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A STUDY OF DELEGATED LEGISLATION IN INDIA, UK AND USA: EVOLUTION AND CURRENT POSITION

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ABSTRACT:

The concept of a welfare state has tremendously increased the role of the government so as to cater to the needs of the citizens. This has necessitated the need for multiple laws to govern multifarious activities. The legislature would thereby not have enough time to discuss upon every single detail while passing the laws, as the process of law making is technical in itself. At this juncture the authority parts and confers its functions of legislation to other organs other than the legislature itself, this is known as Delegated legislation. This allows the legislature to focus on other vital principles and policies. While delegating its legislative functions the legislature usually prepares a skeleton of the law and it becomes the duty of the executive to fill it in with flesh and blood, thereby empowering it with the ability to operate conductively. This power is not ungoverned but comes with a bundle of restrictions imposed by the legislative authority itself. Delegated legislation thus, occupies an integral place in the administration owing to its speed, flexibility and adoptability unlike the traditional process of law making. The position of delegated legislation has evolved and occupied significant changes over time rather it had possessed during its inception. This paper attempts to analyse delegated legislation in India, The USA and UK, alongside judicial attitude towards delegated legislation and also draws a comparison of the three countries.

INTRODUCTION:

The principle of separation of powers makes this abundantly clear that the legislature, executive branch, and judicial branch must operate independently. James Madison has commented that accumulation of power on any one of the organs of the state would lead to tyranny.¹ However, as "laissez faire" was abandoned and the idea of a welfare state was adopted, the role of the state expanded quite fast, the state had to accommodate a variety of roles to achieve several

¹ Abhijit B. & M. Vamsi Mohana, *Delegated Legislation: A Study of Its History, Evolution, and Contemporary Position in India, United States of America and United Kingdom*, 3 INT'L J.L. MGMT. & HUMAN, 690 (2020), <https://www.ijlmh.com/delegated-legislation-a-study-of-its-history-evolution-and-contemporary-position-in-india-united-states-of-america-and-united-kingdom/>

goals. Thus, the functions of executive have partially imbibed in itself the functions of legislation. Delegated legislation is the term for the majority of laws that are passed by the executive acting as a delegate of the legislative.² Delegated Legislation is so multitudinous that the statute is misleading and incomplete if it is not supplemented by it.³ Delegated legislation acquires different forms, such as rules, regulations, bye-laws, orders.⁴

Delegated legislation has increased due to a number of circumstances, they are⁵: Technicalities of law making, rigidity in making laws, the hindrances in experimentation of laws, the complications under the modern administration, the emergency conditions, lack of time. All these paved the way for delegated legislation to become a part and parcel of the complex modern administration. Thus, the Doctrine of Delegation of power is a need of the hour.⁶ The development and current status of delegated legislation in India, the US, and the UK are discussed below. This paper also examines the judicial attitude, and finally draws a comparison of the position of three countries in matters of Delegated legislation.

UNITED KINGDOM:

DEVELOPMENT OF DELEGATED LAWS

One of the established pillars of the UK is the Supremacy of the Parliament. It was the duty of the parliament to make laws and they exercised the ultimate authority over it.⁷ Traditionally in the UK delegated legislation was considered as an evil, however amidst several reasons it was later justified as a principle. Back in the 19th CE the common people could realise the role of the state only in the police station or the post office,⁸ However, the idea was altered in the 19th century. The two world wars had a significant toll on the economy and there was an extreme need for the state's presence in regulating housing, health, education, employment and other related activities.⁹ This paved a way towards acceptance of the conflicted principle 'delegated

² M P JAIN, SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 54 (Lexis Nexis 2013)

³ Sir Cecil Thomas Carr, *Concerning English Administrative Law*, COLUMBIA UNIVERSITY PRESS 189 (1941), <https://doi.org/10.1177/000271624121700173>

⁴ Kenny Chng, *Re- examining judicial review of delegated legislation*, CAMBRIDGE UNIVERSITY PRESS 1(2023), <http://doi.org/10.1017/lst.2023.7>

⁵ Delhi laws Act re, AIR 1951 SC 33; Ramesh Birch v. UOI, 1989 Supp (I)SCC 430

⁶ C K TAKWANI, LECTURES ON ADMINISTRATIVE LAW, 75 (EBC 2018)

⁷ SA De Smith, *Delegated Legislation in England*, 2 THE WESTERN POLITICAL QUARTERLY 514 (1949), <https://www.jstor.org/stable/442972>

⁸ Report of Committee on Minister's Powers (1932) at page 62, Also see C K TAKWANI, LECTURES ON ADMINISTRATIVE LAW, 75 (EBC 2018)

⁹ Supra note 1

legislation’.

Lord Hewart’s in his work “The New Despotism”, stated that the bureaucracy has introduced the plot of excessive delegation of legislative powers so as to acquire arbitrary power.¹⁰ Due to the prevalence of such a notion the Donoughmore Committee was formed in the year 1929. The report of the committee to large extent legitimised the concept of Delegated Legislation. Thus, Delegation legislation remained as a vital element of UK.¹¹

REGULATIONS IN BRITAIN

In Britain, the law governing regulation-making was not complicated, although there was a customary practise of consultation with the interested groups, there was no requirement to abide by the principle of natural justice while enacting such laws, and the statute made no express reference of the preadoption public notice.¹² However, there were certain acts that called for consultations and publications before the rules came into force. According to the Rules Publication Act of 1893, regulations had to be published before being adopted,¹³ this was later repealed in 1946.¹⁴ Any circulars that were created otherwise and not within the domain of delegated legislation required no such publications.¹⁵

Delegated legislation is presented to Parliament by the relevant minister. The parliament had the power to define the boundaries within which the delegated legislation operates, the parliament had the authority to withdraw assent whenever there was misuse of power,¹⁶

By resolution of either House, the legislature has the authority to revoke the rule.¹⁷ The London Gazette must publish proposed rules at least forty days before they are adopted, this was specified under S.1 of the Rules Publication Act of 1893. The Rules Publication Act was later replaced by the Statutory Instruments Act, which made no mention of publication. The relevant statutory requirements then controlled the publication rules.¹⁸

¹⁰ Supra note 7

¹¹ Supra note 1

¹² Bates v Lord Hailsham, [1972] 1 WLR 1373.

¹³ J A G. Griffith, *Constitutional Significance of Delegated Legislation in England*, 48 MICH. L. REV. 1079 (1950). <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=8363&context=mlr>

¹⁴ Statutory Instruments Act, 1946.

¹⁵ DE SMITH, STANLEY A, JM EVANS, DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 64 (Stevens and Sons 1980).

¹⁶ Supra note 10

¹⁷ Michael Asimov, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD JOURNAL OF LEGAL STUDIES 253 (1983), <https://www.jstor.org/stable/764236>

¹⁸ Supra note 7

JUDICIAL ATTITUDE

Generally, the courts occasionally review delegated legislation in UK.¹⁹ There are relatively a few rules that have been reviewed. The grounds for reviewing the rules are usually when these are ultravires the parent act, or they are unreasonable,²⁰ or if there was a mistake made during the rule-making process. In the UK, the judiciary plays a limited role in resolving disputes regarding official discretion. They are usually settled through compromises.²¹

In a leading case,²² There was a duty on the part of the authority to consult intended organisations before making the regulations, but the authority just sent a letter to the organisation. This was considered bad as sending a letter did not amount to consultation under the act.

In yet another case, The Finance Act of 1940 stated that the commissioners had the power to decide the amount of tax due when a tax return was received beyond the deadline. This was an upfront situation of delegated legislation, where the commissioners have granted themselves realm of power beyond that present in the statute.²³

CURRENT POSITION

Through Statutory Instruments, the UK parliament reviews the delegated legislation. The chamber of Commons often appoints a Delegated Legislation Committee to review the policy before it is presented to the House of Lords. These instruments are first put out before the lower chamber. The Secondary Legislation Scrutiny Committee of the House of Lords often conducts merit-based scrutiny. The Joint group on Statutory Instruments, which has representatives from both Houses, provides additional review. However, this group focuses on the technical and legal elements rather than expressly examining the merits of proposals.²⁴

The statutory instruments may be rejected by either house. The houses follow two different methods: the "negative resolution" and the "affirmative resolution" procedures. Any document that goes through the negative resolution procedure automatically becomes a law until it is revoked. The Affirmative Resolution Procedure, however, requires an active proposition from each chamber. The Sunak government has sustained to incorporate extensive delegated powers in its proposed legislative program, as shown by the powers contained in the Retained EU Law

¹⁹ H. W. R. WADE, ADMINISTRATIVE LAW, 709 (Clarendon 1977)

²⁰ Id at 713

²¹ Supra note 17

²² Agricultural Training Board v. Aylesbury Mushrooms Ltd, (1972) 1 WLR 190

²³ Commissioners of Custom and Excise v. Cure and Deeley Ltd, (1961) 3 WLR 798

²⁴ Thomas Fleming, Tasneem Ghazi, *Parliamentary Scrutiny of Delegated Legislation: Lessons from Comparative Experience*, 94 THE POLITICAL QUARTERLY, 412 (2023), <https://doi.org/10.1111/1467-923X.13290>

(Revocation and Reform) Bill and the Strikes (Minimum Service Levels) Bill.²⁵

INDIA:

DELEGATED LEGISLATION DEVELOPMENT

In India, this development is witnessed under two stages. This includes the pre- constitutional and post-constitutional periods. The perception of delegated law has remained consistent with UK, since Britain controlled India just before its Independence. However, in the UK, the parliament is supreme and this notion brings about quite a lot of differences in the practical dimension.²⁶

POSITION DURING BRITISH INDIA

In one of the leading cases *Burah*,²⁷ The Garo highlands were exempted from civil and criminal court jurisdiction by Act XXII. The governor could extend the act's provisions to certain hills specified under the act, in accordance to S.9. The death-sentenced appellants contested this notification. The Calcutta High Court ruled that S.9 of the Act exceeded the authority. The Privy Council overturned this decision, ruling that the Indian legislature was not an Imperial Parliament delegate. Further the act granted the governor the authority to extend the Act's provisions and not to enact new laws.²⁸

In yet another case,²⁹ The clause allowing the interim government to prolong the law's application for a year was invalidated by the Federal court. The Court upheld the fact that the ability to extend the law's application required its re-enactment, which was a legislative responsibility and thus could not be delegated. In contrast, Justice Fazal Ali stated in a dissenting opinion affirmed that extending operation of an act did not amount to re- enactment. The dissenting opinion was later upheld by the SC in several instances.³⁰

POSITION AFTER THE ENFORCEMENT OF CONSTITUTION

The Constitution entered into force in 1950, giving the Delegated laws constitutional validity. Orders, bye-laws, rules, regulations, and notifications were included in the ambit of "law".³¹

²⁵ Id

²⁶ Supra note 1

²⁷ *Empress v. Burah and Book Singh*, ILR (1877) 3 Cal 63

²⁸ Supra note 6, page 75

²⁹ *Jatindra Nath Gupta v. Province of Bihar*, AIR 1949 FC 175

³⁰ *Sardar Inder Singh v. State of Rajasthan*, AIR 1957 SC 510

³¹ INDIAN CONST. art 13

These statutory documents all represented various styles of delegated law.

One of the early cases,³² entailed a president's reference to the SC in accordance with the art.143, the SC addressed the question of delegated legislation for the first time after the Constitution entered into force. In this instance, the government could amend, abolish certain pieces of legislation in connection with certain domains.³³

The 1946 Essential Supplies (Temporary Powers) Act's sections 3 and 6 were contested,³⁴ S. 6 stated that any order issued under S.3 will take precedence over any other provisions that are in conflict with the order. The SC ruled that there was not an excessive delegation in the act as it clearly has laid down its legislative policy and section 6 is merely bypassing other legislations and it is not repealing any other laws.

In the case of *Kishan Prakash Sharma v. UOI*,³⁵ The SC ruled that whenever the legislature gives the executive powers, it must also specify the boundaries of such authority. Therefore, the delegation is legal when the legislative policy is clearly stated, and the executive can use discretion, but only as long as it stays within the boundaries of the policy.³⁶

JUDICIAL CONTROL

Subordinate legislation is only permitted when the parent act gives the executive the authority to make rules, this authority is not unrestricted; for example, the executive cannot be given the authority to set legislative policy, amend or repeal the law, or give rules retroactive effect. Legislative authority may only be delegated for ancillary subjects.³⁷ The Indian Constitution's judicial review of delegated legislation is one of its key characteristics. From *Burah* in 1877 to the *M.P. Bar Association* (2004), the judiciary has actively participated in regulating delegated laws.

Any rule that violates the parent act may be invalidated by the courts. Both substantive and procedural ultra vires exists. The delegated legislation substantially violates the law when:

- a) The enabling Act is unconstitutional
- b) The subordinate laws are unconstitutional
- c) The delegating Act's authority has been exceeded by the subordinate legislation

³² Re Delhi Laws Act, AIR 1951 SC 332

³³ Supra note 6, page 75

³⁴ Harishankar Bangla v. State of Madhya Pradesh, AIR 1954 SC 465

³⁵ Kishan Prakash Sharma v. Union of India, AIR 2001 SC 1493

³⁶ Aparajitha Kumari, *Control over Delegated Legislation*, IJCRT 1414 (2018), <https://www.ijcrt.org/papers/IJCRT1813055.pdf>

³⁷ Sarda Mukund, *Judicial Control Over Delegated Legislation*, SSRN 1 (2016), <http://dx.doi.org/10.2139/ssrn.2711102>

- d) The arbitrary and absurdity of the delegated law
- e) When the enacted legislation is malafide and operates retrospectively
- f) When there is a sub delegation by the delegate
- g) When it excludes judicial review
- h) A valid parent act cannot be used to legalize unconstitutional legislation.

If a delegated law violates the parent act's prescribed procedural criteria, it may be declared invalid. The procedural requirements may include: Publication and Consultation.³⁸

CURRENT POSITION

In India, delegated legislation is permissible to an extent as long as it is not ultravires the constitution or parent act or the authority so delegated is not too vague and ambiguous. The executive branch does not have the authority to amend or repeal laws.³⁹ The courts have been essential in preventing abuse of the delegated legislation. However, there is huge role on the part of the legislature to ensure control so that there is no abuse of delegated powers, this can be curtailed through an appropriate policy.⁴⁰

THE UNITED STATES:

DEVELOPMENT OF DELEGATED LEGISLATION

USA firmly upholds the principle of the separation of powers. In their Constitution. Articles I, II, III deals with the legislative, executive and judicial authority respectively. The dictum "Delegatus non potest delegare," states a delegate cannot further assign his authority. Also, as the Congress receives its authority from the people and so serves as a representative of the people, it is not permitted to further transfer its authority to the executive branch.⁴¹

The views of the SC can be observed in of *Field v. Clark*, the Supreme Court made clear its position, ruling that the Congress could not provide the President legislative authority in order to preserve the integrity of the government system established by the Constitution.⁴²

Additionally, in *Youngstown Sheet and Tube Co. v. Sawyer*, Men have allegedly devised new ways to maintain free governance despite its defects, delays, and difficulties as long as they are constrained by the law, which must be created by legislation.⁴³

³⁸ Supra note 6, at page 121

³⁹ Vasu Dev Singh v. UOI, (2006) 12 SCC753

⁴⁰ Supra note 35

⁴¹ Pennsylvania Case Lockes Appeal, 72 Pa. 491

⁴² Field v. Clark, 143 US 649 (1892)

⁴³ Youngstown Sheet and Tube Co. v. Sawyer , 343 US 579 (1952)

LAW MAKING

Delegation was necessary in light of contemporary government notwithstanding the US's commitment to the theory of separation of powers. Congress could not pass laws that contained multitude of details.⁴⁴ US always had difficulties to formulate schemes that regulated the private sector. Thereby there were always gaps in the regulations and these gaps in the regulatory statutes were filled by the Government agency (regulators). The need for regulators raised in the 1960 and 1970s to prevent the dangers of environmental degradation and technological advancements.⁴⁵ The practise of regulators filling the gaps exists even today.

PROCEDURE FOR MAKING RULES

The Administrative Procedures Act (APA), 1946, outlined ways to find a balance between maintaining the integrity of the separation of powers and the numerous governmental functions. Any agency must first publish a broad notice of the proposed rule. At least 30 days before to going into effect, this regulation is published in the Federal Register.⁴⁶ Any interested parties can submit their views through written or oral submissions.

In US there is the prevalence of 'non-delegated subordinate legislation', these rules do not have the force of law thereby they usually don't comply to the above-mentioned procedures. However, they ought to be published after they are adopted. A similar exclusion also applies to procedural norms.

JUDICIAL ATTITUDE

The Judiciary at first did not perceive the thought of a delegated legislation, it was firm that only the parliament had the right to pass legislations and this opinion of the Judiciary was clearly evident in its decisions in the cases of Clarke⁴⁷ and Sawyer⁴⁸. But in the New deal era there were enormous conflicts between the judiciary and the executive in the implementation of policies.⁴⁹ Thereafter, the SC strived to balance the Separation of powers and the need for delegated legislation, as the need for delegated legislation became inevitable due to modern concept of welfare state.

⁴⁴ Report of Attorney General's Committee on Administrative Procedure, (1941), Also see CK TAKWANI, LECTURES ON ADMINISTRATIVE LAW, 75 (EBC 2018)

⁴⁵ Supra note 17

⁴⁶ Administrative Procedure Act, 1946

⁴⁷ Supra note 41

⁴⁸ Supra note 42

⁴⁹ Cecil T Carr, *Delegated Legislation in the United States*, 25 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 47 (1943), <https://www.jstor.org/stable/754755>

The most important case in the America concerning Delegated legislation was the case of Hot Oil Case ⁵⁰, The President has the authority to restrict on domestic or international oil trade through the National Industrial Recovery Act (NIRA). The SC found that the delegation was illegal since the Congress had not established the legislative policy or the criterion, citing its previous ruling in the Clarke case.

In *A.L.A Schechter case*,⁵¹ the court struck down section 3 of NIRA, which allowed the president to take steps to ensure fair competition and also punish those who violated the same. This discretion was considered as virtually unfettered.

The aftermath of these decisions brought significant change in the perspectives of Judiciary, In a leading case,⁵² the Communications Act, 1934 entrusted the Federal Communication Committee to award broadcasting businesses licenses based on criteria of public interest, convenience, or need. The term was contested because it gave the executive enormous power, but the SC upheld it as a reasonable criterion.

CURRENT POSITION

As Schwartz said “Pragmatic considerations have prevailed over theoretical objections.”⁵³ The same can be witnessed in the acceptance and evolution of Delegated legislation in the US. Thus, doctrine of separation of powers, came to be diluted due to rise of exigencies of the government. The Courts have strived to ensure that there is no excessive delegation, also while interpreting provisions of delegation, the courts have tried their best to construe it narrowly so as to avoid problems.⁵⁴ But by far the Courts have allowed for delegation realising the fact that there is too many socio- economic issues to deal with and it is not practically possible for them to lay down standards for the delegate in every situation.⁵⁵

For several years now, the Federal register of US is way bulkier than the statutes, where laws enacted are published.⁵⁶ This clearly demonstrates the prominence, necessity and development of delegated legislations in the US.

⁵⁰ Panama Refining Company v. Ryan, 293 US 388 (1934)

⁵¹ A.L.A Schechter Poultry Corporation v. US , 295 US 495 (1935)

⁵² National Broadcasting Company v.US , 319 US 190 (1943)

⁵³ BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW, 50 (Pitman 1962)

⁵⁴ National Cable Television Assn v. US, 415 US 336 (1974)

⁵⁵ M P JAIN, SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 54 (Lexis Nexis 2013)

⁵⁶ Supra note 52

COMPARISON AND ANALYSIS:

At the beginning there was hesitance in UK to accept delegated legislation, but later it became a part and parcel of the law- making process. A similar ideology existed in US, where there was criticism of this practise in theory, as US firmly believed in separation of powers, however later it was accepted to manage the dynamics of changes in the society. In India, the concept of Delegated legislation was accepted, as they did not follow strict separation of powers. Thus, delegated legislation was accepted by these countries to meet the various challenges posed by the vast and fast-growing economies.

In USA, the courts have the power to decide the extent of permissible legislation whenever it is questioned, but it is be considered that there has been significant change in the way the concept of delegated legislation was received. In the Hot Oil case, the court established the conditions that had to be met when delegating the legislative responsibilities after initially rejecting the idea in the Clarke case, however it was liberalised and over the time the courts had a flexible approach. Although the concept of delegated legislation was not widely accepted prior to the establishment of the Indian Constitution, it was accepted throughout the post-constitutional period. The court outlined the constitutional and statutory restrictions on delegation in the Re Delhi case. But in UK, the parliament has the power to decide upon the extent of permissible legislation. The Courts hardly interfered in deciding upon such issues. In UK and US, it is mandatory that rules made by the authority should be published before they come into force. In India also a similar position is maintained regarding publication, though there has been no statutory provision mandating publication but yet the courts insisted upon some kind of a publications for the purposes of validity.

In UK, consultation is not specified particularly in the statute, but it is considered mandatory and the effected people are given an opportunity to present their interests. A similar position is seen in the US, the Administrative Procedure Act, 1946 envisages the procedure that has to be followed in consultation. In India, there is no common statutory provision regulating consultation, it usually depends upon the parent which is providing for delegated legislation, as to whether it requires consultation to be merely directory or mandatory.

CONCLUSION:

Thus, at present the UK has adopted delegated legislation though it was initially resistant towards it. In USA also we see that delegated legislation has become an integral part of the governance, though they believe in strict separation of powers. On the other hand, India has recognised Delegated legislation ever since the constitution was adopted. Thus, it is evident that the 3 countries have adopted delegated legislation as an inevitable part to meet the challenges of the modern dynamic state.

Delegated legislation has thus become a part and parcel of these countries in order to meet the exigencies faced by the legislature. It is a tool to reduce the burden on the legislatures in the present times of fast-moving society. However, it should be taken note that the legislature itself has to come up with effective mechanisms to curtail the issues arising out of delegated legislation, as Judiciary is already burdened with other issues. If these problems can effectively be addressed then it is one of best tools for effective functioning of the states.

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