DELEGATED LEGISLATION

(CONSTITUTIONALITY AND ITS CLASSIFICATION)
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INTRODUCTION

Austin says, “There can be no law without a legislative act” But when the Legislature, under the pressure of work delegates the legislative power, it results in delegated legislation.

‘Delegate legislation’ is used in two senses. In one sense delegated legislation means the exercise of the power of rulemaking, delegated to the executive by the legislature. In the second sense, it means the output of the exercise of that power, viz. rule, regulations, orders, ordinances etc. The expression is used were in both senses. Where the emphasis is on the limits of constitutionality of exercise of such power, the term is used in the first sense: where the emphasis is on the output of the concrete rules the term is employed in the second sense.

In simple words, delegated legislation refers to all law making by the authorities other than the legislature i.e., the Central Government, the State Government, Central Board of Revenue and the other administrative bodies and is generally expressed as statutory rules and orders, regulations, by-laws, scheme directions or notifications etc.

Nature and Scope of Delegated Legislation-

Now-a-days, the Parliament passes only a skeleton and the rest of the parts is left on the administrative agencies to provide through the rule making power delegated to them. For example the Import and Export (Control) Act, 1947 contains only eight sections and delegates the whole power to the administrative agency to regulate to the whole mechanism of import and exports.

Extent of Delegated Legislature Powers-

An executive authority can be authorized to modify either existing or future laws but not in any essential feature, while exerting its delegated legislative powers. Exactly, what constitutes an essential feature cannot be enunciated in general terms. But this much is clear that it cannot include a change of policy. When a Legislature is given plenary powers to legislate on a particular subject there must also be an implied power to make law incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power in include in the grant of the power. The primary duty of law-making has to be discharged by the legislate itself, but delegation may be restored to as a subsidiary on an ancillary measure.
**Growth History of Delegated Legislation**

The Statute of proclamation, 1539 which was repealed in 1547 was perhaps the most striking piece of legislation effected by a Parliament. Under it Henry VIII was given wide power to legislative by proclamation. The next instance was Statute of Sewers in 1531 where Legislative powers were delegated to the Commissioner of Sewers, who was empowered to make drainage scheme and levy rates on land owners. These were outstanding early examples of a technique which the Parliament has always felt able to use.

But it was not the realm of delegation and such were the rare instances and it was not until eighteenth century that we have significant development in the realm of delegation. As Maitland says, “The period before 16th century was the period of private laws a period when Parliament legislated in such detail that many of its measures would today be matters of administrative instructions.”

The growth of modern delegated legislation is usually dated from 1834, when the Poor Law Amendment Act gave to the Poor Law Commissioner, who had no responsibility to Parliament, “power to make rules orders for the management of the Poor.” This power which lasted for a century remained a leading example of delegation which put, not merely execution but also the formulation of policy into executive hands. But this was a small instance of experiment in bureaucratic Government. It did not invoke any criticism until later part in the century. The publication of all delegated legislation in uniform series under the title of Statutory Rules and Orders began in 1890 and in 1895 the Rules Publication Act made provisions of systematic printing, publication and public notice. In 1891, for instance, the Statutory Rules and Orders were more than twice as extensive as the statute enacted by the Parliament. Laissez faire state of 19th century had given place to social welfare state of the First World War Defence of the Realm Act, 1914. Social progress after 1942 complete separation of Powers was not possible, act. 123 Art. 240. Art. 357. Art. 143.

**Types of Delegated Legislation**

On the basis of the nature of Delegated Legislation the Committee on Minister’s powers distinguished the following two types of parliamentary delegation:
1. Normal legislation
2. Exceptional legislation

**Subordinate legislation**

In subordinate legislation the process consists of discretionary elaboration of rules and regulations. In England the power of the Parliament are supreme as such all the legislation other than those made by British Parliament are recognized as subordinate. Subordinate legislation has its origin in the delegation of the power of Parliament to inferior authorities and are subject to control of the sovereign legislation.

**Types of Subordinate Legislation**

I. Colonial Legislation
II. Executive
III. Municipal
IV. Judicial
V. Autonomous

**I. Colonial Legislation**

The legislation by the self-government bodies like colonies and other dependence of the Crown are regarded as colonial legislation. The legislative powers of such bodies are subject to the control of the Imperial Legislation.

**II. Executive**

Though the main function of the Executive is to administer, but it has been provided with certain subordinate legislative powers which have been expressly delegated to it by Parliament, or pertain to it by the Common Law Statute.

**III. Municipal**

Municipal authorities are entrusted by the law with limited and subordinate powers of establishing special for the districts under their control. The special laws so established by the Municipal authorities are known as: Bye-laws”, and this type of legislation is known as municipal.
IV. **Judicial**

In England the judicature also possesses the like delegated legislative powers. The higher courts are empowered to make rules for the regulation of their own procedure.

V. **Autonomous**

Though the great bulk of enacted laws is promulgated by the State; the autonomous bodies have been entrusted with a power to make bye-laws for its regulation.

**The constitutional limits of Legislative delegation**

There are two constitutional limits of legislative delegation—

i. The power of delegation is subject to certain limitations the legislature cannot delegate essential legislative functions which consist in determining the legislative policy.

The following non-essential functions may be delegated—

(a) The power to extend the duration of the statutes, having regard to the local conditions.

(b) The power to adopt the existing statutes, with the incidental changes in the name, place etc. and to apply them to a new area, without modifying the underlying policy of the statute.

(c) The power to promulgate rules if such rules to be laid before the Parliament before they would come into force.

(d) The power to select persons on whom the tax is to be laid, to determine the rates for different classes of goods or to amend the schedule of exemptions.

ii. The power conferred on an subordinate authority should not suffer from excessive delegation and whether the power so conferred suffer from excessive delegation should be decided with references to the fact whether the delegation has gone beyond the limits of permissible delegation.

**Conditional legislation** —

When an appropriate legislature enacts a law and authorities an outside authority to bring it into force in such area or at such time as it may decide, that is conditional legislation.

Frequently the legislature enacts a law conditionally leaving it to the Executive to decide as to—
i. When will it come into force:
ii. The period during which it is to be implemented or suspended: and
iii. The place where it should be applied.

In other words, Conditional Legislation may be defined as a statute that provides control but specifies that they are to go into effect only when a given administrative authority finds the existence of conditions defined in the statute itself. The operation of law follows the fulfillment of the condition. Generally the date of the commencement of an Act may be left entirely to the discretion of the Government and it is laid down that:

“It shall come into force on such date as the Central Government may be notification in the Official Gazette appoint and different dates may be appointed for different provisions of the Act.”

**Disadvantages of Delegated Legislation**

1. Not an outcome of Parliament or Legislature
2. Public examination and criticism not open
3. Prior knowledge of Delegated legislation is often denied

**Modes of controlling Delegated Legislation**

1. Procedural control
2. Parliamentary control
3. Judicial Control
   i. Doctrine Ultra vires
   ii. Use of prerogative writs.

**Control of Delegated Legislation by means of Procedure**

The procedural control mechanism operates in following three components:-

i. Prior consultation of interests likely to affect by delegated legislation.
ii. Prior publicity of proposed rules and regulations
iii. Post-natal publicity of delegated legislation
**Parliamentary Control over Delegated Legislation**

i. By laying the rules on the table of Parliament; and  
ii. By a Committee of Parliament scrutinizing the rules so laid.

In U.S.A. the control of Congress over delegated is very limited because neither the technique of ‘lying’ is extensively used nor there is any Congressional Committee to scrutiny it.

In England, due to concept of supremacy of Parliament, the control exercised by the Parliament over and administrative rule making is very broad and effective. This Parliamentary control operates though ‘laying’ techniques. Under the provisions of statutory Instruments Act, 1946, all administrative rule making is subject to the control of the Parliament through the Select Committee on statutory instruments.

In India, the Parliamentary control of delegated legislation follows the same patterns as in England. Like Standing Committee in House of Commons in Britain he further said that such committee would examine delegated legislation and would bring to the notice of Parliament whether delegated legislation has exceeded the original intention of Parliament or has departed from it or has affected any fundamental principle.

(i) By laying rule on the table of Parliament; and  
(ii) By a committee of Parliament scrutinizing the rules so made.

**i. By laying rule on the table of Parliament**

(a) Laying with no further direction  
(b) Laying subject to annulment  
(c) Laying, Subject to affirmative resolution  
(d) Laying with deferred operation  
(e) Laying with immediate effect but requiring affirmative resolution as a condition for continuance
ii. By a committee of Parliament scrutinizing the rules so made

The main function of these committees is to examine the merits of the executive legislation against which petitions are presented.

**Main functions of Committees –**

According to Rule 223, the main functions of the Committee shall be to examine:

(a) Whether the rules are in accordance with the general objects of the Act;
(b) Whether the rules contain any matter which could more properly be dealt the Act;
(c) Whether it contains imposition of tax;
(d) Whether is directly or bars the jurisdiction of the Court;
(e) Whether it is retrospective;
(f) Whether it involves expenditure from the Consolidated Fund;
(g) Whether there has been unjustified delay in its publication or laying;
(h) Whether, for any reason, it requires further Elucidation.

**Constitutionality of delegated legislation**

It basically means the limits that are permissible within a Constitution of a country through which Legislature with all his right can delegate its power of rulemaking to other agencies of administration. The aim of extending the power of the government is to handle socio-economic problem.

**Position in USA:**

Delegated legislation is not allowed theoretically in the constitution of the USA because of the two reasons. These are, “Separation of Power” and “Delegatus non potest delegare”. There is no reference of text has been given in the Constitution of the USA which shows that it delegates its power from Legislature to the Executive. Congress was itself a delegatee then how can it delegate its powers. The political theory that was propagated by philosophers like John Locke and Montesquieu were imbued on the framers of the American Constitution. John Locke has said that
a legislative cannot delegate his powers of lawmaking to any person or cannot place it anywhere. He further stated that there should be separate Legislature and Executive because if the power of law making and execution of that laws go in one hand it can be misused and these people use that power to exempt them from that law and use it for their private advantage. So the doctrine of ‘delegatus non potest delegare’ has been given by John Locke it means the same as what we have explained above.

Another philosopher, Montesquieu has given the concept of ‘Separation of Powers’. According to Montesquieu, one person cannot exercise all the three powers of the government i.e., the Judiciary, the Legislature, and the Executive. The Legislature should make laws and should not enforce or administer it. Similarly Executive should not interfere in the work of Judiciary and Legislature and Judiciary should be free from Executive and Legislature. All should do their work separately. In America, the power to make legislation has been given to the Congress, executive powers given to the President of the USA, and the judiciary power of the United States is vested in the hands of Supreme Court and also it might be given to lower court from time to time on the ordain of the Congress.

Due to the adoption of separation of power by the United States, the legislative power can be vested only in the hand of Congress and no organs of the government. Further, it has argued that the power to the Congress itself has been delegated by the American Constitution so it cannot further delegate its power. In case of Field v. Clarke, 143U.S. 649 (1892) it has been observed by the Supreme Court of America that the power entrusted to one department should only be exercised by that department without interfering in the power or area of another person. But in some other cases of Supreme Court of America, it was observed that in non-legislative power such as rule-making power or quasi-legislative powers can be delegated by Legislature to the Executive. In Wagman v. Southard, 23 U.S. 10 Wheat 11 (1825) Chief Justice Marshall observed that the line has been not drawn between those subjects which were important and, therefore, regulated by the Legislature itself and those subjects of lower interest which were given to the Executive for filling the details in the structure of that legislation.

So to conclude about the delegated legislation in America it can be said that it has not been accepted in principle but in practice, the Legislature has entrusted the power of law-making to the Executive.
**Position in England:**

The doctrine of parliamentary sovereignty is the core element of the UK Constitution. In England the Parliament is supreme and there is no limitation by the Constitution on the Parliament. Also, Parliament in England has wide powers of delegating its legislative power to the Executive or other subordinate bodies. Committee on Ministers’ Powers also refers to as Donoughmore Committee released a report in which a famous lawyer of England, Sir Cecil Carr has quoted about three parts of legislation. These are as follows:

1. The first and the very smallest part is made by the Crown under her prerogative powers.
2. The second and the weightiest part is made by the King in the Parliament and it consists of Acts of Parliament.
3. The third and the bulkiest part is made by such body whom the King entrust the power of legislation in the Parliament.

Sir Cecil Carr has also observed that the truth is that if the parliament is not willing to delegate the law-making power, the Parliament is unable to provide quality and kind of legislation the modern public wants.

**Position in India:**

The position and Constitutionality of delegated legislation in India can be seen in various cases. It is divided into two phases i.e., before independence or we can say it as pre-independence and post-independence.

**Pre Independence:**

In *Queen v. Burah*, (1878) UKPC 26 only Conditional Legislation has been validated by the Privy Council and therefore delegated legislation is not permitted as per its reasoning. The administration of civil and criminal justice of a territory can be vested in the hands of those officers who were appointed by the Lieutenant-Governor from time to time.

The Privy Council has stated that it is better to take help from the subordinate agency in framing the rules and regulations that are going to be the part of the law and giving another body the essential legislative features that has only given to the Legislature through the Constitution. He
also stated about the essential legislative function that included in determining the legislation policy.

In *King v. Benori Lal Sharma*, Condition legislative was again applied by the Privy Council, the same as in the case of *Queen v. Burah*. In this case the validity of the Emergency Ordinance given by Governor-General of India was challenged inter alia. It was challenged on the ground that he is taking the power of the Provincial Government. He was setting up special criminal courts for particular kind of offences but for the settling of any court, power has been given only to the Provincial Government. The judicial committee held that this is not delegated legislation. Privy Council also held that it is an example of an uncommon legislative power by which the local application of the provision of State determined by the local administrative body when it is necessary.

**Post-independence:**

The Constitution of India does not provide the same position as the prominent British Parliament provide to the delegation of legislative powers and also how far delegation is permissible has got to be confirmed in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an exhaustible right of delegation is inherited in the legislative power itself.

In the case of *Raj Narain Singh v. Chairman, Patna Administration Committee Air*, AIR 1954 569 the Supreme Court of India upheld the delegation of power given to the executive by the legislature.

**Conclusion**

Delegated or subordinate legislation means rules of law made under the skilled person of the Act of Parliament. In spite of the fact that lawmaking is within the capacity of the lawmaking body, it might, by a resolution, delegate its capacity to different bodies or people. The resolution which delegates such power is known as the Enabling Act. By enabling act the council sets out the wide rules and nitty-gritty principles are instituted by the delegated authority.

If in India the control of Parliament over the delegated legislation has to be made a living continuity, then it is important that the job of the advisory groups of the Parliament must be
fortified and a different law like the Statutory Instruments Act, accommodating uniform standards of laying and production, must be passed. The board of trustees might be enhanced by a specific authority body to make the watchfulness of assigned enactment progressively successful. Other than the different measures mentioned above, it should be taken to reinforce the control of Parliament over designated enactment. The tenets and standards created by the Legal Executive should be connected by the necessities of the advanced age. In spite of the fact that there are no express arrangements in the Constitution of India to allow the appointment of authoritative power, the legal pattern saw in regard of assigned enactment is as per the aim of establishing fathers our Constitution whose principal concern was the flexibility of the Constitution with changing needs of the time. If you want to make certain that the power of delegated law in the arms of the government is not misuse, it is vital to adopt powerful modes of control as applicable in the USA which India has now not integrated yet.

**Practice Questions**

1. Delegatus non potest delegare means-
   a. A delegate can further delegate
   b. A delegate cannot further delegate
   c. Delegation is bad in law
   d. Delegation is not provided to delegate

2. Which function cannot be delegated?
   a. Essential legislative functions
   b. Exclusion
   c. Suspension
   d. Commencement

3. Which function can be delegated?
   a. Essential legislative functions
   b. Offences and Penalty
   c. Exemption
d. Inclusion

4. A delegated legislation may be held valid on the ground of-
   a. Parent act is unconstitutional
   b. Mala fide: bad faith
   c. Where Parent Act is unconstitutional
   d. Where Parent Act delegates incidental legislative functions

5. When a subordinate legislation fails to comply with procedural requirement prescribed by the parent act or by a general law, it is known as-
   a. Substantive ultra vires
   b. Parent ultra vires
   c. Procedural ultra vires
   d. None of the above