



Conceptual analysis of sub Delegation: An overview

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Abstract

The recent era which has witnessed the rapid growth of delegated legislation in almost all legal systems of the world is not a new phenomenon. Ever since statutes began to be enacted by parliament through a defined formal process, there has been delegation of legislative function. The historical footprints of the delegated legislations can be well seen in the backdrop of the history. Being the most influential amongst all the U.K. legal system bears a well-developed stricture of delegated legislation in the timeline of history. In United Kingdom, as long as in 1531 as per the rule of Henry VIII Clause, the legislators cannot foresee all the difficulties while passing a law, the administrators or executives can be vested with power to make necessary changes to remove difficulties present in the statute passed by the legislators.

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Introduction

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As far as the Indian context of the HENRY CLASUE VIII i.e. the power to remove the difficulty is concerned, it has been now accepted as a general practice. Moreover, plethora of the legislation frequently does consist with this kind of power. Typically such powers do confer wide powers upon the delegated authority to make Orders to remove difficulties in implementing the parent Act, but in practice are upheld only when used for making minor changes not affecting policy.

What is meant by delegation?

The term 'delegate' is derived from Latin term *delegare* which means to *pass power, to give responsibility or authority to another person or body*. Justice Kurian has observed in a case referring to Black's Law Dictionary and Law Lexicon that:

Delegation is the act of making or commissioning a delegate i.e passing on . It generally means parting of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Black's Law Dictionary as "the act of entrusting another with authority by empowering another to act as an agent or representative". In P. RamanathaAiyar's, The Law Lexicon, "delegation is the act of making or commissioning a delegate. Delegation generally

means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself".

[2]

Again Justice Mathew in case of *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and Others* ^[3] has briefly discussed the concept of delegation as follows:

"Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced."

Concept of Sub Delegated / Subordinate Legislation

The expression 'subordinate legislation' means the act of making statutory instruments by a body subordinate to the Legislature and in exercise of the power, within specific limits, conferred by the Legislature. The term also connotes and covers the statutory instruments themselves.

Legislation is either supreme or subordinate. The former is that which proceeds from the supreme or sovereign power in the State, and which is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. The idea is to supplement Acts of Supreme Legislative Body by prescribing detailed rules

required for their operation.

When a legislative body passes an Act, it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are the characteristics of a Legislature itself. After a Law is made by the Legislature, it is clear that every detail for working it out and for carrying the enactment into operation and effect, may be done by the Legislature or may be left to another subordinate agency or to some executive officer. While this is sometimes loosely described as a 'delegation' of legislative power, in essence, it is different from delegation of legislative power which means a determination of the legislative policy and formulation of the same as a rule of conduct

In a contemporary welfare State, governmental activity has encompassed almost every ground of human venture, thus, requiring enactment of miscellaneous laws to control this ever-widening activity. The Legislature does not have enough time to deliberate upon, discuss and approve all the regulatory measures. Moreover, law-making has now become a complicated and technical matter, and law has to be flawless in technical details.

In the nature of things, what the Legislature does, and can do, is to lay down the policy and purpose of any legislation in hand, leaving it to the Executive to frame, in conformity with those principles, formal and procedural details of that measure in the form of 'orders'.

Nature and Scope of sub-delegation

A rule-making authority can sub-delegate its legislative power only when the parent statute authorizes sub-delegation. Sub-delegation of power of delegated legislation is justified only where the parent statute expressly or impliedly authorizes the delegate himself to further sub-delegate that power to anyone else. The maxim, *Delegatus non potest delegare* is a well-known maxim which means that in the absence of any power a delegate cannot sub-delegate its power to another person's. Thus when an Act prescribes a particular body to exercise a power, it must be exercised by that body and none else unless the Act by express words or necessary implication permits such delegation. When a sub-delegation is made, it does not divest the authority making sub-delegation of his statutory authority. A sub-delegation is not permissible unless the said power is conferred expressly or by necessary implication and in the absence of such an express authorisation, legislative power cannot be sub-delegated. A leading case in this aspect is *Ganapati v. State of Ajmer*. Here the parent act empowered the chief commissioner to make rules for the establishment of a proper system of conservancy and sanitation. The chief commissioner made a rule which empowered the district magistrate to devise his own system. The Supreme Court held that the rule made by the district magistrate was invalid since it was a sub-delegation without an express authority. But if the parent article authorizes to sub delegate, then it can be validated. If the parent Act permits sub delegation to officers or authorities not below a particular rank, then the power can be delegated only to those officers or authorities. Here it may be mentioned that the authority cannot go beyond the power delegated.

Principle Underlying Sub-Delegation

The basic principle in this respect is that the sub-delegate

should not be given uncanalised and unguided legislative power. Like delegation, sub-delegation is also subject to the doctrine of excessive delegation. Where a statute itself authorizes an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such sub-delegation is within the terms of the statute itself.

Sub-Delegation of legislative powers

When a statute confers some legislative powers on an executive authority and the further delegates those powers to another subordinate authority of agency, it is called 'sub-delegation.' Thus, a chain of delegation gets created in which the origin of the power flows through the Parent Act.

Sub-delegation is the further delegation of power by a delegate to another person or agency. The basic principle in this process is summarised by the maxim '*Delegatus Non Potest Delegare*'.^[4] Such sub-delegation can't be made without the duly authorisation by the parent statute under which the delegation has been taken place. e.g. Even though no express power to sub-delegate was granted by the Andhra Pradesh Markets Act, 1966, the High Court upheld sub-delegation by implication from S. 57(3) thereof^[5].

However, as sub-delegation dilutes both accountability and oversight of the original administrative authority, safeguards are necessary for their functioning. The sub-delegate should not act beyond the scope of the power delegated over it. At the same time its important that, the sub-delegation should not be vague and must be free from any irregularities. One of the vital aspects about the sub-delegated legislation is, it must get mandatorily published to be operative^[6].

Having considered various aspects of the legislative function of the administration, we will now consider the non-legislative aspects.

Forms of delegation

Following are the broader classification of the sub-ordinate legislations frequently found under the Indian legal system.

Full or Partial

Delegation is full when complete powers are conferred on the agents e.g. : Power to alter or amend or repeal any law by the "other competent authority" under Article 371- F can be included under subordinate legislation^[7]. It is partial when he is required to get advice and guidance on crucial point from the delegating authority in his country. e.g. : Under Sec. 5 of the Essential Commodities Act, 1955 the Central Government can delegate the power to make orders or issue notifications under Sec. 3, subject to such conditions, if any. Here, the powers have been delegated on subordinate authority by partially.

Conditional and Unconditional

Delegation is conditional when the action of a subordinate is subject to confirmation and revision by the superior. However, the unconditional delegation would amount to the similar to that of full delegation of power. e.g. : Under Section 3 of the Essential Commodities Act, 1955, the Sugar Control Order, 1955 was made by the Central Government (first-stage delegation). Under the Order, certain functions and powers are conferred on the Textile Commissioner (second-stage delegation). Clause 10 empowered the Textile Commissioner to authorize any officer to exercise on his behalf all or any of his functions and powers under the Order. Here, the

subordinate authority has been conferred with the delegated power but subject to certain conditions and the prior approval of the commissioner ^[8].

Skeleton Legislation

The skeleton legislation term is used to denote a statute which delegates legislative power without laying down any principle or policy for the guidance of the delegate. While such legislation should be invalid as it violates the principles of delegation, in modern practice there are a number of statutes which lay down only the barest possible policy guidance and leave enormous discretion to the delegate not only on matters of detail, but also on matters of policy choice. Courts sometimes uphold skeletal legislation, which can only be justified on the ground of expediency. E.g.: Mines and Minerals (Regulation and Development) Act, 1948 is a best illustration in this regard. This Act confers myriad powers on the Central as well as State governments to delegated such powers further and control the mining activities.

In consonance to this, the Apex Court dealt the issue of skeleton legislation in the light of expediency of the statutory provisions and other constraints, in *Bhatnagar & Co. v. Union of India* ^[9] wherein the Section 3(1)(a), Imports & Exports Control Act, 1947 authorised the Central Government to prohibit or restrict import and export of goods of any specified description, despite the Act not explicitly stating any policy; upheld the delegation of power by referring to the predecessor Act, which contained a policy statement.

Power to fill in detail

This is the most common type of delegation wherein the legislature makes the law in skeletal form {also called skeleton legislation) and it is the executive which provides blood and flesh to this skeleton. In this type of delegation the legislature formulates the policy and authorises the executive to supply the details.

Doctrine of Excessive Delegation

The doctrine of excessive delegation is applied by the courts to adjudge the validity of the provision delegating the power. Therefore, too broad power ought not to be vested in the Executive in matters of taxation; the parent Act ought to contain policy in the light of which the Executive is to exercise the power delegated to it. The courts uphold delegation of power to decide "matters of details" in a truth, is really a euphemism to cover delegation of significant powers to the Executive in the tax area.e.g.: "*The delegated authority must only implement stated policy, but if there is abdication of legislative power by transferring policy formulation role to the delegate, then there is excessive delegation, which will be invalidated by the court.*"^[10]

There are few instances in which the delegation may be questioned on the ground of being excessive, as In *Orient Weaving Mills v. Union of India* ^[11], when it comes to delegated the power to the Government to exempt a commodity from the purview of tax; a provision conferring power of the Central Government to exempt any excisable goods from the whole or part of the duty leviable on such goods was held valid against the plea of excessive delegation.

In *Banarasi Das v. State of Madhya Pradesh* ^[12], when it comes to confer the power to the Government to bring additional transactions, commodities or persons within the

purview of a tax;a provision authorizing the Government to bring any goods within the purview of sales tax law was held valid.

In *Bimal Chandra Barterjee v. State of M.P* ^[13] the Supreme Court while considering the provisions of M.P. Excise Act, held that section 25, 26, and 62 of the M.P. Excise Act do not empower the Government to levy tax on excisable articles. Therefore it was held that, no tax can be imposed by any bye-law, rule or regulation unless the Statute under which subordinate legislation is made specially authorizes the imposition.

On the contrary, in *Sitaram Bishamber Dayal v. State of Uttar Pradesh* ^[14], the power to impose sales tax at a rate not exceeding 5% was not regarded irregular by the Supreme Court as the rate prescribed was a reasonable upper limit.

United States

As far as USA is concern, its constitution clearly states that, "*the executive power shall be vested in a President of the United States of America.*"^[15] Moreover the *President of the USA has been bound to ensure that he shall take care that laws be faithfully executed* ^[16] Thus, a pellucid approach can be well observed under the Constitution of the USA pertaining to the form of executive functioning. Thus, it will be a futile hardship to trace the roots of the delegated legislation under the Constitution of USA.

In 1892, the Supreme Court declared in *Field v. Clark* ^[17], "*That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance.*" In 1989, nearly a century after it the Supreme Court of USA in *Mistretta v. United States* ^[18] had upheld the urge and gross necessity of the grant of legislative power to the executive agencies to implement the same in most appropriate and efficient way based on the guidelines for federal criminal offences. This precedent paved way towards more pragmatic and liberal judicial interpretations to welcome the radical changes in the field of administrative law such as delegated legislations.

United Kingdom

Being the essence of parliamentary democracy U.K. bears its own kind of set up for the delegated legislation. Having been based on the principle of 'parliamentary sovereignty', U.K. legal system bears paramount authority to the parliament. Thus every minute intricacy in this regard can be seen to be linked with the Parliament. In the earliest years of British Parliament, broad power to legislate by proclamation remained with the crown. In the 1539 Royal Power to issue proclamation for good order and governance was recognised by Henry VIII's Statute of Proclamations and such proclamations were enforced as if made by Act of parliament. However the aforesaid statute was replaced in 1547. Thereafter the Acts of parliament delegated power to the crown to make laws ^[19].

In Britain executive has no inherent legislative power. Statutory authority is indispensable. The delegated legislation does not have any immunity from challenge in courts which Acts of parliament enjoy as there is a fundamental difference between a sovereign and subordinate law making power. *House of Lords in Hotel and Catering Industry Training Board v. Automobile Ply Ltd* ^[20] Declared invalid an order of minister of labour which would have imposed Industrial Training Act, 1964.

The validity of statutory instrument may be challenged on two main grounds i.e. the content and substance of the instrument is ultra vires the parent act and that the correct procedure has to be followed in making the instrument ^[21] In 1998 the parliament enacted Human Rights Act 1998. Sec 3(1) of the Human Rights Act 1998 casts a duty to interpret the legislation consistently with the European convention rights where it is possible to do so. Thus, the requirement of a valid subordinate law is that it should be in conformity with European Convention Law. In *Bourgoina v. Ministry of Agriculture* ^[22] a ministerial order was held to be unlawful on account of conflict with European Convention treaty.

Precedents on Sub-Delegation in India

The necessity of sub-delegation is ought to be supported, inter alia, on the grounds- Power of delegation necessarily carries with it power of further delegation; and sub-delegation is ancillary to delegated legislation; and any objection to the said process is likely to subvert the authority which the legislature delegates to the executive. Sub-delegation of legislative power can be permitted either when such power is expressly conferred by the statute or may be inferred by necessary implication. Without the strict adherence to this principle no sub-delegation can be possible.

The Lok Sabha Committee on Subordinate Legislation took the view that, as the ultimate authority of the sub-order has to be traced to the Act, it should have been laid. The Committee, however, subsequently stated the necessity to "lay" sub-delegated legislation made under the coal Mines (Conservation and Safety) Rules, 1954, and statutory orders under the Defence of India Rules, 1971 ^[23]. The topic can be studied under three sub-heads: Sub-delegation of legislative power, Sub-delegation of judicial power and Sub-delegation of administrative power. The maxim '*delegatus non potest delegare*' (a delegate cannot further delegate) applies to delegated legislation also and it is not possible for the delegate to sub-delegate the power conferred on him unless the parent Act authorizes him to do so either expressly or by necessary implication.

In, *Central Talkies Ltd. v. Dwarka Prasad, the U.P. (Temporary) Control of Rent and Eviction Act, 1947* ^[24] provided that no suit shall be filed for the eviction of a tenant without permission either of a District Magistrate or any officer authorized by him to perform any of his functions under the Act. An order granting permission by the Additional District Magistrate to whom the powers were delegated was held valid. Thus, express mention of the delegated powers in the orders plays a key role.

In landmark case of *Ajaib Singh v. Gurbachan Singh* ^[25], under the relevant statute, the Central Government was empowered to make rules for detention of any person by an authority not below the rank of District Magistrate. Where the order of detention was passed by an Additional District Magistrate, the action was held bad. Here, the principle of delegated legislation was held subject to the strict interpretation of the statute.

Another illustration of such strict interpretation by the Apex Court is, the case of *District Collector Chittoor v. Chittoor District Groundnut Traders Association* ^[26], Wherein, the Essential Commodities Act confers rule-making power on the Central Government. The Central Government sub-delegated this power to the State governments subject to the condition that before making any rules, the State Government would

obtain the prior concurrence of the Central Government. The Supreme Court ruled in the instant case that any rule made by a State Government without the concurrence of the Central Government would be ultra vires. The Hon'ble Apex Court stated that, "A delegate is not entitled to exercise powers in excess or in contravention of the delegated powers. If any order is issued or framed in excess of the powers delegated to the authorities, such order would be illegal and void."

In *Morgan (I) v. U.S* ^[27] the Supreme Court of America held that the duty to decide cannot be performed by one who has not considered evidence or argument. It is not a impersonal obligation. It is akin to that of a judge. '*The one who decides must hear*'. Lord Denning rightly stated: "while an administrative function can often be delegated, a judicial function rarely can be; no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication" ^[28]. The same principle is accepted in India as the basic principle ^[29].

In, *Bombay Municipal Corporation v. Thondu*, the words of Hidayatullah, J. have become a guiding star to deal with the similar intricacies of the delegated legislation and the judicial powers, as follows- "It goes without saying that judicial power can not ordinarily be delegated unless the law expressly or by clear implication permits it" ^[30].

Under the relevant Act and the rules the Minister was empowered to hear the parties and to pass the final order, but he delegated his function of hearing to his Secretary, who heard the parties and put a note before the Minister for final decision and the order was passed by the Minister. Quashing the orders, passed by the Minister, Subba Rao, J. held that it was not a judicial hearing. "If one person hears and another decides, personal hearing becomes an empty formality".

Conclusion

When talking of the nature of subordinate legislation or delegated legislation 'Subordinateness' not merely is suggestive of the level of the authority making it but also of the nature of the legislation itself. Delegated legislation under such delegated powers is ancillary and cannot, by its very nature, replace or modify the parent law nor can it lay down details akin to substantive law. There are instances where pieces of subordinate legislation which tended to replace or modify the provisions of the basic law or attempted to lay down new law by them had been struck down as ultra vires.

Delegated or subordinate legislation means rules of law made under the authority of an Act of Parliament. Although law making is the function of legislature, it may, by a statute, delegate its power to other bodies or persons. The statute which delegates such power is known as Enabling Act. By Enabling Act the legislature, lays down broad guidelines and detailed rules are enacted by the delegated authority. Delegated legislation is permitted by the Indian Constitution. It exists in form of bye rules, regulations, orders, bye laws etc. Factors responsible for its increase.

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