
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**DELEGATED LEGISLATION: A COMPARTIVE STUDY BETWEEN
INDIA AND THE UNITED STATES**- Ishita Chowdhury ¹**ABSTRACT**

This paper studies the evolvement of delegated legislation in India and the United States. The expectations of having a welfare state, overburdens the Legislature to conduct their multifarious activities. As per the Separation of Powers the legislature delegates or shares certain powers in the executive wing of the government. Such delegation has been a deeply contested issue to India's democracy. Although, the need for delegated legislation emerged to avoid overburdening the Parliament, give specified knowledge in emergent situations and have flexible enactment. This paper delves into flagging the various defects secondary legislation forms in the modern welfare state, while critiquing the constitutionality of such a power.

In comparison, the situation in the United States seems to take a fresher, more liberal approach. Even though both countries exercise delegated with a limited scope. India, places different, much stricter mechanisms of scrutiny to ensure the validity of the law. The US confers its 'sweeping clause', to execute laws that activate necessary federal powers. The Rule Making procedure in US lays implicit guiding principles which strikes a balance between the delegated authority and its superior. A balance, India could benefit from if applied in its own context. This paper aims to fill the gaps that delegated legislation has in India, a law still in its formative stage, while learning from its American counterpart.

INTRODUCTION

The expectations of having a welfare state, overburdens the Legislature to conduct their multifarious activities. The **Separation of Powers** emphasizes on the separation of the three organs of the government; i.e. legislature, executive and judiciary. The doctrine can be seen

¹Advocate, Supreme Court of India, Jindal Global Law School²¹

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

through the influences of Aristotle and John Locke. But the main attribution of this can be given to **Baron de Montesquieu in De L’Esprit des Loix** (The Spirit of the Laws). He names three functions; “that of making the laws, executing public resolutions and of judging crimes and disputes of individuals”². One of the powers the Constitution empowers the Legislature is the act of creating legislation itself. Even the legislature cannot always perform all the functions. Under delegated legislation, the legislature delegates or shares certain powers in the executive wing of the government. This has been one of the most contested issues, different legal philosophers think of this to be contravenes to the doctrine of separation of powers. Although over the years it has achieved a growing significance, followed by all modern democratic countries.

WHAT IS DELEGATED LEGISLATION?

Delegated or secondary or subordinate legislation is when the legislature confers powers to the executive wing to implement, administer, confer rule-making powers or to fill in the details. Although the power rests with anybody other than the legislature but is vested by the legislature themselves. The parliament then, generally through a section in the Act, delegates its legislative powers to the government to frame rules or regulations, to provide clear cut procedures and details to supplement the Act. The Act conferring legislative power is known as the **“Parent Act”**; the subordinate laws which emerge under it are known by a great diversity of names such as **rules, regulations, schemes, bye-laws, notifications, circulars, orders etc.** The benefits of delegated legislation are multi-fold, they help in the expeditious government transactions, reduce delay in waiting for an Act to be passed, can be more specialised in nature.

Traditionally, executive law making has been seen as an evil as it causes considerable infringement to the separation of powers. It raises questions on the executive causing an overreach while adopting mechanisms through such a wide power. The considerable violation can be not preferred as the people in question are not the direct representatives in the Parliament. Yet, there are certain factors that continue to be in favour of delegated legislation.

² 'Separation Of Powers: A Comparative Analysis Of The Doctrine India, United States Of America And England - Academike' (Academike, 2015) <<https://www.lawctopus.com/academike/separation-of-powers-comparative-analysis-of-the-doctrine-india-united-states-of-america-and-england/>>.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

NEED FOR DELEGATED LEGISLATION IN INDIA

As mentioned before, Delegated Legislation has consequently grown into all modern democracies. There are various **reasons why there was an emergent growth** for delegated legislation. Making laws in an over growing modern welfare or service state was not possible. This is a job that is required throughout the year, which would only make that one organ less effective and reduce the quality of legislation. With states getting divided into more minor segments, local authorities could come to the forefront to “fill in details”. They with their own level of expertise and knowledge about the local conditions could improvise. This let’s laws be more technical in nature which leads to a mature legislation. Ordinary legislation rarely ever partakes in any form of experimentation, this form gives room for flexibility. Similarly, this form of specialisation is highly recommended in emergency situations. The Government at times needs to make decisions with discretion, especially when it had to carry out policy objectives. Thus, when administrative agencies wanted to make rules, such a process came to aid. Not just for administrations but also for the people governed, direct participation became more possible³.

Delegated Legislation was put in place to avoid the overloading to the Parliament; plus, such legislations don’t require any form of waiting for an Act to pass. This further prevents the Parliament to spend time on technical matters and to specify into the details. (2) Such a form of delegation enables the right person to take care of the specific field of interest. Thus, an expert with the required set of knowledge gets to design the legislation. (3) Since it is highly efficient in process, it is best for emergent situations⁴. (4) Finally, delegated legislation covers situations where the Parliament might not have foreseen enactment but through such a process it makes it flexible. Delegations hence keep up with the changing times, along with

³Development Of Delegated Legislation In India' (*Aclawresearch.blogspot.com*, 2012)

<<http://aclawresearch.blogspot.com/2012/12/development-of-delegated-legislation-in.html>> accessed 19 May 2020.

⁴Development Of Delegated Legislation In India' (*Aclawresearch.blogspot.com*, 2012)

<<http://aclawresearch.blogspot.com/2012/12/development-of-delegated-legislation-in.html>> accessed 19 May 2020.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

unforeseen disasters. The authority appointed by the sovereign provides for rules, regulations, by-laws, notifications, orders, etc⁵.

THE CONTROVERSY BEHIND DELEGATED LEGISLATION

Delegated Legislation has been an epicenter for a multitude of confusions. “Legislators from time to time use it as an excuse, administrators as a shield and a provocation for the Constitutional purists”⁶. With changing times, subordinate legislation has become a necessity and an inevitable part when the social, economic, technological, administrative aspects outrun the scattered traditional legislative ideals and processes. This process was criticized on the ground as way to pass the buck from the duty that the voters had trusted the legislature with. This voluntary abdication of power is categorized as a modern democracy problem⁷.

Following such a controversy, delegation has faced a set of criticisms. The main **defects of secondary legislation** are varied. First, delegated legislation has given more space to make excessive laws along with amendments. Second, it goes against the grain of the democratic promise, as most of these are made by unelected people. Thirdly, even though delegation works fast but lesser parliamentary scrutiny is undergone than primary legislation. Thus, this increases the possibility of inconsistent laws. Lastly, the public is kept out of the loop as delegation occurs through statutory instrument and escapes the public’s eye⁸. This in contrast to the Act of the Parliament, which is heavily public. The reason for such secrecy is because delegated legislation occurs in such large numbers that it becomes difficult to notify all of them. This makes delegated legislation free from public opinions which is against the fundamentals of a democracy.

CONSTITUTIONALITY OF THE DELEGATED LEGISLATION IN INDIA

Even though, this power has faced plenty of criticisms it still was able to find a place in the Constitution. **Article 312** of the Constitution details the powers for delegated legislation, K.N

⁵Dr. Ketan Govekar, *Delegated Legislation in India*, Kare College Of Law

⁶P.B Mukharji, *Delegated Legislation*, 1 The Indian Law Institute (1959)

⁷Ibid.

⁸Dr. Ketan Govekar, *Delegated Legislation in India*, Kare College Of Law

For general queries or to submit your research for publication, kindly email us at editorial@ijlr.in

Wanchoo in *D.S Gerewal v The State of Punjab*⁹ observed “There is nothing in the words of Article 312 which takes away the usual power of delegation, which ordinarily resides in the legislature”. In comparison to the Indian situation, England has zero restrictions while delegating powers from the supreme to another. The United States comes closer to the Indian scenario, the Congress does not enjoy unlimited power of delegation. It is subject to the condition that the administrative authority has to prescribe limits for subordinate rule-making. The words of Article 312 says, the “Parliament may provide”, which when read with **Article 13(3)** defines ordinances, bye laws, rules, regulations, etc. having the force of law but with a limited scope.

The Constitutionality of Delegated Legislation can be traced by examining the cases that took place pre and post-independence. Speaking of pre independence, *Queen v Burah*¹⁰, the Privy Council validated only Conditional Legislation and did not permit Delegated Legislation. The Governor of Bengal could vest the power in an officer to decide the civil and criminal administration of Garo Hills, Khasi and Jaintia Hills according to Section 8 and Section 9. Burah, of the Khasi and Jaintia Hills was sentenced to death. The High Court declared Section 9 to be unconstitutional delegation of legislative power. The reason was that the Indian Legislature was already subordinate to the British Parliament, hence they could not further delegate (**doctrine of delegatus non potest delegare**). The Privy Council later held Section 9 to be constitutional on the grounds of it being conditional legislation. Along with stating that the Indian Legislature had plenary powers of legislation itself. This led to two forms of interpretation; the Indian legislature did not have any limit on delegation. Second, only conditional legislation was allowed and not delegation of legislative power. But this case failed to provide clarity on the scope of delegation.

The court in *King v. Benori Lal Sharma*¹¹, the Governor General was challenged due to the setting up of special criminal offences. The court yet again, said that this was an example of a local authority exercising its power and was not delegated legislation. The question of constitutionality of delegation of legislative powers came before the Federal Court of India in

⁹*D S Garewal vs The State Of Punjab And Another* [1958] Supreme Court of India, 1959 AIR 512

¹⁰*The Empress vs Burah And Book Singh* [1877] Calcutta High Court, (1878) ILR 3 Cal 64

¹¹*Emperor vs Benori Lal Sarma* [1944] Bombay High Court, (1945) 47 BOMLR 260

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

*Jatinder Nath Gupta v Province of Bihar*¹². The Bihar Maintenance of Public Order Act gave authorisation to the provincial government to extend the applicability of an Act for a year if it may deem fit. The Federal Court held such a clause to be unconstitutional as the power of extension was an essential legislative power and delegating it to the executive was not possible. Unlike in *Queen v Baruh*, this case provided finality on legislative functions cannot be delegated. The view in *Jatinder Nath* was a highly restrictive standard and based itself on a rigid separation of powers doctrine. This came to shape the new model Independent India was soon to adopt, the Legislature was soon to accord greater freedom to legislators in India.

Post-Independence, the confusion regarding legislative power continued. *Delhi Laws Act, 1912*¹³ discussed the validity of three laws, i.e Section 7 of the Delhi Laws Act, Section 2 of the Ajmer Merwara Act and Section 2 of Part C of States (Laws) Act. The Delhi Act and Ajmer- Mewara Act had the power to extend any law that it deemed fit to its area. The States Act also had the same power along with the power to repeal or amend laws. This case has seven points elucidated in its holding. The extension of power clause for all the laws were held valid except for the repeal and amendment part. The court held that delegation of legislative power by the legislature to the administration was necessary in order to deal with the extensive number of issues in India. Secondly, since the legislature derives its powers from the Constitution, excessive freedom cannot be granted and that there was a need to impose an outer limit on delegation by the legislature. But these were the only points where all the judges agreed upon. Yet again, the **permissible limits of delegations** were still not decided. While one side argued for a British influenced delegation, where it could delegate to the point that it did not efface itself, or abdicate its power and the legislature remains to be the ultimate control over authority. The other side, from an American point of view expressed certain limits. The Legislature should not be allowed to delegate its essential functions which would compromise the formulation of policy and rule of conduct. The courts finally laid down, the latter view, the Supreme Court further based this on the intent of the Constitution makers and democratic ideals. The *Delhi Laws* case, stated a twofold argument in favour of

¹²*Jatindra Nath Gupta vs Province of Bihar* [1949] Federal Court, AIR 1949 FC 175

¹³*Re The Delhi Laws Act, 1912, The vs The Part C States (Laws) Act, 1950* [1951] Supreme Court of India, 1951 AIR 332

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

delegation. The Legislature was allowed to delegate as long as it was limited to only the non-essential functions.

MECHANISMS FOR SCRUTINY OF INDIAN DELEGATED LEGISLATION

The **scope of different statutes** is varied. It could either be a simple statutory provision where rule making power is given to the Government or to officers for carrying out the purpose of the Act (E.g. S.120 and 121 of Civil Procedure Code). Sometimes the statute emphasises on the rule to be published in the Official Gazette before they come into operation (E.g. S.23 of General Clauses Act). Very rarely certain provisions help with how rules should be drafted. Some statutes provide that the rules expressly say that they are to be placed before the Parliament (E.g. S.10 of the National Highways Act). Another type of delegation occurs to the way of Schedules and appendixes (E.g. Minimum Wages Act). At times the statutes delegating power to exempt or include new subjects¹⁴. But generally, one of the most contested legislations is called as “conditional legislation”. Such a legislation makes law but leaves it to the executive to operate when the conditions are fulfilled.

For the exercise of a delegated legislation, certain **requirements are to be met to ensure its validity**. (1) The parent Act under which the power of the subordinate legislation is exercised must be valid. (2) The parent Act has to contain a clause that expresses delegation. (3) The statutory instrument has to be in conformity in terms of substance, procedure and form with the delegation clause. (4) It should generally not be in violation with norms of judicial decisions. (5) Most importantly it should not be in violation with the fundamental rights of the Constitution¹⁵.

While delegated legislation enables the powers to be delegated to the Government, certain functions as was termed earlier as “essential” cannot be passed on. These include powers such as framing the legislative policy, exceeding the scope of the delegating Act, creating a retrospective effect, etc. There are three mechanisms in place that ensure that such situation does not arise; namely parliamentary scrutiny, public consultation and judicial scrutiny.

¹⁴P.B Mukharji, *Delegated Legislation*, 1 The Indian Law Institute (1959)

¹⁵P.M Bakshi, *SUBORDINATE LEGISLATION: SCRUTINISING THE VALIDITY*, 36 Indian Law Institute (1994)

- i) **Parliamentary Scrutiny:** Parliament has the power to oversee rules at different stages: during the debate of the Act, statutory motion to discuss rules, Question Hour and Committee on the Subordinate Legislation. Statutory Motion: MP's may move for a statutory motion that would amend or modify the rules. The Parent Act requires the rules to be tabled for 30 days and the changes can be made till the last day of the motion. Question Hour: The scope and the provisions may be discussed during the Question Hour. Committee on Subordinate Legislation: Each House has a standing committee in place for delegation. This is place to oversee the correct powers are being delegated. The following guidelines have to be overseen. Such as are they in lieu with the Constitution, no delay in the publication of rules, no retrospective application and does not bar the jurisdiction of courts. It is then submitted to the government who make an Action Report¹⁶.
- ii) **Judicial Interpretation:** The Courts have held that the legislature can delegate only if it has to (a) modify an Act, (b) appoint for deciding on a commencement date, (c) exempt and include certain categories of people.
- iii) **Public Consultation:** India does not require legislations to be first published in draft forms. The courts have a discretion over this clause. If such a draft is made out then it has to be published in the Gazette and the objections have to be invited on a specific date¹⁷.

UNITED STATES AND DELEGATED LEGISLATION

The political system of the US is slightly different than that of India. The backbone of their polity lies in the hands of the executive. The Constitution although lays down, "all legislative powers shall be vested with the Congress" and "executive power with the President".

Article 1 of the US Constitution, i.e. the sweeping clause allows Congress to execute laws which deems it to be necessary for activating its federal powers. This **Sweeping Clause** runs as- "The Congress shall have Power... To make all Laws which shall be necessary and proper

¹⁶*Parliamentary Scrutiny of Executive Rule Making Background Note for the Conference on Effective Legislatures*, PRS Legislative Research (2012)

¹⁷Ibid.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof¹⁸.

RULE MAKING PROCEDURE

The **Administrative Procedure Act (APA)** of 1946, through the Attorney General's Committee on Administrative Procedure built upon a rule making procedure under Section 4 of the APA. The APA makes an agency give notice of the terms of the proposed rule. People who are interested submit their views, data, etc. The rule has to have a concise general statement of its basis and purpose and has to be published in thirty days or less from the date of effect. Similar to India, no procedures are required to adopt these subordinate legislations¹⁹. The US form of delegated legislation takes up many roles, which in practice becomes difficult for the Supreme Court to manage between the doctrine of separation versus inevitability of delegation.

*Wayman v Southhard*²⁰, Supreme Court distinguished between "important subjects" and mere details. The case dealt with the clause in Process Act that authorized federal courts to establish rules of practice. The court held that such a law was "**to fill in the details**" of such laws, while maintaining the power with the Congress. The line between the important subjects and other general provision has still not been clearly demarcated. Justice John Marshall stated a very important principle in this case that went on to mold the relationship between the Courts and Congress. "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

Another form of practice is that of **contingent legislation**, where Congress demands a previous statute to be modified upon the finding of new facts by an administrative or executive officer. *Field v Clark*²¹ is one such case where this theory was used. The President was given the right to suspend items from their duty-free status. The defendants sued on the

¹⁸Saad AbdulbaqiSabti& YP Rama Subbaiah, *A comparative study of delegated legislation: With special reference to United States of America and United Kingdom*, 3 International Journal of Law (2017)

¹⁹Ibid

basis that such a right was vesting the President with a rule-making power which would act like a legislative function. The court in this case held that such a power was not a power of legislation as it was only delegated as a discretionary power. Article 1 of the US Constitution issued all legislative powers to the Congress, if these were passed to the executive then the people would be a victim of unelected bureaucracy. Suspension of the law was not seen as the same as making the law. The importance of this case was twofold, the Courts allowed the President to exercise powers without the approval of the Senate and the Court offered a delegation power to the President. Another case where question before the court was a delegation of power to the President as unconstitutional was in *Panama Refining Co. v Ryan*²². The court here held the power to be unconstitutional as there were no clear guidelines, limits on the executive discretion for the policy.

There are some implicit guiding principles to “fill in the details”, this is the requirement of “intelligible principles” or “standards”²³ to guide and limit the subordinate authority. The purpose of this is that the decision made can still be linked back to a representative of the people. The other is it prevents judicial review from becoming an exercise to measure an action only against legislation. This concept of “standards” was tested in *A.L.A Schechter Poultry Corp. v United States*²⁴, the National Industrial Recovery Act allowed the president to approve codes of fair competition. The Act failed to provide any standards to implement its objectives.

The court just like in *Panama Refining Co.* held that no branch of government can delegate its power to another²⁰ and the policy was too ambiguous to be enforced. But this is not the general defining requirement in all cases. In *Mistretta v United States*²⁵ the United States Sentencing Commission was created that would bridge the gaps in the sentencing guidelines for federal offenses. This delegation was said to have been granting excessive legislative

²¹ 143 U.S. 649 (1892)

²² 293 U.S. 388 (1935)

²³ DELEGATION OF LEGISLATIVE POWER LII / Legal Information Institute, <https://www.law.cornell.edu/constitution-conan/article-1/section-1/delegation-of-legislative-power> (last visited May 17, 2020)

²⁴ 295 U.S. 495 (1935)

discretion in violation of the non-delegation doctrine to the Commission. The Court saw the Act to be unconstitutional instead of seeing this as delegation, it saw it as a way of assistance and coordination between two branches. They applied the **test of intelligible principle** here, which ensures the delegated authority adheres to the directives given by its superior. The guidelines were said to be 'practical, specific and detailed' which was important to lay down the concept of practical governance.

CONCLUSION

The pre-rule making scenario in the US, makes it compulsory to draft rules in the Federal Register along with a cost benefit analysis of the rules. The Publication of the Rules have to be in the same register as soon as they are approved by the Congress. But they have to laid in front of them prior to them coming into effect. The Committee System is referred on the particular subject and jurisdiction. The Congressional Review Act gives the Congress sixty days to amend or modify rules that will have a financial impact on the market. But the final approval only lies with the Congress.²¹

India has a lot to learn from the America context, in this light; certain **reforms** as suggested by P.B Mukharji can be taken into account. A statute should have the power to extend, only in situations when the conditions and standards have been elucidated and a previous publication of the same would be preferable. There should be a complete abolishment of those Acts that let the Executive decide the working of an Act. The rule of laying on the Table of the Parliament should be done away with and the American alternative of laying based on particular demand should be considered²². If a delegation deals with procedure, the statute should lay the basic features, requirements and the right of objection and hearing with it.

In conclusion, the process of delegated legislation is still in its formative stage and still has a long way to perfection. Although, the American context continues to have discrepancies between their theory and practice; what is important that we learn an important lesson from

²¹*Parliamentary Scrutiny of Executive Rule Making Background Note for the Conference on Effective Legislatures*, PRS Legislative Research (2012)

²²P.B Mukharji, *Delegated Legislation*, 1 The Indian Law Institute (1959)

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

them. The process of delegated legislation should not be done with a view to increase the gap between the public and their representatives. As discussed earlier, modern democracies have a growing tendency to operate with delegated legislation but at no point this should be made the norm. The **fundamentals of a democracy must not be lost**, and they should only operate out of absolute necessity and with a view to aid and better Administrative Law in India.

BIBLIOGRAPHY

Indian Judgements:

- *D S Garewal vs The State Of Punjab And Another* [1958] Supreme Court of India, 1959 AIR 512
- *Emperor vs Benoari Lal Sarma* [1944] Bombay High Court, (1945) 47 BOMLR 260
- *Jatindra Nath Gupta vs Province of Bihar* [1949] Federal Court, AIR 1949 FC 175
- *Re The Delhi Laws Act, 1912, The vs The Part C States (Laws) Act, 1950* [1951] Supreme Court of India, 1951 AIR 332
- *The Empress vs Burah And Book Singh* [1877] Calcutta High Court, (1878) ILR 3 Cal 64

Foreign Judgements:

1. *A.L.A Schechter Poultry Corp. v United States* 295 U.S. 495 (1935)
2. *Field v Clark* 143 U.S. 649 (1892)
3. *Mistretta v United States* 488 US 361 (1989)
4. *Panama Refining Co. v Ryan* 293 U.S 388 (1935)
5. *Wayman v Southhard* 23 U.S. 10 Wheat. 1 1 (1825)

Books and Journals

- Bakshi, P.M., *SUBORDINATE LEGISLATION: SCRUTINISING THE VALIDITY*, 36 Indian Law Institute (1994)
- Govekar, K., *Delegated Legislation in India*, Kare College Of Law
- Mukharji, P.B., *Delegated Legislation*, 1 The Indian Law Institute (1959)
- *Parliamentary Scrutiny of Executive Rule Making Background Note for the Conference on Effective Legislatures*, PRS Legislative Research (2012)

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

- Sabti, A., &Subbaiah, R., *A comparative study of delegated legislation: With special reference to United States of America and United Kingdom*, 3 International Journal of Law (2017)
- Singh, A., *Lectures on Administrative Law & Regulatory State*

Websites

- Delegation of Legislative Power LII / Legal Information Institute, <https://www.law.cornell.edu/constitution-conan/article-1/section-1/delegation-of-legislativepower> (last visited May 17, 2020)
- 'Development Of Delegated Legislation In India' (*Aclawresearch.blogspot.com*, 2012) <<http://aclawresearch.blogspot.com/2012/12/development-of-delegated-legislation-in.html>> accessed 19 May 2020.
- 'Separation Of Powers: A Comparative Analysis Of The Doctrine India, United States Of America And England - Academike' (*Academike*, 2015)
- <<https://www.lawctopus.com/academike/separation-of-powers-a-comparative-analysis-ofthe-doctrine-india-united-states-of-america-and-england/>>.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>