

Junctures That Buildout Delegated Legislation in India

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Abstract:

The present modern complex socio-economic problems necessitate delegated legislation. Delegated legislation suggests the exercise of the law-making power, by any administrative authority, delegated to it by the legislature. It has thrived and escalated with the extension of administrative processes in the modern welfare state. Nonetheless, in India, the locus of delegated legislation has been uncertain, because the delegation of legislative power raises a natural question of its constitutionality, which is decided by the courts of law.

The chief cause of this is the varying judicial attitude concerning the constitutionality of the mechanism of delegated legislation in India, which itself is the result of variations in the organizations of the Government and Courts. This paper attempts to determine the constitutionality of delegated legislation throughout various time periods in India, viz. First, when the Privy Council was the highest court of appeal, Second, when the Federal Court was the highest court of appeal and Third, when the Supreme Court is the highest court of appeal.

The distinction between conditional legislation and delegated legislation has always been underlined throughout the timeline of development of delegated legislation in India. But is this distinction real? Many features of the mechanism of delegated legislation in India are similar to that of the system in USA, but there are many other which display striking similarity to British system. The question here lies that from which among the both does the Indian mechanism actually derive, or is the system in India is distinct from that of both the countries?

Keywords: *Delegated legislation, Constitutionality of delegated legislation, Conditional Legislation.*

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FOREWORD

Delegated legislation has flourished and intensified with the extension of administrative processes in the modern welfare state. The notion of modern welfare state in itself conveys not only the protection of the fundamental human rights, but also the idea of socio-economic development and progress in all facets, of the lives of its people. It necessitates legislation at grass root levels. Consequently, legislatures are faced with a great load of work as they have on the anvil many more bills than what they can conveniently dispose of. Thus, just one legislature is not sufficient to deal with and predict the technical and situational intricacies in every arena; it cannot visualize and provide for the multitudinous needs and demands of every situation. Admittedly, the legislature in India lacks experience and expertise to make laws taken into account the present and future requirement in a developing country. Therefore, the need for several administrative bodies, which can legislate for the specific needs of specific subjects and situations, with professional expertise, is inevitable.

Moreover, the mechanism of delegated legislation permits a certain amount of flexibility and elasticity in the area of legislation, as it is much easier to make necessary adjustments in delegated legislation if circumstances so demand, than to secure an amendment of the statute through the legislature. Accordingly, the legislature can set broad policies and principles in the legislations it enacts and then leave the task of shaping and formulating the details to the concerned administrative body. When any administrative authority exercises the law-making

power delegated to it by the legislature, it is known as the rule-making action of the administration.¹

The Constitution of India also constitutes India as a modern welfare state, necessitating administrative rule-making. The Supreme Court of India has enumerated the following as the leading reasons for the necessity of delegated legislation in India²-

- (i). The area for which powers are given to make delegated legislation may be **technically complex**, so much so, that it may not be possible and may even be difficult to set out all the permutations in the statute.
- (ii). The executive may require to **experiment** and to find out how the original legislation was operating and therefore to fill up all other details.
- (iii). It gives an **advantage to the Executive**, in the sense that a Government with an onerous Legislative time schedule may feel tempted, to pass skeleton legislation with the details being provided by the making of rules and regulations.

Without going into unnecessary details, it will not be out of place to know the historical context of delegated legislation in India. It all commenced when the East India Company first started its operations as a trading company in India and gradually acquired political influence. The British, when they became politically strong in India, built a new constitutional structure on their experience in England.

¹ I. P. Massey, Administrative Law 48 (8th ed. 2012).

² Agricultural Marketing Committee v. Shalimar Chemical Works Ltd., AIR 1997 SC 2502. *See also*

State of Rajasthan v. Basant Nahata, AIR 2005 SC 3401.

The Crown in England became the legislative authority in respect of areas which had come under the control of the East India Company. The Indian Councils Act of 1861, gave power to the Governor-General in Council, with additional nominated members, to make laws. The constitutional position, therefore, was that the British Parliament was the sovereign body which passed the Indian Councils Act. It gave the Governor-General in Council in his legislative capacity powers to make laws over the territories in India under the governance of the Crown. Then, under the Government of India Act, 1919, the powers of Governor General were substantially widened. Still, his powers were necessarily defined and limited. After the Act of 1919, the Government of India Act, 1935 was passed, which kept intact the supremacy of British Parliament. It is, therefore, clear that the Indian Legislature was a subordinate legislature and not a sovereign legislature.

Finally, the Indian Independence Act, 1947 was passed, which marked the end of the British Raj in India.³ Trailing it, the Constitution of India came into force in 1950⁴, which has been the supreme authority in India, under which the Central and State Legislatures have received lavish powers of legislation⁵, which includes power of delegation.

WHAT IS DELEGATED LEGISLATION?

Before dwelling into the meaning of delegated legislation, it is essential to establish the meaning of “legislation” itself. Legislation (generally) is that source of law which consists in the declaration, enunciation, or promulgation of legal rules by a competent authority [legislator or a legislative body], which have the force of law.⁶ Legislature is the law-making organ of any state. Under the Indian Constitution the law-making power has been vested by the combined effect of Arts. 107-111, and Arts. 196-201, for the Union in the Parliament and for the States in the respective State Legislatures.⁷ The power of delegation is a constituent element of the legislative power as a whole under Article 245 of the Constitution and other relative Articles and when the Legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying out the policy laid down by the Acts as part of the Administrative Law.⁸

Delegated legislation, in a simple way, refers to all law-making which takes place outside the legislature and is generally expressed as rules, regulations, bye-laws, orders, schemes, directions or notifications, etc.⁹ The *Halsbury's Laws of England* describes, when an instrument of legislative nature is made by an authority in exercise of power delegated or

³ B. M. Gandhi, V.D. Kulshrestha's Landmarks in Indian Legal and Constitutional History 374- 407 (Eastern Book Company, 10th ed. 2012).

⁴ The Constitution of India, Article 394.

⁵ *Ibid.*, Article 245.

⁶ J.W. Salmond, Jurisprudence or the Theory of the Law 113 (1902).

⁷ Constitution of India, Articles 107-111 and Articles 196-201.

⁸ *Agricultural Marketing Committee v. Shalimar Chemical Works Ltd.*, AIR 1997 SC. See also *Vasanlal Maganbhai Sanjanwala v. State of Bombay and Others*, AIR 1961 SC 4; *The Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*, AIR 1968 SC 1232.

⁹ *Supra* note 2, at 79.

conferred by the legislature, it is called subordinate legislation or delegated legislation¹⁰.

Salmond defines delegated legislation 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... They [delegated legislations] may be regarded as having their origin in a delegation of the power of Parliament to inferior authorities, which in the exercise of their delegated functions remain subject to the control of the sovereign legislature.”¹¹

The term delegated legislation itself may be used in two senses-

- I. The exercise by a subordinate agency of the law-making power delegated to it by the Legislature. {The Action (*verb*)}; or
- II. The subsidiary rules themselves which are made by the subordinate agency in pursuance of the power so delegated, *i.e.* the actual exercise of law-making power itself in the form of rules and regulations, etc.¹² {The Act (*noun*)}

LEGITIMACY OF DELGATED LEGISLATION

In order to possess the *force of law* every legal action must be lawful. The same prerequisite applies to delegated legislation to have the force of law. The constitutionality or legitimacy or legality of delegated legislation means the permissible limits of the constitution of any country within which the legislature, which as the sole repository of law-making

power, can validly delegate rule-making power to other administrative agencies.¹³

The authority of determining the legality of any law lies within the territory of Judiciary. Hence, the question of permissible limits of the Constitution within which the law-making power may be delegated is ascertained by the Courts of law. The organization of Courts in India has been transforming, accordingly the legitimacy of delegated legislation. It can be cogitated in three different phases, *i.e.* *First*, when the Privy Council was the highest court of appeal, *Second*, when the Federal Court was the highest court of appeal and *Third*, when the Supreme Court is the highest court of appeal.

A. THE PRIVY COUNCIL (1726- 1949)

The Privy Council was the highest court of appeal from India in constitutional matters for more than 200 years. In this time period the laws were reviewed in compliance with English laws, which were uncoded. In *King Emperor v. Benoari Lal Sharma*¹⁴, the Privy Council for the first time upheld the validity of the Governor General's Ordinance of special courts, which had delegated the power to extend the duration of the ordinance on provincial governments in case of an emergency, *on the ground of conditional legislation*. The Privy Council observed that it was a piece of conditional legislation as the legislation was complete and what had been delegated was the power to apply the Act on the fulfilment of certain conditions.

The question of constitutionality of delegated legislation properly came before the Privy Council in the prominent case of *R. v. Burah*¹⁵. In this case an Act was passed by the in 1869 by the Indian Legislature to

¹⁰ 44 Halsbury's Laws of England 981-84 (4th ed.).

¹¹ *Supra* note 7, at 116.

¹² Jain and Jain, Principles of Administrative Law 44 (Updated 6th ed. 2013).

¹³ *Supra*, note 2 at 91.

¹⁴ *King Emperor v. Benoari Lal Sharma*, AIR 1945 PC 48.

¹⁵ *R. v. Burah*, 4 ILR Cal. 172 (1879).

remove Garo Hills from the civil and criminal jurisdiction of Bengal, vesting the powers of civil and criminal administration in an officer appointed by the Lieutenant Governor of Bengal. The Lieutenant Governor was further authorized by Sec. 9 of the Act to extend any provision of this Act with incidental changes to Khasi and Jaintia Hills. One Burah was tried for murder by the Commissioner of Khasi and Jaintia Hills and was sentenced to death.

The **Calcutta High Court**, by a majority judgment, decided that the said notification had no legal force or effect and declared *Sec. 9 as unconstitutional delegation of legislative power* by the Indian Legislature on the ground that the *delegate cannot further delegate*. Here, the principle of agency was relied upon and the Indian Legislature seemed to be regarded an agent delegate, acting under a mandate from the Imperial Parliament.

The **Privy Council** on further appeal reversed the decision of the Calcutta High Court and upheld the constitutionality of Sec. 9 of the Act on the ground that *it is merely a conditional legislation*.

Apparently, the question of permissible limits of delegation by the Indian Legislature was not dealt appropriately by the Privy Council. Hence, during the term of the Privy Council as the highest court of appeal, the question of permissible limits of delegation remained uncertain in India.

B. THE FEDERAL COURT (1949- 1950)

The Federal Court of India was established in 1937 by the Government of India Act, 1935.¹⁶ It was established formally as the highest court of appeal in 1949.¹⁷ The question of delegation of legislative powers came before the Federal Court in the leading case of *Jatindranath Gupta v. Province of Bihar*¹⁸. In this case the validity of Sec. 1(3) of the Bihar Maintenance of Public Order Act, 1948 was challenged on the ground that it authorized the provincial government to extend the life of Act for one year with such modifications as it may deem fit.

The Federal Court held that the power of extension with modification is unconstitutional delegation of legislative power because it is an essential legislative act. The observations of Mukherjea J. suggested that the 'power to extend' was a legislative power, but where the Legislature itself fixed a maximum period of duration for an enactment and then authorized the Executive to give effect to the Act within the maximum period, according to the exigencies of the situation then prevailing, it was not unconstitutional.¹⁹

In this manner for the first time it was held that in India legislative powers beyond conditional legislation cannot be delegated.²⁰

C. THE SUPREME COURT OF INDIA (SINCE 1950)

Article 124 of the Constitution of India provides for the establishment of the Supreme Court of India²¹,

¹⁶ B. M. Gandhi, V.D. Kulshrestha's Landmarks in Indian Legal and Constitutional History 214 (Eastern Book Company, 10th ed. 2012).

¹⁷ The Abolition of Privy Council Jurisdiction Act, 1949. See also the Federal Court (Enlargement of Jurisdiction) Act, 1947. See also Garikapati Veeraya v. N. Subbiah Choudhary, AIR 1957 SC 540.

¹⁸ Jatindra Nath Gupta v. Province of Bihar, AIR 1949 FC 175.

¹⁹ D.D. Basu, Shorter Constitution of India 1666 (LexisNexis Butterworths Wadhwa Nagpur, 14th ed. 2009).

²⁰ *Supra*, note 2 at 95.

²¹ The Constitution of India, Article 124.

which is the highest court of appeal in India since independence. After the judgement of Federal Court the limits of delegation of legislative powers were particularly uncertain. The issue of constitutionality of delegated legislation came before the Supreme Court in the *In re The Delhi Laws Act*²² case, which is said to be the Bible of delegated legislation²³, wherein the President invoked the advisory jurisdiction of the Supreme Court under Article 143 of the Constitution of India,²⁴ to elucidate the constitutionality of three Acts covering three different periods, in form of three questions, viz.

- a) The Delhi Laws Act, 1912 – It covers the legislative powers of the Indian Legislature during the period prior to the Government of India Act, 1915.

Question- 1- "Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?"

[Section 7 of the Act delegated to the provincial government, the power to extend to Delhi area with such restriction and modification any law in force in any part of British India];

- b) The Ajmer-Merwara (Extension of Laws) Act, 1947 – It is in respect of the legislative power of the Indian Legislature after the Government of India Act, 1935, as amended by the Indian Independence Act of 1947.

Question- 2- "Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?"

[Section 2 of the Act delegated the power to the government to extend to the province of Ajmer-Merwara any law in force in any other province with such modification and restriction as it may deem fit]; and

- c) The Part "C" States (Laws) Act, 1950- It is in respect of the power of the Indian Parliament under the present Constitution of 1950.

Question- 3- "Is Section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament?"

[Section 2 delegated power to the Central Government to extend to Part "C" States, with such modification and restriction as it may deem fit, any enactment which was in force in any Part "A" State. It also empowered the government to repeal or amend any corresponding law which was applicable to Part "C" States.]

In this case seven judges participated in the decision and seven opinions were delivered. The case was argued from two extreme positions, *i.e.* M.C. Setalvad, on behalf of the President of India, argued that the power of legislation carries with it the power to delegate, and unless the legislature has completely abdicated or effaced itself, there is no restriction on the delegation of legislative powers, as in Britain. While on the opposite, the learned Counsel argued on the grounds of the theory of separation of powers and "*delegatus non potest delegare*", that there is an implied prohibition against delegation of legislative powers, as in USA.

The Court could either hold that a Legislature in India could delegate as much power as it liked

²² *In re Delhi Laws Act*, AIR 1951 SC 332.

²³ *Supra*, note 2 at 96.

²⁴ The Constitution of India, Article 143.

following the British model, or else that it could not give to the delegate unlimited powers and should state the policies subject to which the delegate is to function in making delegated legislation, following the American model.

The Supreme Court took the via media and held-

1. The Doctrine of separation of powers is not a part of Indian Constitution.
2. Indian Parliament was never considered as an agent of anybody, and therefore the doctrine of “*delegatus non potest delegare*” does not apply.
3. The Parliament cannot abdicate or efface itself by creating a parallel legislative body.
4. Power of delegation of legislative powers is ancillary to the power of legislation.
5. The limitation on the delegation of legislative power is that the legislature cannot part with its essential legislative powers that has been expressly vested in by the Constitution. Essential legislative power means laying down the policy of the law and enacting the policy into a binding rule of conduct.

On the basis of this legal reasoning, the Supreme Court gave answers to the three questions as –

Answer-1 – Section 7 of the Delhi Laws Act, 1912 is wholly *intra vires*.

Answer-2 – Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947 is wholly *intra vires*.

Answer-3 – Section 2 of the Part “C” States (Laws) Act, 1950 is *intra vires*, except the latter part of the section which delegated power of repeal and modification of legislative policy, as it amounts to excessive delegation of legislative powers.²⁵

Even though there were seven different judgements in this case, there was similarity of perspective on these three points-

- a. Legislature cannot give that quantity and quality of law which is required for the functioning of a modern state. Therefore, delegated legislation is a necessity.
- b. In view of a written constitution the power of delegation cannot be unlimited. The Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act concerned.
- c. The power to repeal a law or to modify a legislative policy cannot be delegated because these are essential legislative functions which cannot be delegated.

The discursive judgement of this case has boiled down to the fact that Indian Legislature indeed has the power to delegate, but the limitation is that of degree, *i.e.* it is subjective on the case where the question of constitutionality has arisen, that whether *essential legislative functions* have been delegated or not.

DOCTRINE OF EXCESSIVE DELEGATION OF LEGISLATIVE POWER

The conferment of unfettered, uncanalized powers without laying down certain norms for the enforcement of the Act tantamount to abdication of legislative power by the Legislature. It is not permissible in law.²⁶ According to the doctrine of excessive delegation of legislative power, the Legislature itself must discharge the essential

²⁵ *Supra*, note 1.

²⁶ State of Tamil Nadu v. K. Shyam Sunder, AIR 2011 SC 3470. See also Humdard Dawakhana

legislative functions and the delegate would then legislate to execute the legislative policy and to work out details within the framework of the policy and guidelines, otherwise the law will be *ultra vires* on account of excessive delegation.²⁷ The essentials of a legislative function are the determination of the legislative policy and its formulation as a rule of conduct and these essentials are the characteristics of a legislature by itself.²⁸ The Supreme Court has enunciated the doctrine of excessive delegation as follows:

*“...The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism unlimited. So, the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must, by laying down policy and principle and delegate it may to fill in detail and carry out policy... If guidance there is, wherever it may be found, the delegation is valid.”*²⁹

In *Ishwar Singh v. State of Rajasthan*³⁰, the court held that sub-delegation of rulemaking power does not imply parting with power or authority. The delegator of power does not denude or divests himself of all the powers. Delegating authority will retain the power to act concurrently on matters within the area of its authority, except insofar as it may have bound himself by an act of his delegate.

In *Kerala Samsthana Chetu Thozhilali Union v. State of Kerala*³¹, the Supreme Court gave a new direction to law relating to the constitutionality of delegated legislation. The Court restated the principles of delegation of law-making power by the legislature to the administrative authorities and held –

1. While framing the Rules for the purposes of the Act, the legislative policy cannot be abridged. The Rules must be framed *to carry out the purposes of the Act*.
2. Under the common law as also under the provisions of the Specific Relief Act, an employer is entitled to employ any person he likes. It is well-settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation *unless the same is expressly conferred by the statute*.
3. A rule is not only required to be made in conformity with the provisions of the Act where under it is made, but the same *must be in conformity with the provisions of any other Act*, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature.
4. While imposing terms and conditions in terms of Section 18A of the Act, the State *cannot take recourse to something which is not within its jurisdiction or what is otherwise prohibited*

(Wakf) v. Union of India, AIR 1960 SC 554; State of Rajasthan v. Basant Nahata, AIR 2005 SC 3401; State of Tamil Nadu v. M. Seshachalam, 10 SCC 137 (2007); Krishna Mohan (P) Ltd. vs. Municipal Corporation of Delhi and Others, AIR 2003 SC 2935.

²⁷ *Supra*, note 15 at 58.

²⁸ *Per* Kania, Hiralal J. (CJ), *In re Delhi Laws Act*, AIR 1951 SC 332.

²⁹ Registrar of Cooperative Societies v. K. Kunjambu, AIR 1980 SC 350, 352.

³⁰ Ishwar Singh v. State of Rajasthan, AIR 2005 SC 773.

³¹ Kerala Samsthana Chetu Thozhilali Union v. State of Kerala, AIR 2006 SC 3480.

in law. Sub-sections (c) and (d) of Section 24 of the Act provide that every licence or permit granted under the Act would be subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the Government may direct either generally or in any particular instance in this behalf. The said provisions are also subject to the inherent limitations of the statute. Such an inherent limitation is that *rules framed under the Act must be lawful and may not be contrary to the legislative policy*. The rule making power is contained in Section 29 of the Act. At the relevant time, sub-section (1) of Section 29 of the Act provided that the government may make rules for the purpose of carrying out the provisions of the Act which has been amended by Act No. 12 of 2003 with effect from 1.4.2003 empowering the State to make rules either prospectively or retrospectively for the purposes of the Act.

5. Its power, therefore, was to make rules only for the purpose of carrying out the purposes of the Act and not de' hors the same. In other words, *rules cannot be framed in matters that are not contemplated under the Act*.
6. The State may have unfettered power to regulate the manufacture, sale or export-import sale of intoxicants but *in the absence of any statutory provision, it cannot, in purported exercise of the said power, direct a particular class of workers to be employed in other categories of liquor shops*.
7. Both the power to frame rules and the power to impose terms and conditions are, therefore,

subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also *give effect to the purport and object of the Act and in good faith*.³²

8. *The conditions imposed must be such which would promote the policy or secure the object of the Act*.
9. *The power of delegated legislation cannot be exercised for the purpose of framing a new policy*. The power can be exercised only to give effect to the provisions of the Act and not de' hors the same. *While considering the carrying out of the provisions of the Act, the court must see to it that the rule framed therefor is in conformity with the provisions thereof*.
10. The legislative field contained in the Seventh Schedule of the Constitution of India provides for field of plenary power of the legislature but *what a legislature can do, evidently, a delegatee may not, unless otherwise provided for in the statute itself*.

COMPARISON-BRITAIN, USA AND INDIA

In England, Parliament is supreme and therefore, unhampered by any constitutional limitations, Parliament has been able to confer wide legislative powers on executive. However, sovereignty of Parliament does not mean that there are no

³² Ashok Lanka v. Rishi Dixit, AIR 2006 SC 2382. See also Bombay Dyeing & Mfg. Co. Ltd. v. Bombay

Environmental Action Group & Ors., 5 SCC 161 (2005).

principles to which the practice of delegation must conform. The Committee on Minister's Powers in its third recommendation has suggested that the precise limits of lawmaking power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it when discretion is conferred, its limits should be defined with equal clearness. Laying down of limits in the enabling Acts within which executive action must work is of great importance to England than to any other country, because in the absence of any constitutional limitation, it is on the basis of those parliamentary limits alone that the power of judicial review can be exercised.³³

In the US, the position is substantially different from what prevails in Britain. In the US, the rule against delegation of legislative power is basically based on the doctrine of separation of powers and its necessary corollary "*delegatus non potest delegare*". In the US, the doctrine of separation of powers has been raised to a constitutional status. The US Supreme Court has observed that the doctrine of separation of powers has been considered to be an essential principle underlying the Constitution, and that the powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers of another.³⁴ In the leading case *Youngstown & Tube Co. v. Sawyer*³⁵, the US Supreme Court held that the American Constitution is inconsistent with the notion of executive law-making authority.

But pragmatic considerations have prevailed over theoretical objections and in course of time the courts have relaxed the rigidities of the doctrine of

separation of powers and permitted broad delegation of power, subject to the stipulation that the Congress itself should lay down standards or policies for the guidance of the delegate; that delegation should not be vagrant and uncontrolled, for to do so would amount to abdication of its functions by the Congress. If Congress transfers to others the essential legislative functions with which it is vested, the statute doing so would be unconstitutional. This doctrine of excessive legislation has never been repudiated, though in practical application the courts have adopted a practical approach.³⁶

In spite of the dilution of the theory of non-delegation in the USA, there is a real doctrinal difference between Britain and the US on the question of delegation of legislative powers. In the US, the last word rests with the courts on question as to how much delegation would be permitted in a given situation, while in Britain it rests with the Parliament as there is no constitutional limitation to restrain Parliament from assigning power where it likes.

There are similarities and dissimilarities between the Indian Constitution, on one hand, and the Constitutions of Britain and the USA, on the other.

India and Britain both have parliamentary form of government in which the executive is also a part of the legislature and can be closely supervised by it. While on the other end, while India has a written Constitution, Britain functions mostly under an unwritten Constitution. The British Parliament has the right to make or unmake any which no court or body or person can set aside or override. The Indian Parliament is a creature of the Constitution and its

³³ *Supra*, note 2 at 92.

³⁴ *Field v. Clark*, 143 US 649 (1891).

³⁵ *Youngstown & Tube Co. v. Sawyer*, 343 US 579 (1952). See also *Baker v. Carr*, 369 US 186 (1962).

³⁶ *Supra*, note 15 at 52-54.

powers and privileges and obligations are specified and limited by the Constitution. Also, while India, like the US, has the system of judicial review of legislation, the same does not prevail in Britain. This means that while Courts in India can declare a law unconstitutional, such a power is not available to any in Britain. But then, the presidential form of Government is based on the principle of separation of powers, the Indian set-up does not follow that principle.

CONCLUSION

It is recognized that the modern complex socio-economic problems cannot be met adequately without resorting to delegated legislation. It has become so ubiquitous that only a small part of the total legislative output is enacted by the legislature. In India, as elsewhere, the mechanism of delegated legislation is used extensively. Almost every statute passed by the Parliament or a State legislature confers rule-making power on the Government or on some other administrative agency. The Legislature concentrates on defining the essential principles and policies in the legislation and leaves the task of enunciation of the details to the administration, which is referred to as delegation of legislative powers.

The mechanism of delegated legislation was originally opted for by Britishers, when India was a colony of British Empire. Consequently, it established in India and became a necessity. The establishment of delegated legislation in India as a source of law has taken a considerable period of time. The chief cause of this is the varying judicial attitude concerning the validity of the mechanism of delegated legislation in

India, which itself is the result of variations in the organizations of the Government and Courts.

Initially, when India was under the suzerainty of Britain, the Privy Council was the highest court of appeal. It is effortlessly discernible that the Imperial Parliament could not legislate efficiently for such a vast colony of India. It had to delegate ample amount of legislative powers to its delegate in India for proper administration. The celebrated case of *R. v. Burah*³⁷, regarding the validity of delegation of legislative powers, apparently laid down the principle that the then Indian legislature could only “conditionally delegate” its law-making power, but simultaneously, it had “plenary power” to “conditionally delegate”.

It appears from this decision that the Privy Council, rather than simplifying and definitely stating the validity of delegation of legislation in India, gave excessive attention to the distinction between conditional legislation and proper delegated legislation. The distinction between the two was subjective, which further muddled the situation. But, one point was established that the delegation of essential legislative powers would lead to effacement of the existing legislature.

After Privy Council, the Federal Court became the highest court of appeal for a very short period of time. In this period only one significant case regarding the validity of delegation of legislative powers came before the Federal Court, i.e. *Jatindranath Gupta v. Province of Bihar*³⁸. In this case also conditional legislation was only allowed and the delegated powers of extension of time period and modification were declared unconstitutional.

³⁷ *R. v. Burah*, 4 ILR Cal. 172 (1879).

³⁸ *Jatindra Nath Gupta v. Province of Bihar*, AIR 1949 FC 175.

Therefore, the real question regarding the validity of delegated legislation was further tangled.

Finally, under the Supreme Court of India as the highest court of appeal, the various aspects of constitutionality of delegated legislation were clarified by the court in the *In re The Delhi Laws Act case*³⁹. The peculiarity of this case lies in fact that a bench of seven judges gave seven judgements. Nonetheless, the Bench was impliedly unanimous on the point that delegation of legislative powers is inevitable, and delegation of essential functions to such an extent that amounts to abdication or creation of a parallel legislature, is unconstitutional. The Court held that essential functions of laying down the policy of the law and enacting the policy into a binding rule of conduct should not be delegated by the legislature. The conditions when essential legislative functions are delegated the law automatically becomes ultra vires by reason of excessive delegation of legislative power. After this decision, the main controversy in every case involving delegation has been the determination of essential legislative function, which cannot be delegated and non-essential legislative function, which can be delegated.

Though a necessity, delegated legislation like every law is required to be within the bounds of legitimacy. The principal consideration in this arena is that the delegation of legislative power by the legislature to the subordinate authority and the exercise of that power by the subordinate authority is within the permissible bounds of constitutionality. No such question arises in Britain because of the doctrine of Sovereignty of the British Parliament, *i.e.* it can pass any legislation it thinks necessary and proper, it can

delegate any amount of its law-making power. The position is different in the US, where the courts have evolved the principle that the Congress can delegate legislative powers to the executive subject to the stipulation that it lays down the policies and establishes standards while leaving to the administrative authorities the making of subordinate rules within the prescribed limits. In India, the situation is quite similar to that in the US.

It is also noted that the delegated legislation cannot breach those principles of Constitution by which the parent legislation itself is bound. It is necessary that, as far as practical, the legislature should state the policy of law in a clear and articulate terms so that it may be easy for the courts to ascertain whether the delegate is acting within, or exceeding the scope of authority conferred on him. It is equally necessary, that the legislature under the veil of delegation of its work does not become lethargic, and keep shifting its work so much so upon other authority that it becomes hard to regain those powers itself. Minimal legislative powers should be left in the hands of the administrative authorities.

It should be remembered that the ultimate aim of the mechanism of delegated legislation is public interest. It should not, in any case, be used to spread tyranny and encroach upon the rights of public. It is for the reason that an administrative authority is already endowed with quasi-judicial powers as well as administrative powers proper by its very nature. Such an extent of power in one authority, though a necessity, should not be allowed to become arbitrary.

³⁹ *In re Delhi Laws Act*, AIR 1951 SC 332.