

Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

Centre for Environmental Law, Education, Research and Advocacy (CEERA)

National Law School of India University, Bengaluru

Week- 11

Lecture-01

Delegated Legislation – I

As constitutional enthusiasts, you all must all know that it is the legislature that performs the function of drafting legislations. However, the administration or the offices who are empowered to carry out various constitutional functions and legislative functions are also empowered to make legislation. The legislature, although it oversees the entire gamut as to how legislation in a country should be governed, minuscule operations of day-to-day affairs and others is better left off with the executive wing of the government. With this we venture to understand the role of delegated legislation as to how it is relevant in today's general public administration.

To understand the concept of delegated legislation, one must first need to understand the doctrine of separation of powers. The legislature makes the law, the executive that implements the law and the judiciary interprets the law and administers justice. In your previous sessions, you must have been introduced to the manner in which administrative action can be challenged before the courts of law. In this session, you will discuss in more particular as to the legislative functions that are exercised by administrative authorities as to how they acquire such power and whether the exercise of such power is within the grand framework of the Constitution of India.

While we have the legislature to make the laws, why should the administration be even involved in making the laws? Because at the end of the day, those who are in the legislature represent the public; the electoral system that is put in place under the constitutional framework allows the legislature to be the will of the people. Then why bring in the administration and create the clout of certain maladministrative actions or interference with the will of the people? This is merely because of the wide nature of activities that today the government or the state in general undertake. Traditionally, the state was generally involved only in administration of its subjects' activities and the people were allowed to carry on their activities with the permission of the state. There was not much interference by the government in your day-to-day affairs.

That brought in the concept of *laissez faire*- live and let live. The government only intervened in the manner in which they required to create a governance structure so that people can live and let live. However, today the government is not just a mere regulator, it is also a businessman. It also undertakes activities in competition to other individuals. It provides for employment opportunities. It takes care of the welfare activities of those who are downtrodden, those who are oppressed and tries to ensure that the civil liberties guaranteed under the Constitution are meted out and no individual is left to face injustice under the hands of any third person or the administration itself or the state, no matter who it is. In today's era, the government is no longer a mere administrator. It is also an economic regulator. It is also a businessman and has also taken up the duty to protect the welfare objectives and provide to all its citizens certain aspects of security both in the sense of economic well-being as well as social well-being. With the government performing such a large number of activities and engaging in diversified roles, there was no other avail but to allow for the administration to carry out the legislative functions in addition to its generic executive actions.

Let's move on to understand the relevance of delegated legislation. When we use the term 'legislation', it could mean several things. However, when we use the term 'delegated legislation', we refer to that gamut of legislation which is passed by an authority who is not the legislature. At the outset, kinds of legislation can be divided in the terms of supreme legislation as well as subordinate legislation. Supreme legislation generally refers to that gamut of law which is made by the legislature itself. It is also interchangeably termed as the parent Act, primary law, supreme legislation and from all of these aspects emanates delegated legislation also known as subordinate law or child legislation. The similarity between supreme legislation and subordinate legislation is that they both are products of legislative power which is vested in the government. But however, its distinction is that the delegated legislation is an outcome of delegation by the sovereign itself. It is a delegation that is made to an executive wing whereby the executive makes the law for it to be implemented.

Regardless of who makes the law, whether it be supreme legislation or delegated legislation, the force of law remains the same. As a matter of distinction, it is to be observed that supreme legislation is passed by such authority who does not require any other delegation of power to it. It is by itself vested with the power to make such supreme legislation. Whereas the executive on the other hand has to be delegated with such vested power by means of a delegation and only thereafter can the executive come up with a subordinate law or a delegated law be so it. The connected aspect thereof is that for an executive to pass a delegated legislation, the validity and continued existence of the delegation is essential. It owes its existence to the superior who has delegated such powers to the executive. It may thus be understood that the constitutional scheme rejects the notion of inherent lawmaking power in the hands of the executive administration. Unless such

power is delegated by the legislature, the executive or the administration cannot claim a valid right to make a law, either by way of rules or any other manner whatsoever. In this context, Justice Mukherjee provides that delegated legislation is an excuse for the legislators, a shield for the administration and a provocation to constitutional jurists.

The term ‘delegated legislation’ could be used in two senses. Firstly, delegated legislation is called so because such legislation emanates from a subordinate authority by virtue of exercise of a legislative power which is delegated, hence the term delegated legislation. And secondly, in common parlance, the subordinate legislation itself is called delegated legislation. Hence, the legislative powers are executed by an authority other than the legislature itself. Further, the powers of the authority are limited by the statutory provision by means of which the delegation is made. In the second sense, where we refer to the subordinate legislation itself, such subordinate legislation could be in the form of rules, regulations, bylaws, orders, etc. It could also include notifications and other particular aspects whereby the executive seeks to promulgate certain legislative actions so as to be implemented on a given subject matter. Take the example of the Essential Commodities Act of 1955. There are certain commodities that are expressly defined as what essential commodities should be. However, the list is not exhaustive in nature. The Central Government has been given the power to further enlist certain other aspects under the said heading of essential commodities. During COVID-19 lockdown, certain other things such as masks and sanitizers were also brought under the head of essential commodities. This is something that the Essential Commodities Act expressly allowed the Central Government to issue a notification and make such a declaration.

Challenges to Delegated Legislation

As to in what circumstances can a delegated legislation be held to be unconstitutional or void? In the earlier instances, you must have come across that any law that is passed which is in delegation with your fundamental rights, be it passed by the legislature itself can be held to be unconstitutional and void. What about the delegated legislation then? Delegated legislations too have a mandate that they have to be in consonance with the constitutional framework and also not to be in violation of the fundamental rights that are granted by the Constitution.

Further, they too, the delegated legislation also has to be in consistency with that of the parent legislation. In the sense, a delegated legislation cannot supersede the ambit that the parent legislation itself covers. This leads us to the query as to whether delegated legislation is necessary even or is it a requirement of the day? The age-old principle and orthodox view that constitutional scheme rejects the notion of inherent law-making power and the particular aspect that it is essential that the separation of powers that is mandated by the Constitution is maintained so as to ensure that each wing of the government performs its functions and activities in the rudimentary framework of the rule of law. That brings us to

the premise as to how delegated legislation can be considered. In the orthodox perspective, delegated legislation has been regarded as an evil by itself.

However, it was deemed necessary even because the administration was much more convenient to take decisions where the legislature itself could not reach out. Administrative legislation was traditionally looked upon as a necessary evil because of the inevitable infringement of separation of powers. However, the relaxation of this doctrine paved the way for allowing for the growth of delegated legislation. It is pertinent to note that the borderline between the legislative functions and that of the administration was being thinner and thinner day by day. The same was because a clear-cut division of power did not allow the government to take up its multifarious roles that it had envisaged for itself, be that as an administrator or that as a businessman or that as a caretaker or provider of welfare to its citizens.

Such predominance has paved the way to understand that delegated legislation today is the need of the hour. And further, there cannot be an instance without delegated legislation involvement in the day-to-day affairs. That brings us to the juncture that in fact, the delegated legislation is there to stay and is therefore a requirement of the day. Let's move on to the concept of growth of delegated legislation as to how it has become so predominant in today's era that it is the need of the hour and the requirement of the day. As we discussed earlier, the growth of the state functions from that of a mere police state to that of a welfare state is something that stimulated the growth of delegated legislation.

Earlier, the government was only in charge of the security of the territory and that of the people. However, taking across the role of a welfare state, taking across the role of that of a businessman has only made the state much broader in its ambit of functions. Therefore, the multitude of actions, activities that the government undertakes today is much bigger and larger than that of a police state which it was several years ago. The Constitution of India envisages that a total of 552 members may be appointed to the Lok Sabha. The Lok Sabha which is the House of the People, and the Lower House of the Indian Parliament currently hosts about 545 members of which two are nominated. And these members meet across in three sessions to deliberate on the entire gamut of law making within the country. The three sessions are generally the budgetary session which is between January to the first week of May, the monsoon session which is between July and August and the winter session which is between November to December. Is this amount of time sufficient to delve into the entire multitude of functions that a welfare state is going to carry? No. And it is impossible for the 545-member strength to look into the gamut of activities that is performed by 1.4 billion people.

Just as you would recollect that during your childhood, your parents would have asked you to go ahead, and purchase say certain grocery items from the nearest grocer while they would look at bigger things that are required in the house such as that of cooking the dish

for your lunch or dinner. Similarly, the parliament too to relieve itself of the stress of overwork and so that it is capable of attending to major matters delegates the power to legislate in the hands of the executive or the administrator that it can look across such minor matters by itself and hence the term parent legislation as against child legislation. The second reason as to why there is a growth of delegated legislation is because of the technical complexity of the subject matter of legislation. Not always the legislatures are equipped with technical and sound principles of knowledge on a given subject matter. Sometimes the laws that are being framed may be something of scientific or technical nature that requires an expert body to determine how the legislation is to be implemented.

That leaves the parliament to have its faith and belief entrusted upon the administration so that the scientific body of knowledge can be succinctly brought in forth in the legislative mandate and policy and hence giving way for delegated legislation on such subject matters. Thus, technical legislations on matters such as electricity, drugs, gas, and otherwise generally the power to create delegated legislation is vested in the hands of the Central Government because these matters require a certain amount of scientific profound knowledge which allows for governance in a better manner on such technical aspects. The third foremost reason as to why there has been a growth of delegated legislation is the need for flexibility in the governance framework. The legislature cannot be available at all times. The COVID pandemic clearly stipulated the need for urgent action and flexible manner in which the governance structure should be taken about and that the legislature by itself could not have met out.

As such the delegated legislation allowed for flexible governance during the COVID-19 pandemic. The contingency that was present and prevalent during those times, it was impractical for the parliament to sit on the particular sessions and also carry on the particular legislative function. As such delegated legislation played a pivotal role in the governance framework. Situations and contingencies such as this mandated the growth of delegated legislation over a period of time. The inherent feature of delegated legislation is meting out the requirement during an exigency and as such you would have seen, and you will always continue to see the removal of difficulties clause in numerous legislative mandates.

This removal of the difficulty clause is also called the Henry VIII clause on which we will subsequently discuss in detail as to how the manner in which the Henry VIII clause is to be interpreted and how it is to be utilized so that the power that is vested in the executive is not abused. The fourth reason why there has been a growth of delegated legislation is that the delegated legislation by itself allows for meeting the need for experimentation. The concept of delegated legislation allows the executive to do a permutation and combination of the various manner in which the laws can be implemented. Further, this allows the executive to understand as to what are the repercussions that it could face at the time of implementation.

For example, the matters that are connected with road safety measures is something which you could do about by way of a tested mechanism. The determination as to which roads must be a one-way, which road should involve a passage for only vehicles which are that in the nature of a car, in which roads should you prohibit entry of say non-passenger vehicles such as a good truck are all matters which is to be determined by way of an experimentation mechanism. So, in those aspects, if you were to put a clause under the Motor Vehicles Act by itself as to which roads are to be governed and in which manner they have to be governed, probably the Motor Vehicles Act which already is a large legislation would probably run into several thousands of pages which could never have an end to it. Lastly, the complexity of modern administration required that the delegated legislation paid its way to the current form that we see today. If you look at it from the perspective of a police state, the government and the state machinery has grown to such an extent where certain economic and social spheres have also been ventured there too by the government. And that bringing across the new aspect of a governance structure required delegated legislation to be implemented time and again because the legislature did not have time to sit on as a businessman. Thus, the pragmatic and practical requirement to have delegated legislation supersede the modern governmental functions mandated the growth of delegated legislation. The growth of delegated legislation has not just been an Indian phenomenon, rather a global one in that perspective. In the United Kingdom parliamentary supremacy is at its peak, it is of that nature that it is above the entire gamut of activities.

The constitutional validity of a parliamentary legislation is something that took several years before even being brought up before the judiciary in the UK. The conflicting rule was that administrative law was never looked upon as law and as such it regarded a hindrance to the development of the executive to its fullest extent like how it has taken place in other jurisdictions including that of India. But however, administrative law, just as it has grown in other jurisdictions, even in the United Kingdom, has found its prevalence and relevance both in the manner of governance as well as in the framework of legislative policy. When it came to the concept of delegated legislation in the United States of America, it is to be known that the doctrine of separation of powers was one of the biggest challenges to the growth of delegated legislation. The primacy that was given to the separation of powers doctrine in the United States did not allow for the delegated legislation to have a concrete growth in the United States.

However, the modern administration structure allowed for delegated legislation to pave its way into the governance structure in the United States as well. In the US, the implementation of delegated legislation has found its aspects into various functions of the government. In one of the cases where it was challenged as to how price fixation can be delegated to the price administrator, the US Supreme Court upheld that delegated legislation can be allowed for and is the norm of the day. Similarly, where sentencing guidelines were challenged, that in theoretical practice, although the United States and its

Constitution follows the principle of separation of powers which is envisaged in the article 1, 2 and 3 of that Constitution. However, in practical consonance, the same cannot be said to prevent the growth of delegated legislation.

Delegation of powers has well much pervaded into the practice of governance in the US as well. We now move on to conclude the discussion of this introductory lecture as to how delegated legislations have been classed. The legislature as we discussed earlier cannot be at all places to prescribe the minuscule aspects of what the law should govern. In most circumstances, laws provide for either the Central Government or any other regulatory authority to prescribe certain rules which could govern the conduct or regulate the manner in which any activity is to be governed. So, first and foremost, delegated legislations can be classified based on their title in the form of rules, bylaws, notifications, ordinances, etc.

What is title-based classification and how are they different? For instance, under the Companies Act of 2013, Section 469, the Central Government has been empowered to make rules for carrying out various provisions of the Act. And in certain aspects, it has also been provided that the conduct of a person should be regulated as may be prescribed under various portions of the Companies Act of 2013. The Central Government has come up with several rules that regulate and govern the matters of incorporation, it could relate to the aspect of buyback of the shares, it could be relating to appointment of directors, the manner in which the meetings have to be undertaken, and so on and so forth. Further, it is also pertinent to note that besides the Central Government, certain specialized bodies like the Institute of Company Secretaries of India have also been nominated and given the power to prescribe certain secretarial standards. And these secretarial standards govern the matters as to how meetings should be undertaken, the manner in which the notice is to be served to the parties, which of course, the legislature could not have superseded because of the technical expertise that is required for the sake.

So, on the basis of title, rules are those that are provided in most of the legislations. Similarly, bylaws are also provided for, for instance, where the power is extended to any non-governmental authority to make certain conduct of regulations. In those circumstances, they are referred to as bylaws. For example, under the Securities Contracts Regulation Act, any recognized stock exchange has been empowered to make bylaws for the regulation and control of contracts that relate to securities. The same has been predicted by virtue of putting across a rider that the same shall be subject to the prior approval of the SEBI, which is a regulatory authority.

Similarly, there may arise scenarios where the prescribed code of conduct or regulations may not really give across the actual meaning that it was intended to notify. So, in those circumstances, power is given across to the government or any other particular authority to come up with clarificatory aspects and as such the term notifications. The Goods and Services Tax Act, particularly under the Central Goods and Services Tax Act, Central

Government is empowered to give across recommendations to the council by way of notification for carrying out the various provisions of this Act. By virtue of those, there have been several notifications that have been passed by means of which certain clarificatory reliefs have been provided to various service providers under the Goods and Services Tax Act. Further, title-based classification would also include the aspect of ordinance.

Under Article 123 and 213 of the Constitution, the executive has been empowered to pass ordinances where the legislature is not in session. Sometime around September 2020, the farmers in and around the surrounding areas of Punjab and Haryana had come across and staged a nationwide protest against three farm ordinances which were passed by the Central Government. Although the legislations that were proposed in the form of ordinances and in the form of bills were beneficial to these farmers, the nationwide protest showed as to how good the Indian democracy upholds. It was a time of exigency when the COVID-19 pandemic was in and around and the parliament could not have its regular sessions going about. But nonetheless, in order to ensure that there is security of food within the country, the ordinances were passed.

The nationwide protest just shows clearly as to how the Indian democracy allows for delegated legislations also to be voiced by public opinion. And further, as to how the checks and balances are intact to check the misuse of powers where the same has been misused. The purpose-based classification of delegated legislations contains specific powers which could include the power to extend the appointed date, the power to exclude operation in areas which are notified by the said notification or to suspend or modify the provisions so long as the said purpose based delegated legislation does not substantially alter the legislative mechanism that is created. In this context, it is pertinent to note that Section 5 of the Environment (Protection) Act is a purpose-based delegated legislation, whereby the Central Government is given wide powers that regardless of any other law or the provisions of the Environment (Protection) Act itself, the Central Government has been enabled to come across by way of directions for even giving across orders for the closure or prohibition or regulation of any industry of that nature. The Central Pollution Control Board and the State Pollution Control Boards have been designated the particular powers under various laws to allow for operation of industries.

Nonetheless, Section 5 of the Environment (Protection) Act gives across a superseding enabling power to the Central Government to oversee the operations of these boards by virtue of delegated legislation, which is given by way of directions. The next aspect that we will learn about is authority-based delegated legislation. Generally, in the case of delegated legislation, there is some designated authority who is given the power to make such delegated legislation, either in the form of rules, bylaws, notifications or otherwise. The authority-based classifications stipulate which authority is essentially to make a particular delegated legislation. For instance, a central Act may enable a government of the

state to actually make certain kinds of rules, or it could delegate the power to the Central Government itself. Take the example of the Air Act. Under the Air Act, the power to make rules has been extended to the state government under Section 54. The state government more particularly under Section 54 has been empowered to make certain prescriptive rules and regulations in regard to the governance of a State Pollution Control Board. It could relate to the terms of appointment of the Member Secretary, it could relate to terms of appointment of the Chairman or the fees that are to be paid to the members of the committees of the State Boards, etc.