

Constitutional Law and Public Administration in India

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Lecture-02

Delegated Legislation – II

To understand the evolution of delegated legislation in India, we would take a two-prong approach. We will understand the evolution in a two-phase manner, wherein we would first study the evolution of delegated legislation in the pre-constitutional period, that is prior to 1950 and the evolution of delegated legislation subsequently after the adoption of the constitution. In this context, it is pertinent to note two various cases which were decided prior to the adoption of the Constitution. This leads us to a discussion of *The Empress v. Burah*, a matter decided by the Privy Council. The case before the Privy Council was an appeal which was from the High Court of Calcutta as it then existed. The appeal before the High Court of Calcutta was filed by persons who were convicted of murder and sentenced to death. They were sentenced to death was because the courts which were there in Khasi, Jaintia and Naga Hills were removed from the jurisdiction of the civil and criminal courts that were established in the country and thereby which the lieutenant governor was allowed for extension of those particular laws which was essentially applicable to the Garo Hills by virtue of an 1869 legislation. The power to extend the laws to other territories was the question before the honorable courts to determine whether such delegation of power was an excessive delegation or not. It is pertinent to observe that the High Courts of Calcutta were predominantly oriented as to how the judicial minds in the UK were trained. They regarded that the Indian provincial governments were subordinate to that of the UK Parliament and as such a further delegation by the Indian Parliament to the left-hand governor would be treated as an excessive delegation and sub-delegation is not permissible under law.

However, upon appeal, the Privy Council reversed the decision of the Calcutta High Court and held that the Indian legislature was not a delegate of the Imperial Parliament and had plenary powers of its own legislative powers and the same was on similar lines as that of the Imperial Parliament itself. Although it did agree that the Governor General could not by legislation create a new legislative power or create any other subsequent authority, but however, if the power was given to the left-hand governor to extend the applicability of certain laws that were passed by the provincial legislature, the said power was a competent

delegation of legislative power and as such, such delegation is a valid delegation. Similarly, in *Jatindra Nath Gupta v. The Province of Bihar*, the question arose with regard to the Bihar Maintenance of Public Order 1948. In this case, the question arose as to the extension of the law for a further period than for which it was made for. Under this law, a particular provision allowed for the extension of the Act for a further period beyond one year, which was essentially passed by the legislature. In this case, the majority of the federal court held that such an extension of a period is unlawful and is an invalid delegation of power. However, Justice Fazal Ali gave a dissenting opinion in the sense, he gave a contrary view, and he was a minority bench in this, wherein he observed that the particular extension is correct and a valid delegation of power. These two cases predominantly created the validity of delegated legislations in India. On adoption of the Constitution in 1950, India adopted a democratic model, and the powers of the sovereign were vested in three bodies, which is the legislature, executive and judiciary, thereby embarking a separation of the sovereign power in these three bodies. There is a fair way to understand that the separation of judiciary from the executive and the legislature is essential for having a successful democratic model.

In this context, the Delhi Laws Act, 1912 matter, which arose before the Supreme Court becomes relevant to understand to what extent the legislative power can be exercised by the executive. The matter concerning the Delhi Laws Act of 1912 was the first case on delegated legislation that was determined by the honorable Supreme Court of India. This matter was brought before the Supreme Court by means of a reference that was made by the President of India under article 143 of the constitution. The query that was put before the Court was with regard to the power of the Central Government under Section 2 of the Delhi Laws Act, which allowed for extension of the particular laws that were applicable to Part A states to states that were enumerated under Part C of the particular Act. With the adoption of the constitution, the states were reorganized, and Part A, B and C states were created, and various states were enumerated depending upon their administrative capacity.

Under the Delhi Laws Act of 1912 and the Delhi and Ajmer-Merwara Land Development Act, 1948, there were a particular aspect of regulatory regime that was created by virtue of which the Central Government was authorized to extend to any Part C state such legislative provisions with such modification and restrictions as the Central Government may deem fit. So, long as such enactment is similar to that nature which is already enforced in a part A state. The provision was so enumerative and exhaustive that it gave complete freedom to the central government to make any modification to any existing law that prevailed in such part C state. The Supreme Court was to determine the legality of this provision. It is to be observed that all seven judges who determined this matter gave separate opinions on this particular topic. The question pertinently was whether the legislative in India could be permitted to delegate its legislative power and if yes to what extent. It is to be observed that the majority of this judgment observed that delegation of legislative power in India is

a valid delegation. But however, it is subject to two foremost limitations. Firstly, an executive cannot be authorized to repeal a law which is already in force and thus under the particular legislatures that is the Delhi laws Act and the Ajmer-Merwara Act. The provision which empowered the Central Government to repeal an existing law in force which was there in Part C state was held to be wrongful in nature and as such void.

Secondly, it was also observed that while exercising such delegated power of modification, the legislative policy should not be changed. In this sense, the particular subordinate legislation which is brought forth should always be consistent with the parent legislation which is there in force. As such substantive alteration or modification is something that cannot be allowed by virtue of delegation of this legislative power. And to this day, we follow this particular premise wherein wherever there is a legislative action that is taken by virtue of a delegated legislation and if the same is not in consonance with that of the parent law or the supreme law, then in those circumstances, the subordinate law or the child law is held to be bad in law and as such void. On one hand, the judiciary observed that delegation of legislative power is permissible to the executive. On the other hand, it clearly allowed for a particular framework or a particular manner in which a demarcation for the extent on which such power can be exercised by the executive. Bringing the contours on which delegation is permissible in India.

With this we move on to the next aspect which deals with the functions that can be delegated to executive authorities. You may have observed that in every statute there is a particular clause which is known as the 'appointed date clause' wherein it empowers the relevant Central Government or the state government to appoint a particular day on which such act can come into force. In those circumstances, is this a particular provision that can be given for delegation of such powers? The codes on numerous instances have held that appointed date clauses are valid. The Legal Services Authorities Act of 1987, although passed in 1987, was brought into force only in 1997 after a long gap of about a decade. One of the reasons as to why this power has been extended to the government to bring in across the implementation of the law is because implementation of legislative Acts requires certain administrative set ups that are to be made. And as such appointed date clauses which allows for the Central Government or any other state with a government, the power to notify as to when the act becomes applicable is a valid delegation of power.

The second aspect wherein the functions that are generally delegated by in the form of delegated legislation is with regard to supplying of certain details. The legislature gives the broad framework on which the law becomes applicable, and the Central Government is given across the further delegated power to supply for essential details as to how the law is to be implemented. In this context, a case concerning the particular manner in which the legal profession is to be governed is essential to be discussed. The matter pertains to *Hansraj L. Chulani v. the Bar Council of Maharashtra and Goa*. In this case, the facts were of such nature that the State Bar Council had framed a rule upon the aspect of right to

practice legal profession and under this rule, it disqualified persons if they are engaged in any other occupation. The matter arose as to whether a person who is carrying on the medical profession in the form of a doctor can carry out the legal profession or not. The delegated rule which was formed by the State Bar Council was challenged before the courts of law. The Honorable Court clearly stipulated that this was not an excessive delegation, and the rule was valid because the entire scheme and purpose of the act was stipulated by virtue of supplying details which was done in the rules. Essentially, practicing a legal profession requires that the person does not engage in any other alternate occupation that requires his full time and devotion.

A second aspect of understanding as to how supplying details is essential for creation of delegated legislation can also be observed while looking across to the Minimum Wages Act. Under the Minimum Wages Act, the Central Government is given the power to essentially determine to which particular industries the Minimum Wages Act becomes applicable. In *Edward Mills Co. v. State of Ajmer*, the query arose on the same Minimum Wages Act of 1948 wherein the power of the appropriate government to add other industries to the Schedules to which Minimum Wages Act is applicable was challenged as an excessive delegation of power. It was held that the opinion of the government was given the foremost importance under the legislative mechanism and there was no said bridled powers on the basis of which the Central Government was authorized to decide the matter as to whether an industry should be included in the schedule or not. Please note, the Supreme Court taking into account the nature on the basis of which the legislation has been formulated which is the welfare of workers clearly stipulated that such a delegation of power is a valid delegation of power, and the Supreme Court upheld the validity of the Minimum Wages Act.

The further function that may be delegated to the executive is that of inclusion and exclusion. As observed in the Delhi Laws case and the case concerning the Minimum Wages Act, it is essential that the power to include is something that is a valid delegation of legislative power. Now this allows for various aspects as to how the legislative policy can briefly be set up and the government is empowered to extend the applicability of such legislative policy to suitable mechanisms which can be provided by way of inclusion or exclusion of certain industries. In this context, it is pertinent to observe the matter concerning *Hamdard Dawakhana v. Union of India* which was one of the particular instances where a central law which is essentially the Drugs and Magic Remedies (Objectionable Advertisements) Act of 1954 was held to be invalid on the ground that it allowed for excessive delegation of power. When we spoke about the aspect of the power of inclusion or exclusion, please note that this power should always come across with the aspect of provision of flexibility to the executive to allow for legislative policy implementation.

However, it comes with the rider that such power to allow for flexibility should always be curtailed by certain restrictions that are placed under the Act. Under the *Hamdard Dawakhana* case, the Drugs and Magic Remedies Act allowed for enlisting various lists of diseases under the particular schedule by the Central Government. It was held by the Supreme Court that the said provision to include the list of various diseases did not have any particular principles, criteria or standards that was laid down for identification of such particular diseases and as such it was held that this is an excessive delegation of power. Another aspect of delegation of power is the power of suspension. Few of the enactments allow for the appropriate government to suspend or relax the applicability of a certain legislative provision to a particular entity, subject matter, or territorial jurisdiction. In those circumstances, it is to be observed that the power of suspension is an essential function that can be delegated because there may be certain exigencies that may arise whereby the following the legislative procedure may result in an untoward incident or may be something that cannot be done in the scheme of things as to how the facts and circumstances unfold. For instance, under the Banking Regulation Act of 1949, the Central Government on representation that is made by the Reserve Bank of India, the supervisory Central Bank of India that the applicability of the particular provisions under the Banking Regulation Act required to be suspended. The Central Government may for a period of up to 60 days suspend the operation of all or any of the provisions of the Banking Regulation Act from being applicable to any specified banking company. Now this particular power involves in itself the power for suspension of the application of the Act and as such it is a valid delegation of power because the circumstances of some nature may have arisen whereby the banking company is unable to fulfill the requirements of the Banking Regulation Act. But however, the failure of any banking institution may relate or lead to the collapse of the entire financial system as happened in 2008-2009 in the US where two major banking institutions collapsed. Such power which is provided in the Banking Regulation Act of 1949 may prevent a scenario that had occurred in 2008 in India.

The next function that can be delegated to an executive authority is the application of an existing law. We have already looked across this particular power of delegation in the Delhi Laws Act of 1912. So, it is quite clear and evident that by extending the application of the existing law to other states there is no excessive delegation or wrongful delegation of legislative power. However, so long as the delegation or the legislative policy is not in incontinence with that of the constitution whereby an excessive delegation structure is created where there is a power that is given across to the executive to make across the application with such number of changes whereby the exact legislative policy itself is being abdicated. In those circumstances alone the extension of application of existing laws will be held to be an excessive delegation. Otherwise, where the legislative policy remains intact and has the necessary controls or checks and balances for exercise of such application of existing laws, such a delegation is a valid delegation.

The next power, modifying existing statutes to suit the application requirement. We have already discussed in the Delhi Laws Act case that the power to modify is something that should be exercised with abundant caution. The legislative function in order to ensure flexibility to the executive cannot be given with unbridled powers to modify the exact legislative policy or scheme that the legislation tries to achieve. Modification is essential to come with brittle powers of checks and balances and so long as such checks and balances are there the same shall be treated as a valid delegation. Two factors need to be considered at the time of determining whether the modification is a valid delegation or not. Firstly, is the need for such delegation and secondly it is the danger or risk of misuse of such power by the executive.

The next aspect of functions that is delegated is generally that of the power to prescribe punishments. The power to prescribe punishments generally of punitive nature is given to either the Central Government or the state government or any other authority that is created by virtue of a statute. Generally, this power involves a delegation to the executive for punitive actions. It is essential to note that under this particular power while exercising the same it is essential that the statute contains the contours to the maximum punishment that is required to be provided and where a delegation is given to any particular governmental authority who is created by a statute. There is a particular government approval that is provided for a check and balance to ensure that the power is not misused. An illustration of such delegated power is contained under Section 37 of the Electricity Act of 1910 whereby the Electricity Board has been empowered to prescribe punishments for breach of the Electricity Act of 1910. Similarly, under Section 59 of the Damodar Valley Corporation Act of 1948, the power to prescribe punishment has been delegated to a statutory authority without a maximum limit fixed under the said Act. Further it is essential to note that whenever such a power is given something that is of similar nature to that of the Electricity Act is essential to be followed.

The next function which is often delegated under various statutes is the power of framing of rules. We have already discussed this when in the initial discussion about delegated legislation that in most legislations you will find that either the Central Government or the state government has been given the power to prescribe rules. In a few other instances the power to make such rules has also been delegated to a statutory authority or a particular professional body. The discussion that we had about *Hansraj L. Chulani v. Bar Council of Maharashtra and Goa* is pertinent. So, as long as the rules are in line with the parent enactment, that is the delegated legislation is in consonance with the particular supreme legislation, the said rules are valid and must be observed. Where the contours of the validity of the rules is to be challenged, it is essential to prove that the rules are not in consonance with that of the supreme law or that it is in a manner that is against the fundamental rights.

The last form of delegated legislation that you fall out with as a function is generally the Removal of Difficulties Clause that is found in a legislation. The removal of difficulties

clause is also called the Henry VIII clause to indicate the manner in which Henry VIII who was the earlier king of England had an autocratic manner of governance. He would ensure that his will was enforced, and all his difficulties were removed by ensuring the instrumentality of a parliament that was extremely weak in nature during his regime. Various critics of delegated legislation and that of the staunch proponents of the doctrine of separation regard the removal of difficulties or the Henry VIII clause as the most preposterous of delegated legislation or delegated functions. It is provided that such clauses which provide for removal of difficulties must be bridled with extreme caution and worded extremely carefully so as to allow for the narrow interpretation of the same and not provide for a widest interpretation of the said clause. It is pertinent to note that although the critics against the Henry VIII clause or the removal of difficulties clause, it is essential that such a clause prevails in a legislation. It is because the legislature cannot always foresee what the outcomes of implementing legislation can be. It may so happen that upon implementing the particular legislation or statute there may be several difficulties that may come across as that of opening of a Pandora's box and in order to ensure that the opening of such Pandora's box does not arise in implementing the legislative scheme or policy, the Henry VIII clause or the removal of difficulties clause is essentially inserted into a legislation.

Under this manner, the appropriate authority which could be either be the Central Government or the state government or a prescribed authority is given the power to either pass the rules, regulations or orders or certain bylaws in order to ensure the smooth functioning of the legislative policy. To illustrate this, we would refer to Section 37 of the Payment of Bonus Act of 1965, whereby under Section 37(1), it was provided that the Central Government was empowered to make such orders not inconsistent with the purposes of the Act. Further, it was provided under subsection 2 that the order of the Central Government which was passed under subsection 1 would be final. Although subsection 1 seems a narrow-worded clause, subsection 2 made it an unbridled power because there were no questions that were to be laid to any action that was taken by the Central Government under section 37(1). It was challenged in *Jalan Trading Co. v. Mill Mazdoor Union* wherein the Supreme Court was called upon to question the legality of Section 37 of the Payment of Bonus Act 1965. The Supreme Court by a majority of 3:2 held that Section 37 was ultra-vires, the Constitution of India on the ground of excessive delegation. It was provided that the Central Government was made the sole judge of whether any difficulty or doubt would have arisen in the particular implementation of the legislation. Such power was an autocratic form of exercise of delegated legislation. Hence, the same was invalid. Although the majority took a view that Section 37 of the Payment of Bonus Act was amounting to an excessive delegation, it is pertinent to also understand the view of the minority. The minority in this matter took a liberal interpretation of the aspect of delegated legislations and observed that the powers and functions that were delegated to the Central Government by in no means were a legislative function. But rather it was something that was in order to devise the legislative policy in implementation. In the words

of Justice Hidayatullah, former Chief Justice of India, Parliament has not attempted to set up another legislature. It has stated all that it wished on that subject of bonus in the Act.

Apprehending however, that this application of the new Act doubts and difficulties may arise and not leaving their solution to the courts with the attendant delays and expense, Parliament has chosen to give the power to the Central Government to remove doubts and differences by a suitable order. It is to be observed that the minority in this particular matter, that is *Jalan Trading Company*, took this liberal perspective on the basis that the Payment of Bonus Act was more of a welfare legislation, wherein there was a stance that the welfare of the labourers could be affected because of the interference of the judicial system. And as such, the finality clause that was given to the orders that was passed by the Central Government was said to be justified. It is said that generally Henry VIII clauses have to be riddled with power. But the view of the minority is also something to be observed and cherished. In this circumstance, it is essential to understand that not all removal of difficulties clauses tantamount to an arbitrary exercise of power. The purpose of the statute needs to always be looked at before coming to a conclusion on whether such a delegation of power is excessive or not.