
DELEGATED LEGISLATION IN INDIA: CONSTITUTIONAL LIMITS AND THE CHALLENGE OF EXCESSIVE DELEGATION

Ishika Bhattacharjee, M.S. Ramaiah University of Applied Sciences, School of Law

ABSTRACT

Delegated legislation refers to the process by which secondary powers are conferred upon administrative or executive entities by the legislature to assist the legislature by creating rules, by-laws, regulations, and other such necessary legal frameworks. With this paper, the author aims to find a deeper understanding as to what extent such delegation by the legislature would be allowed as constitutionally valid, as there are certain constitutional checks that the legislature would have to abide by while delegating such powers onto the administrative entities. In essence, the author aims at a doctrinal and analytical understanding of the necessity and constraints of delegated legislature, in the Indian context. The paper will examine the doctrinal principles and constitutional limitations onto the exercise, with the aid of landmark cases such as *Ajoy Kumar Banerjee v. Union of India*. The author will further examine how the judiciary has played a role in shaping and evolution of the doctrine and what effect such evolution has on the relationship between the legislature and the administrative bodies. The author realises that legal efficiency can only be ensured by practices such as delegated legislation, but at the same time there is enough scope for such practices to jeopardise democratic and constitutional integrity, and hence, that will be delved into in the paper.

Keywords: Constitutional Limits, Legislature, Excessive Legislation, Delegated Legislation, Constitution.

Introduction

“It is during global wars that governmental regulation becomes most intrusive. This is natural enough, to secure survival from these uncomfortable experiences, legislative power must be delegated in the widest terms to meet unforeseeable as well as patent danger...”¹

-Sir Cecil Carr

Delegated Legislation, while being a constitutionally valid practice within its limits, is a highly debated topic in the current framework. While some scholars argue that it is indeed a necessary practice in order to ensure legal executional efficiency, others have argued that there is a well thought of reason for the existence of the organs of the government being assigned very specific roles, and legislature bearing the role of law making should be exclusive to them, and hence the practice of the legislature re-assigning these specific rules, despite being within very strict frameworks, is inherently unconstitutional. Considering both the arguments, it is very important to comprehend the different viewpoints and the legal correctness that surrounds delegating legislative powers to administrative bodies.

Where does Delegated Legislation’s Constitutional and Doctrinal foundations lie?

The Constitution of India, as the grundnorm, has no mention of delegated legislation. In India, the practice has been for the legislature to permit Delegated Legislature by means of the parent act itself or the, ‘enabling act’, which means the original act under which, accompanied by strictly regulated frameworks, the administrative body may be allowed to make rules, regulations and by-laws, all subject to allowance from the Constitution of India. The reason for the delegated powers being very regulated and closely monitored by the legislature is to make sure that administrative bodies do not act arbitrarily, and overstep their boundaries with the powers vested with them. The doctrine, as a whole, is in practice to address technical challenges pertaining to law, which may not be possible for the legislature to answer. Hence, the delegated powers are conferred upon specific and expert administrative bodies to apply technicalities and case case specific legislation.

¹ Sir Cecil Carr, Foreword to John E. Kersell, *Parliamentary Supervision of Delegated Legislation* 7–8 (Stevens & Sons 1960)

‘Delegatus Non Potest Delegare’ which means a person who has had powers delegated on them cannot further delegate the powers, is the doctrine which addresses the limitation on the legislative powers which can be conferred upon the executive or administrative entities, by the legislature. The doctrine essentially says that the legislature, as the supreme law making body of the country with the ultimate powers vested with them by the Constitution of India itself, cannot delegate certain core functions of legislation, for example, the amendment of the parent acts from which the legislative powers are delegated upon the administrative bodies, because these are essentially powers which can rest exclusively with the legislature. However, with that being said, the executive has to step in at some point to help the legislature address and make laws which require a degree of expert knowledge that the specific administrative body would acquire. In *In re Delhi Laws Act, 1951*², it was upheld by the Supreme Court of India that there is an apparent distinction between permissible and impermissible delegation.

Additionally, there is another doctrine. The doctrine of essential legislative function, which explains that the essential features of law vested with the legislature, are not within the permissible limits of delegation to the executive or administrative bodies. Hence, only ancillary provisions in order to implement a statute may be delegated to administrative bodies, but the ‘essential’ body of the law must be retained by the legislature exclusively. In the case of *Avinder Singh v. State of Punjab*³, it was upheld by the Supreme Court that essential legislative functions are those which uphold the legislative policy or essentially the goal of a specific legislation.

A juxtaposition of the doctrine of Excessive Delegation and the doctrine of Separation of Powers

The doctrine of excessive delegation and the doctrine of separation of powers are two thoughts which are intrinsically connected and connect with each other when placed next to each other. The doctrine of separation of powers is the one which essentially expands on the constitutional principle of separation of the organs of the government; The Legislature would strictly make laws, the Executive would execute said laws, and the Judiciary would interpret the laws. The doctrine says that one organ must not overstep and perform functions and powers of another, and this is where the doctrine of excessive legislation comes into picture wherein, the

² AIR 1951 SC 332

³ 1979 AIR 321

legislative body is not permitted to delegate to administrative figures law-making powers which are essential and core to the legislature exclusively. The doctrine of separation of powers was based on the understanding that liberties of the people must not be subjected to tyrannical and despotic rulers which happens when all the powers are vested with one person in power.⁴

In the view of the author, the doctrine of excessive delegation recognizing that it is inherently unconstitutional to delegate too much of its powers onto administrative figures, which could potentially lead to arbitrariness, in a way protects and upholds the doctrine of the separation of powers- both these doctrines seeking to maintain the intended constitutional balance. The doctrines essentially converge, from usurpation and abdication of functions, to uphold the legislative supremacy and its significance of retaining its core powers and functions. This interplay between the two thoughts upholds the discussion in the case of *Kesavananda Bharati v. State of Kerala*⁵ wherein it was discussed that legislative supremacy only extends to the extent as intended by the Constitution of India for the purpose of a balanced governance framework.

Landmark Cases on Delegated Legislation

Again referring back to the case of *In re Delhi Laws Act, 1951*⁶, Indian legislation has found a foundational basis in this very landmark judgement. The Court debated whether the Parliament had the power to delegate to the executive the power to extend legislation by other legislatures, with or without any sort of amendments. The doctrine of excessive delegation was discussed wherein it was upheld that while delegation to some extent is permissible as according to the enabling or the parent act, delegation those core functions and powers which form the foundation of the legislature is not permissible which means the essential functions of legislation. Chief Justice Kania and Justice Mukherjea upheld that the Parliament may form guidelines as to the legislative framework for delegation and that delegation may not be of the extent to modify or repeal any act in practice. Essentially, the case discussed that the legislature must exercise some regulation and control over the administrative body when any legislative

⁴ Rao, P. Separation of Powers in a Democracy: The Indian Experience, 37(1) Peace Research, 113-122 (2005)

⁵ 1973 4 SCC 225

⁶ AIR 1951 SC 332

delegation is vested with them, and that such delegation may be revoked at any point of time.

In the case of *Harishankar Bagla v. State of Madhya Pradesh*⁷, one specific act was challenged for possible excessive delegation, the Essential Supplies (Temporary Powers) Act, 1946, Section 4. The Supreme Court upheld that the Parliament had given appropriate guidelines for control of commodities which happen to be essential during emergencies, and hence, there was no abdication on the part of the legislation.

Finally, in the case of *Ajoy Kumar Banerjee v. Union of India*⁸, concerns with regard to the Life Insurance Corporation Act, 1956, and powers conferred upon the government under it. It was contended that the delegation had allowed the government to make modifications in the conditions enclosed in the act, but this was turned down by the Supreme Court which said that delegation was still happening within the ambit of the implementation of the policy as laid down by the Parliament.

The unconstitutionality and challenge that Excessive Delegation poses

The rule of law, the doctrine of separation of powers and the parliamentary freedom- all form a part of the conflict which creates the unconstitutionality of excessive delegation. The legislation delegating powers to the executive bodies essentially creates a constitutional aberration, but despite that, this delegation does not hold the same democratic legitimacy as a legislature-made law. Again, the legislature-made law means the essential legislative functions, which cannot possibly extend to the executive, because when they do, it amounts to the said excessive delegation. When a statute delegates any sort of essential legislative function onto an executive body, violation of the parliamentary sovereignty happens, not because delegation is unconstitutional, but this could potentially not abide by the policy which the legislature would abide by in order to uphold the deliberative spirit of legislative core powers.

The unconstitutionality of excessive delegation also extends when it is considered that fundamental rights could also be infringed, because with excessive delegation comes the risk of arbitrary rule which could be used to suppress a person's fundamental rights because no due

⁷ AIR 1954 SC 465

⁸ 1984 AIR 113

process of law would be followed as such, as discussed in the case of *Indian Express Newspapers v. Union of India*⁹.

Additionally, the accountability characteristic of the parliament gets diminished before the people of the country. One of the most recognizable characteristics of the Legislature is that they are accountable to the people of the country and when they happen to unconstitutionally delegate excess powers to executive bodies which they are supposed to hold exclusively, the blame and accountability gets shifted to the secondary bodies. In the case of *Lachmi Narain v. Union of India*¹⁰, it was rightfully upheld that delegation of excessive powers to executive bodies is unconstitutional because it would serve to effectively help the legislature escape liability.

Hence, excessive delegation cannot be taken as a mere defect because it creates a long chain of disruption in the form of substantial violation of the separation and balancing of powers and the overall legitimacy of the entire process. The reason for conferring specific and core functions to the legislature is very deliberate and disruption that would mean choosing to allow convenience over democratic principles of the country as intended by the Constitution when discussing the reason for separation of powers between the three organs of the government. The supremacy of the Parliament in terms of making laws can be reaffirmed only when excessive delegation is taken to be a disruption in the democratic process rather than a mere interruption of it. This is the reason for the judiciary to reaffirm the status and invalidation of excessive delegation through and through. The legislature has to remain the supreme lawmaking organ and in this quest to preserve the constitutional spirit, excessive delegation must be discouraged as it poses the challenges that were previously elaborated upon. Like the Parliament holds supreme lawmaking power, it is also accountable to the people for its actions and this entire chain has to remain undisrupted in order to ensure the system of democracy and governance as intended by the Constitution, This delegation negates not just the legality but also the equality before law in case it happens to violate fundamental rights of anyone, which was also elaborated upon as a challenge.

Remedies to combat excessive delegation

The primary measure to control and keep delegation of legislation in check is legislative

⁹ 1986 AIR 515

¹⁰ 1976 AIR 714

control itself. The legislature must lay down procedures, stricter scrutiny and discussions. A compulsion of laying before the Parliament any rule or regulation which is made by the executive bodies in order to modify, or repeal anything which jeopardises the policy as intended by the legislature with the parent act of the delegated power.

Secondly, a discussion committee to discuss policies and to examine and additionally scrutinise the delegated legislations made by the legislature and whether they conform to the constitutional framework and ideal for the legislature would be a remedy as this check would filter out any scope for excessive delegation.

The Judiciary could potentially review delegations made by the legislation and as judicial review has been held to be very effective in most scenarios, excessive delegation which oversteps the allowed limit of delegation to the executive could be removed before it reaches any negative effect. Lastly, the process of scrutinising any preliminary discussion of delegation of excessive powers beyond the permissible limits so as to prevent the process altogether would be very effective in the view of the author.

Conclusion

Hence, it is very apparent that modern legislation would need assistance in terms of expertise in technicalities with regard to certain questions of law which could be provided by specific sectors of the administrative bodies, but this assistance must be within the framework of democratic accountability and the spirit of constitutional intention. The Indian Judiciary has attempted to separate the permissible and impermissible limits of delegation of legislative powers through a chain of landmark judgements, and that has led to more clarity in terms of the doctrines of separation of powers and excessive delegation. The constitutional spirit remains clear in its stance, that essential and core functions of the legislature cannot be delegated under any circumstance, only assisting rules, regulation and by-laws can be made by the executive to contribute to the parent or enabling act, all of which has to be strictly regulated by the legislature. Ultimately, lawmaking can only work in the spirit intended if it abides by the constitutional principles, and excess of power to the body unintended would be the entire contrast of it because as it goes, "Power corrupts and absolute power tends to corrupt absolutely". Hence, essential powers of legislation must only lie with the organ they are intended and deliberated for, the legislature because arbitrariness of these essential powers would cause a very unintended and unfortunate drift from the intended democratic principles

and foundational constitutional spirit, upon which the system of administration of the country relies on.