory and that non-laying of an order before Parliament does not make it void. The use of the word 'shall' in S. 3(6) is not conclusive and decisive of the matter, it is for the court to determine the true intention of the legislature. In *Narendra Kumar v. Union of India*<sup>29</sup>, the Supreme Court held that the provisions of Section 3(5) of the Essential Commodities Act, 1955, which provided that the rules framed under the Act must be laid before both Houses of Parliament, are mandatory, and therefore Clause 4 of the Non-Ferrous Control Order, 1958 has no effect unless laid before Parliament.

However, in *Jan Mohammad v. State of Gujarat*<sup>30</sup>, the court deviated from its previous stand. Section 26(5) of the Bombay Agricultural Produce Markets Act, 1939 contained a laying provision but the rules framed under the Act could not be laid before the Provincial legislature in its first session as there was then no functioning legislature because of World War II emergency. The rules were placed during the second session. Court held that the rules remained valid because the legislature did not provide that the non-laying at its first session would make the rules invalid. Even if the requirement of laying is only directory and not mandatory, the rules framed by the administrative authority without conforming to the requirement of laying would not be permissible if the mode of rule-making has been violated.

(c) **Parliamentary Scrutiny Committees (Indirect Control)**: the laying procedure by itself does not afford much of an effective parliamentary supervision. In the negative resolution which now prevails in India, everything depends on the vigilance of each individual member of Parliament. Allen has remarked so rightly, 'it lies, then, in the realm of constitutional fiction to say that Parliament exercises any really effective safeguard over delegated legislation'.<sup>31</sup> Though said in the context of England, it is equally true in the Indian context as well. To make parliamentary supervision over delegated legislation more effective, two committees on subordinate Legislation, one in each House of Parliament, have been established.<sup>32</sup> In India and UK, there are Standing Committees of Parliament to scrutinize delegated legislation. In the USA, on the other hand, there is no equivalent to such committees, the responsibility

<sup>29</sup> AIR 1960 SC 430

<sup>30</sup> AIR 1966 SC 385

<sup>31</sup> Allen, Law and Orders, 135. Also see, Report of the Davies Committee (1953)

<sup>32</sup> Lok Sabha Rules 317-322, Rajya Sabha rules 204-212

being diffused. The responsibility is shared but a host of committees – standing committees in each House of Congress, committees on government operation in each house, and some other joint bodies like the committee on atomic energy. In England, the Select Committee on Statutory Instruments was established by the House of Commons in 1944. In 1950, the Law Minister made a suggestion for the establishment of a Committee of the House on the pattern of the Select Committee on Statutory Instruments, 1944, to examine delegated legislation and bring to the notice of the House whether administrative rule-making has exceeded the intention of the Parliament or has departed from it or has affected any fundamental principle. The Committee on Subordinate Legislation of Lok Sabha was appointed on December 1, 1953 .

The main functions of the Committee are to examine: (i) whether the rules are in accordance with the general object of the Act, (ii) whether the rules contain any matter which could more properly be dealt with in the Act, (iii) whether it is retrospective, (iv) whether it directly or indirectly bars the jurisdiction of the court, and questions alike. The Committee has between 1953 and 1961, scrutinized about 5300 orders and rules and has submitted 19 reports. With the institution of the Rajya Sabha Committee, Parliamentary Control of delegated legislation in India has become much more effective, for the two committees can scrutinize many more rules every year than could possibly be done by one committee alone.

**(d) Recommendation by the Committee on Subordinate Legislation:** The Committee on Subordinate Legislation has made the following recommendation in order to streamline the process of delegated legislation in India:

- (i) Power of judicial review should not be taken away or curtailed by rules.
- (ii) A financial levy or tax should not be imposed by rules.
- (iii) Language of the rules should be simple and clear and not complicated or ambiguous.
- (iv) Legislative policy must be formulated by the legislature and laid down in the statute and power to supply details may be left to the executive, and can be worked out through the rules made by the administration.
- (v) Sub-delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub-delegate his authority to another functionary.
- (vi) Discriminatory rules should not be framed by the administration.
- (vii) Rules should not travel beyond the rule-making power conferred by the parent Act.
- (viii) There should not be inordinate delay in making of rules by the administration.
- (ix) The final authority of interpretation of rules should not be with the administration.
- (x) Sufficient publicity must be given to the statutory rules and orders.

Therefore, legislature exercises its control over the delegated legislation or the rule-making power by these two methods: namely, 'laying' procedure and via Scrutiny committees.

## 2. Procedural Control over Delegated Legislation:

It is not possible for the Parliament to exercise effective control over delegated legislation. Therefore certain procedural safeguards have been provided which are relevant to keep constant watch over the exercise of this power by the administrative authorities. The methods of procedural control can be studied under the following heads.

- (i) ***Prior Consultation of Interests Likely to be affected by Proposed Delegated Legislation:*** In the United States the practice of prior consultations of the affected interests is very much common. The Administrative Procedure Act in S.553 requires the rule making authority to consult the interest likely to be affected.<sup>33</sup> The interested persons are given an opportunity by the agency concerned to submit their representations within prescribed time. There are various Acts in America which provide not only consultation of interested bodies but also the consultation of certain advisory bodies which are formulated for such purposes. In America consultation of interests has tended to become a regular feature of the rule-making process. The purpose of prior consultations of the affected interest is to know their view points and to minimize the objection to administrative legislation. This technique would also be useful in avoiding improper use of rule-making power by the executive. This has been especially true where the interests affected are well organized and have a constant contact with the administrative authorities. In America various bodies of affected interests are consulted by the Ministry of Health before making new statutory regulations about the use of preservatives in food.<sup>34</sup> In England, there is a lot of informal consultation. But consultation as a matter of right arises only when it is prescribed by a statutory provision. There is no statutory provision requiring consultation of affected interest in the rule-making process.<sup>35</sup> From time to time, statutes specifically lay down some requirement or process for the rule making authority to consult designated bodies or interests.<sup>36</sup> Usually, the statutory requirement of consultation has been held to be mandatory by the courts.<sup>37</sup>

<sup>33</sup> M.P.Jain & S.N. Jain, Principles of Administrative Law, (2013) Vol. I 7<sup>th</sup> Edn., LexisNexis Publication.

<sup>34</sup> Bernard Schwartz "The Modern Law Review" Volume 11, Issue 4, pages 450–451, October 1948.

<sup>35</sup> The Rules Publication Act, 1893 made provision for the antecedent publicity of rules, but the Statutory Instrument Act, 1946, dropped such a provision. The Government argued that consultation with affected interests has become a routine administrative practice and so there was no need for a statutory provision requiring antecedent publicity. However removal of a statutory provision was a retrograde step as it did free the Administration from any legal obligation to consult the affected interests.

<sup>36</sup> For example, the Agricultural Act, 1947 requires the minister to consult bodies' representative of the interests of landlords and tenant before making certain regulations and orders. A more elaborate procedure has been laid down in the National Insurance Act, 1946 under which a statutory committee has been created to give advice and assistance to the minister in connection with his duties

In India there is no general provision of law, requiring consultation of the affected interest in the process of rulemaking. Where consultation is required, such words as “the power to make rules shall be subject to the conditions of previous publication” are inserted in the parent Act. It is notable that in some statutes provisions are laid down conferring the power on the affected interests to initiate and frame rules them. It is now a well-established proposition in India that no hearing or consultation can be claimed by any one as a matter of right or natural justice, when the administration is engaged in discharging a legislative function<sup>38</sup> and the same cannot be challenged on the ground of non-observance of the Principle of natural justice.<sup>39</sup> According to the Supreme Court: ‘the rules of natural Justice are not applicable to legislative action plenary or subordinate’. The procedural requirement of hearing is not implied in the exercise of legislative powers unless hearing was expressly prescribed.<sup>40</sup> For example, Section 9-A of the Forward Contracts (Regulations) Act, 1952, authorized the recognized association to make rules with respect to several matters mentioned therein. These rules become effective after having been approved by the Central Government. The Government can also make such modification as it deems fit.

- (ii) **Prior Publicity of Proposed Rules and Regulation:** In India the practice of prior publication has been adopted wherever prior consultation has been deemed necessary. According to Section 23 of General Clauses Act, 1897, the authority shall publish the draft rules for information of affected interests in such manner as it deems sufficient. The authority shall take into consideration any such objection which may be received by it while finalizing the rules.

In America the practice of prior publication has been adopted under various Acts. For example, under Rules Publication Act, 1808, public notice was given of proposals to make 'statutory rules' and the department concerned had to consider representations or suggestions made by interested bodies, who were thus made aware of proposed rules of which they otherwise might not have known. Such antecedent publicity was characterized by the Donoughmore Committee as 'undoubtedly a safeguard of the highest value particularly where it leads to consultation with the interests concerned.'<sup>41</sup> A similar system of antecedent publicity is

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under the Act. A preliminary draft of the proposed is submitted to this committee which hears objection and then reports to the minister who finalizes the rules after considering the report.

<sup>37</sup> See, R. v Secretary of State, ex p. AMA [1986] 1 All ER 164. See also, Griffith, Delegated Legislation-Some Recent Developments, 12 Mod LR, 297 (1949).

<sup>38</sup> Tulsipur Sugar Co. v Notified Area Committee, Tulsipur, AIR 1980 SC 882: (1980) 2 SCC 295

<sup>39</sup> I.E. Newspaper (Bombay) Pvt. Ltd. v Union of India, AIR 1986 SC 515,540: (1985) 1 SCC 641

<sup>40</sup> Sundarjas Kanyalal Bhatija v Collector, Thane, AIR 1991 SC, 1893, 1901: (1989) 3 SCC 396.

<sup>41</sup> Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) 44. It is not, however, provided for in the Statutory Instruments Act, 1940, which repeals the Rules Publication Act, 1893

provided for in the American Administrative Procedure Act, 1946-a statute which imposes certain minimal procedural requirements upon the administrative process in that country.<sup>42</sup>

- (iii) **Publication:** The term Publication refers 'to the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny...an advising of the the public; making known of something to them for a purpose.'<sup>43</sup> something generally known. It comes from the Old English word ' *publicatio* ' whose origin can be traced back to ' *publicare* ', which means to make public. The simple concept which ascertains the publication of delegated legislation revolves around two important principles. Firstly, it is to provide the parties which are going to be affected by the said legislation an opportunity of being heard as provided by the Principle of Natural Justice. In the leading case of *Harla v State of Rajasthan*<sup>44</sup>, the Supreme recognized the importance of publication of rules in the governance of the country. Natural justice requires that before a law becomes operative it must be promulgated or published. It must be broadcast in some recognizable manner so that all men may know what it is, or, at the very least there must be some special role or regulation or customary channel through which such knowledge can be acquired with the exercise of due and reasonable diligence

Secondly, according to the maxim *ignorantia juris non excusat* ' (i.e. ignorance of law is no excuse) and according to this rule no person can claim the ignorance or him not knowing the law as an excuse. But this can be applied only when the public were made aware of the existence of such law and this can be done by the means of publication hence Publication of Legislation and Delegated Legislation has evolved and is regarded as a mandatory rule. It is a fundamental principle of law that ignorance of law is no excuse (*ignorantia juris non excusat*). But there is also another equally established principle of law that the public must have access to the law and they should be given an opportunity to know the law. The very justification for the basic maxim is that the whole of our law, written or unwritten, is accessible to the public-in the sense, of course, at any rate, its legal advisers have access to it, at any moment, as of right.<sup>45</sup> In *Union of India v M/s. Ganesh Das Bhojraj*<sup>46</sup>, it was said by the court that publication in the Official Gazette is the established practice for bringing a rule or subordinate legislation to the notice of the people. Individual service of notice to every member of the public about a general notification is not required and all interested person can acquaint

<sup>42</sup> Schwartz, 'The American Administrative Procedure Act, 1946', (1947) 63 L.Q.R. 43

<sup>43</sup> State of M.P. v Ram Ragubir Prasad Agarwal, AIR 1979 SC 888

<sup>44</sup> AIR 1951 SC 467

<sup>45</sup> Referred from the e-copy of Keli Vakil, Procedural Deviance of Delegated Legislation from Parent Act downloaded from <http://ssrn.com/abstract=1877247>

<sup>46</sup> AIR 2000 SC 1102

themselves with the content of the notification in the Gazette.<sup>47</sup> And in the recent case of *Gulf Goans Hotels Co. Ltd. v Union of India*<sup>48</sup> the Supreme Court was required to decide whether the various notifications relating to coastal regulation Zone could be deemed to be valid law. The Court by referring to the Harla Case categorically held that since the guidelines issued by the union of India were not published through the customarily recognized official channel they failed to satisfy the essential and vital parameters/requirements of law hence were not enforceable to the prejudice of the Appellants.

Jain and Jain rightly stated: —it is essential, therefore, that adequate means are adopted to publicize delegated legislation so that people are not caught on the wrong foot in ignorance of the rules applicable to them in a given situation. The system of publication ought to be such that delegated legislation is not only made known to the people, but it is also easy to locate as and when necessary.<sup>49</sup>

### 3. Judicial Control over Delegated Legislation:

In spite of the existence of the Parliamentary Control, judicial form of control of delegated legislation is considered as an integral form of control mechanism. The fundamental justification for judicial control is based on the constitutional obligation of the Courts to uphold the principle of rule of law. In a constitutionally governed state it is the essential function of the judiciary to ensure that the laws made by the Parliament are not Ultra vires under the Constitution and the delegated legislation enacted under the statute are within the ambit of both the parent statute and the constitution. In addition Article 13(3)(a) of the Constitution has define the term law as order, rules, bye-law, regulation and notification thereby clearly highlighting that not only by means of laws made by the legislatures but also through the subordinate executive laws, the state authorities should not attempt to take away or abridge the rights conferred by the Part III of the Constitution. Judicial form of control is said to be more effective form of control because the courts have the power to strike down a law if it is ultra vires to the parent statute or to the Constitution. The implementation of the procedural form of control is also entrusted to the judiciary who determine the legality of the subordinate law making process through the rules of procedural ultra vires. In *Ram Krishna Dalmia v Justice S.R.Tendulkar*<sup>50</sup> the constitution bench of Five Judges

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<sup>47</sup> The Supreme Court overruled the earlier decision in *Collector of Central Excise v New Tobacco Co.* AIR 1998 SC 668, wherein it was held that mere publication of the notification in the Official Gazette is not sufficient till the Gazette was made available to the people.

<sup>48</sup> 2014 (11) SCALE 83 : MANU/SC/0848/2014

<sup>49</sup> Referred from the e-copy of Keli Vakil, Procedural Deviance of Delegated Legislation from Parent Act downloaded from <http://ssrn.com/abstract=1877247>

<sup>50</sup> 1959 SCR 279

of the Supreme Court after analyzing a series of earlier decision laid down the scope and extent of the power of Judicial review of legislation in India.

- (i) ***Parent act is Ultra Vires the Constitution:*** If the parent statute or the enabling Act is in non-conformity with the Constitution then the different rules and regulations framed under such statute will also be deemed to be unconstitutional, if it is in violation with the express or implied limits of the constitution. The express limit under the constitution are those provisions which specifically set the limits on the powers of the state authorities such as no violation of the fundamental rights specified under Part III of the constitution, strict adherence with the distribution of the legislative powers as specified under List I, II and III of the Seventh schedule, no violation of the commerce clause under Article 301 of the Constitution, no retrospective effect of criminal legislation as provided under Article 20 etc. it is necessary that both the Parent statute as well as the delegated legislation should be in compliance with these express limits of the constitution for the purpose of legal enforcement. The implied limits in the context of delegated legislation has been laid down in the cases of *In Re: Delhi Laws Act case*<sup>51</sup> and *Harishankar Bagla v State of M.P.*<sup>52</sup> wherein it was acknowledged that legislature can delegate the power of rule making to a subordinate body after laying down the legislative policy and the general rules of conduct. In the case of *St. Johns teachers Training Institute v Regional Director, National Council for Teacher Education*<sup>53</sup>, the Court applied the inherent policy of the statute to uphold the constitutionality of the delegated legislation. Thus the power to make subordinate legislation is derived from the parent statute and it is essential that the delegate on whom such power has been conferred has to act within the limits of the authority specified under the Act and this referred to as the implied constitutional limits on the power of delegation of rule-making authority.
- (ii) ***Delegated legislation is ultra Vires the Constitution:*** the court may be asked to consider the question of Constitutionality of delegated legislation itself. The parent statute may be constitutional, but the delegated legislation emanating there under may be in conflict with some provision of the constitution. In that case, the delegated legislation will be invalid. Here, again the frame of reference to assess the validity of delegated legislation is the constitution. For example, *In Dwarka Prasad Laxmi Narain v State of U.P.*, a few provisions of the UP Coal Control Order, 1953, made under S.3(2) of the Essential Supplies Act,1946<sup>54</sup> were declared ultra vires as

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<sup>51</sup> [1951] 2 SCR 471

<sup>52</sup> AIR 1954 SC 465

<sup>53</sup> AIR 2003 SC 1533

<sup>54</sup> AIR 1954 SC 224: 1954 SCR 803

infringing Art.19(1)(g). Similarly, in *Rashid Ahmad v. Municipal Board*<sup>55</sup>, certain bye-laws made by a municipality were held bad under Art.19(1)(g). In *Narendra Kumar v Union of India*<sup>56</sup>, the Supreme Court specifically considered the point whether the question of unconstitutionality of delegated legislation made under a valid Act could be raise or not. The Court held that though a law may not be unconstitutional, an order made there under may yet be challenged under the Constitution, because the law could not be presumed to authorize anything unconstitutional. Again, the question of unconstitutionality of the rules falls more appropriately under constitutional law. In *Indian Express Newspaper (Bombay) (P) Ltd. v Union of India*<sup>57</sup>, the Supreme Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Further in the case of *Union of India v R. K. Chopra*<sup>58</sup>, Supreme Court said that the rules framed by the President of India in exercise of the power conferred by the proviso to Art. 309 of the Constitution of India have the force of law.

- (iii) **Doctrine of Ultra Vires:** Subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on the ground that it does not conform to the statute under which it is made. It may be further questioned on the ground that it is inconsistent with the provision of the act or that it is contrary to some other statute applicable on the same subject-matter. Therefore, it has to yield to plenary legislation. It can also be questioned on the ground that it is manifestly arbitrary and unjust. That, any inquiry into its vires must be confined to the grounds on which plenary legislation may be questioned, to the grounds that is contrary to the statute under which it is made, to the grounds that it is contrary to other statutory provisions or on the ground it is so patently arbitrary that it cannot be said to be in conformity with the statute. It can also be challenged on the ground that it violates Art. 14 of the Constitution.<sup>59</sup> Delegated legislation can be challenged before the court on the ground of being ultra vires the parent act. The Court can adjudge the legality and validity of delegated by applying the doctrine of ultra vires. It need to be emphasized at the very outset, that the doctrine of ultra vires concern itself with the question: is the rule challenged within the scope of the authority conferred on the rule-maker by the parent statute? The Court does not concern itself with the wisdom or efficacies of the rules. It is for the

<sup>55</sup> AIR 1950 SC 163: 1950 SCR 566, Also see, *Md. Faruk v State of M.P.*, AIR 1976 SC 93: (1969) 1 SCC 853

<sup>56</sup> AIR 1960 SC 430: 1960 (2) SCR 375

<sup>57</sup> AIR 1986 SC 515, 542 (para 73 and 75)

<sup>58</sup> (2010) 2 SCC 763,771 (para 27)

<sup>59</sup> *J.K. Industries Ltd. v Union of India*, (2007) 13 SCC 673

rule maker to decide as matter of policy, how to implement the provisions of the statute and what measures to take to efficaciously achieve the object of the act. It is not for the court to examine the merit and demerit of the case.<sup>60</sup> The doctrine of ultra vires has two aspects: substantive and procedural. When delegated legislation goes beyond the scope of the authority conferred by, or it is in conflict with the parent statute it is invalid and this is known as substantive ultra vires. When the rule making authority deviates from the procedure, if any, prescribed by the parent statute for making rules, it is known as procedural ultra vires.

- (iv) **Non-compliance with the Court's Order:** in the instant case, the government attempt to evade the direction of the Supreme Court and the Court struck it down.<sup>61</sup>
- (v) **Non-application of mind:** Delegated legislation may be struck down on the ground of non-application of mind on the part of delegatee to the relevant facts in taking decisions.<sup>62</sup>

### Conclusion

Delegated legislation is permitted by the Indian Constitution. It exists in form of bye-rules, regulations, orders, bye laws etc. Modern legislation requires technicality and expert knowledge of problems of various fields, our legislators, who are politicians are not expected to have such knowledge. Subordinate legislations are more flexible, quickly and easily amendable and revocable than ordinary legislation, in case of failure or defect in its application.

Justice P.B. Mukherjee has stated ;

*“Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists. It is praised as a necessity and felt as inevitable in our world where social economic technological psychological and administrative speed outstrips the spacious and placid traditional legislative ideals and processes. It is criticized as an abdication of power by legislators and an escape from the duty imposed on them by voters of democracy. In England the king lost the legislative power at Runnymede and parliament lost legislative at stampede that followed since to provide the government for the country through administration and bureaucracy”.*

In order to ensure that the power of delegated legislation is not misused in the hands of executive it is necessary to adopt effective modes of control. The judicial control of delegated legislation in India is complete. The

<sup>60</sup> Sitaram Sugar Co. Ltd. v Union of India (1990) 3 SCC 233

<sup>61</sup> Subaranand Sonwal(II) v Union of India, (2007) 1 SCC 174

<sup>62</sup> Vasu Dev Singh v Union of India, (2006) 12 SCC 753

constitutional position of judiciary is such that its right to examine legislation, whether emanating directly from Parliament or from subordinate authorities, cannot be barred. A law purporting to confer the statutory finality on subordinate legislation would not bind the court.

But it is submitted that judicial control from its very nature can only be of limited effectiveness. The court may step in to prevent the abuse of power or its exercise for purpose other than those for which it is delegated. Any interference by the courts beyond that will hamper the potentialities of delegated legislation- a process of undeniable necessity and incontestable usefulness.

Effective control against the abuse of delegated powers of legislation must come from the legislature itself, primarily at the time of delegation, and secondarily in the supervision of the manner in which they are exercised. Equally important is the need for public co-operation in the rule-making process. In a democratic system the administration must respond to the needs and views of those whom its rules are going to effect. There is no sure test of the success of a policy than that it is in tune with the genuine needs of the people, receiving their sympathy, good-will and satisfaction. Finally, we must devise methods by which the rapidly growing subordinate legislation shall become easily accessible, in an intelligible manner, to those concerned. All those have to be done in India to achieve an efficient system of delegated legislation.

