
THE EXECUTIVE AS LEGISLATURE: A CONSTITUTIONAL MISDIRECTION

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ABSTRACT

The essay critically engages with the proposition that the delegation of legislative power should face no constitutional or legal restraint, so long as Parliament retains the authority to amend or repeal the laws enacted by its delegates. While the parliamentary supremacy provides a formal check on such delegation, the analysis contends that this rationale alone is inadequate to ensure accountability, democratic legitimacy, and adherence to the separation of powers. The aim is to trace the evolution of delegated legislation and examine relevant doctrines and judicial pronouncements. It also considers the political realities that often hinder effective scrutiny of delegated legislation.

The essay is divided into three parts. In the first part, a foundational overview of the scope of delegated legislation in (a) England and (b) the U.S.A. is provided. The second part examines the delegation of law-making power in India in the pre-constitutional and post-constitutional phases through theoretical developments in the judgments. The final part deals with a preliminary analysis of the Waqf (Amendment) Bill, 2025 (hereinafter referred to as “the Bill”), through the doctrine of excessive delegation. Administrative legislation has conventionally been regarded as a necessary yet undesirable encroachment upon the doctrine of separation of powers.

Keywords: delegated legislation, accountability, democratic legitimacy, separation of powers.

I. INTRODUCTION: Foundational Overview of the Scope of Delegated Legislation

Neither Dicey's conception of the Rule of Law nor Montesquieu's doctrine of the separation of powers has proven sufficient to curtail the expansion of delegated legislation. In contemporary governance, delegated legislation has evolved beyond a mere administrative necessity to become a significant political instrument. Consequently, while its legitimacy is no longer contentious, the operation of any modern constitutional framework without recourse to delegated legislation appears impracticable.¹ Delegated legislation is inclusive of rules and regulations, and bylaws. To achieve the purpose of the parent act, the legislature prepares a skeletal version of an act, but leaves the rest to the executive to operate. The distinction lies between the delegation of legislative power, which entails discretion in determining the substance of the law, and the conferring authority or discretion regarding the law's implementation, to be exercised in accordance with and within the framework of the law. While the former is impermissible, the latter is not subject to objection. As articulated by Professor Dicey, parliamentary sovereignty is an unequivocal principle of constitutional law, encompassing both its affirmative authority to enact laws and its negative authority to override or abrogate them². From a legal standpoint, Parliament possesses the unfettered competence to legislate on any subject matter. It is well established that the authority to repeal or amend a law constitutes a core legislative function; consequently, conferring such power upon the executive amounts to an excessive delegation of legislative authority, thereby *ultra vires* to the constitutional framework. Complexity, technicality, emergency and expediency compelled the Parliament to delegate its legislative functions to the government³.

The mere retention of Parliament's power to amend or repeal delegated legislation does not, by itself, justify an unrestricted delegation of law-making authority. For delegation to be constitutionally valid, the parent statute must articulate a clear legislative policy, prescribe adequate safeguards, and maintain a meaningful framework for oversight. In light of the statement given, the paper, thus, argues that Parliament's power to repeal or amend cannot alone justify the delegation of law-making power and overlook the practical reality that such

¹ K.C. Joshi, 'Question of Legislative Policy in Delegated Legislation—Recent Cases' (1976) Vol 18 (3) 509

² Sudhi Ranjan Das, 'Inaugural Address' (1958) Vol 1 (1) 13, 15

³ C.K. Takwani, *Lectures on Administrative Law* (4th edn, EBC) 64

oversight is often illusory. To ground the literature survey, a foundational overview of delegated legislation- (a) in England, and (b) the U.S.A., is cardinal.

(a) in England

As observed by C.K. Allen, “Nothing is more striking in the legal and social history of the nineteenth century in England than the development of subordinate legislation.”⁴ In England, where a strict separation of powers is not observed, the delegation of legislative authority by Parliament to the Executive does not pose a constitutional challenge. Here, specific standards governing such delegation have been established, and deviations from these are treated as improper. Legislative authority may be conferred upon the Executive in two primary forms: either by authorising His Majesty to issue Orders in Council for specified objectives, or by delegating the power to formulate regulations, rules, schemes, or orders to a designated Minister for those defined purposes⁵. It became evident that the legislative and administrative powers do not represent entirely distinct categories of authority. The tests developed to differentiate between these two functions were ultimately found to be inadequate and conceptually imprecise⁶.

This tension between legislative sovereignty and delegated authority continues to manifest in contemporary legal developments. In March 2017, significant public and parliamentary discourse emerged in the United Kingdom concerning the introduction of the Great Repeal Bill, which sought to transpose existing European Union laws into domestic legislation upon the UK’s formal withdrawal from the EU⁷. A particularly contentious feature of the Bill was the inclusion of the Henry VIII clause, which is a removal of doubt or difficulty clause, reignited longstanding debates regarding the necessity and constitutional propriety of such clauses as instruments of delegated legislation, further underscoring the blurred boundaries between legislative and executive functions in modern governance. The judicial oversight of delegated legislation, here, is limited. Statutes may explicitly exclude judicial review or use language that grants departmental regulations the same authority as Acts of Parliament, placing

⁴ *Law in the Making*, (1993) 531

⁵ S.A. de Smith, ‘Delegated Legislation in England’ (1949) Vol 2 (4) 514

⁶ Wade, *Administrative Law* (1994) 859-60

⁷ Ben Riley-Smith, ‘Theresa May to unveil plans for converting EU law via ‘Henry VIII clauses’ later this month’ (2017) <https://www.telegraph.co.uk/news/2017/03/18/theresa-may-unveil-plans-converting-eu-law-via-henry-viii-clauses/> accessed April 28 2025

them beyond judicial scrutiny. Additionally, courts cannot review orders that require parliamentary approval.

(b) in the U.S.A.

Under the U.S. Constitution, the concept of delegated legislation is generally rejected due to two foundational doctrines. First, the doctrine of separation of powers vests legislative authority exclusively in Congress, with the judiciary empowered to strike down any law that contravenes constitutional provisions, as affirmed in *Field v. Clark*⁸, where the American Supreme Court observed:

“That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of Government ordained by the Constitution.”⁹

Second, the principle of *delegatus non potest delegare* holds that since Congress derives its authority directly from the people, it cannot further delegate its law-making power to other entities. This reflects a core tenet of representative government, that legislative powers entrusted to elected representatives cannot be transferred to unelected bodies¹⁰. Congress formally acknowledges the President’s rule-making authority through two primary instruments: (i) Presidential Proclamations, which serve as official national declarations, and (ii) Executive Orders, through which the President issues directives of significant importance, particularly within the domestic policy domain¹¹. Therefore, in practice, the U.S. Supreme Court adopted a more liberal stance toward the delegation of legislative authority, upholding such delegations in several instances.

Justice Cardozo articulated that for a delegation of legislative power to be valid; the enabling statute must contain a reasonably clear standard to guide executive discretion¹². This principle upholds the doctrine of separation of powers by ensuring that essential legislative functions remain with the legislature and are not transferred to unelected officials. Congress may delegate only non-essential functions; absent a guiding standard, the delegation effectively transfers

⁸ *Field v. Clark* [1892] 143 US 649

⁹ *Id.* at p. 692

¹⁰ *Pennsylvania case*, (1873) 71 Locke’s Appeal 491(497)

¹¹ Ramesh Narain Mathur, ‘Legislative Control of Delegated Legislation a Survey’ (1960) Vol 21 (1) 27

¹² *Panama Refining Co. v Ryan* [1935] 293 US 388, 434

law-making authority. This was exemplified in *Panama Refining Co. v Ryan*¹³, where the U.S. Supreme Court invalidated a statute for granting the President unrestricted power to regulate interstate oil commerce without articulating any policy, standard, or conditions, thereby making the President the de facto legislator. In *National Broadcasting CO. v. United States*¹⁴, the Court validated the broad powers granted to the Federal Communications Committee (FCC) under the Communications Act of 1934, despite the standard, “public interest, convenience, or necessity”, being relatively vague. This decision reflected a judicial willingness to accept broad discretionary powers delegated to administrative agencies, provided a general standard or guiding principle was present¹⁵.

II. DELEGATION OF LAW-MAKING POWER IN INDIA

As stated by Justice Mukherjea, “Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists.”¹⁶ Not having a strict separation of powers helps in dealing with practical problems but opens pandora’s box of executive despotism, which further necessitates a stronger checks and balances system. The discussion on the delegation of law-making power in India can be categorised into two phases: (a) the pre-constitution era; and (b) the post-Constitution era.

(a) Pre-Constitution era

During the pre-constitution era, when the Privy Council served as India’s highest appellate authority until 1949, the issue of legislative delegation was examined in *Queen v Burrah*¹⁷. The case concerned an Act that conferred discretionary powers on the Lt. Governor, including the authority to implement the Act, determine applicable provisions, and extend its operation to specific regions such as the Khasi, Jaintia, and Naga hills. The central question was whether such authority amounted to an unconstitutional delegation of legislative power. The Privy Council, reversing the decision of the Calcutta High Court¹⁸, upheld the validity of the delegation, holding that the Indian legislature possessed plenary legislative authority

¹³ [1935] 293 US 388, 434

¹⁴ [1943] 319 US 190

¹⁵ C.K. Takwani, *Lectures on Administrative Law* (4th edn, EBC) 64

¹⁶ Quoted by Chakravarti, *Administrative Law* (1970) 166

¹⁷ 1878 3 AC 889

¹⁸ *Empress v Burrah and Book Singh* ILR 3 Cal 64

comparable to that of the British Parliament and was not a mere delegate of any other body. This foundational interpretation framed subsequent debates on the scope and limits of legislative delegation in post-independence India.

On the brink of independence, the Federal Court in *Jatindra Nath v. Province of Bihar*¹⁹ ruled that the legislative delegation in India was limited strictly to conditional legislation. In this case, the Provincial Government was authorised by notification to extend the operation of the Bihar Maintenance of Public Order Act, 1948, a power the court deemed non-delegable. These rulings generated considerable uncertainty surrounding the scope of delegated legislation. Moreover, since the Indian Constitution does not explicitly address the permissibility of legislative delegation, such questions could not be exclusively resolved on constitutional grounds alone. The expansion of administrative functions and powers has become essential, as many complex modern socio-economic issues are more effectively addressed through administrative mechanisms rather than traditional legislative or judicial processes²⁰.

(b) Post-Constitution era

The case, *Delhi Laws Act, 1912*²¹, under consideration, stands as a seminal judgment delivered by the Supreme Court and is often referred to as the ‘Bible case’ in the context of delegated legislation. It was adjudicated by a Constitution Bench comprising seven judges. The case arose from a presidential reference under Article 143 of the Constitution, seeking the Supreme Court’s opinion on the constitutionality of statutory provisions that empowered the executive to extend, modify, or repeal existing laws in specified territories. The proceedings witnessed extensive and rigorous deliberation from all judges involved, specifically addressing the contours and legitimacy of delegated legislation. In essence, the *ratio decidendi* of the judgment may be articulated as follows: first, the scope of delegated legislation is inherently circumscribed by the codified framework and overarching supremacy of the Constitution; second, the legislature, namely Parliament, cannot abdicate or transfer its “essential legislative functions”; and third, these essential legislative functions are principally understood to encompass the authority to formulate and prescribe binding policies, rules and normative standards²². The focal point is the two limitations held by the majority, which include that the

¹⁹ [1949] 2 FCR 595

²⁰ M. P. Jain & S. N. Jain, *Principles of Administrative Law*, LexisNexis, 7th ed: Chapter 3

²¹ [1951] SCC 568

²² *ibid.*

executive cannot be given the power to repeal a law in force, as the provision empowering the Central Government to repeal a law in Part C was bad; and that by exercising the power of modification, the legislative policy should not be changed²³.

The case offers a multi-faceted theoretical discourse through the distinct yet intersecting opinions of the seven judges on the Bench, with a 5:2 majority. From a constitutional orthodox approach, the dissent of Chief Justice Kania opined that law-making power is bestowed upon the legislature alone, and they are to apply their wisdom, not the executive, thereby striking down all three impugned sections. The key doctrines deliberated upon by him on the power to repeal or amend in focus, summarily, state that a delegate cannot sub-delegate rooted in the maxim *delegatus non potest delegare*; conditional legislation is permissible where the legislature lays down the law but leaves the application contingent upon executive satisfaction; and the legislature must not efface itself or delegate its core function of policy-making.²⁴ The assumption, *arguendo*, underlying Chief Justice Kania's framework, that the legislature can and will monitor delegated legislation effectively, proves increasingly tenuous in practice. Moreover, the power to undo an executive action still lies with the legislature, so there is no abdication of power in the constitutional sense.

Justice Fazl Ali was the most permissive among the judges, subscribing to a functionalist approach. He rejected a rigid separation of powers and argues that the Constitution does not explicitly limit delegation, subsequently upholding the entirety of the legislative schemes, recognising administrative discretion and flexible governance structures²⁵. Another prominent school of thought stems from Justice Mukherjea²⁶, who designed the judicial fiction of the 'essential legislative function' doctrine, distinguishing between the delegable functions and ancillary functions. It is clear that the legislative power involves both the determination of policy and the formulation of a binding rule of conduct. Taking a middle path, he invalidated certain sections on the grounds of excessive delegation, notable provisions that authorised the executive to repeal existing law and apply new legislation. Notably, the variance between the

²³ C.K. Takwani, *Lectures on Administrative Law* (4th edn, EBC) 69

²⁴ *Supra* note 21. Reference made to pages 595-99.

²⁵ *Supra* note 21. Reference made to page 606. He upheld the *vires* of all three impugned sections in their entirety along with Patanjali Sastri, J.

²⁶ *Supra* note 21. Reference made to page 661. He upheld the *vires* of all three impugned sections insofar as they permitted adaptation of laws with permissible restrictions and modifications, but struck down that portion of one section that permitted repeal or amendment of existing laws.

views of the minority and majority was not materially different.

After the Delhi Laws Act case, the case of *Gwalior Rayon Silk Mfg. Co. v Asstt. Commr.*²⁷ questioned the limits of delegation, Justice Mathew's 'abdication test', that so long as Parliament retains the power to revoke the parent Act, there is no true abdication of legislative authority, this premise rests on a formalistic assumption rather than practical institutional behaviour. The complexity and volume of delegated legislation, coupled with the often-opaque procedures through which it is enacted, mean that Parliament is rarely in a position to exercise meaningful scrutiny and intervention²⁸. Moreover, equating the mere *possibility* of legislative correction with actual accountability undermines the doctrine of separation of powers and blurs the normative distinction between law-making and law-executing bodies. Arguably, if the executive is permitted to both frame and apply substantive policy under the cover of delegated authority, and if the Parliament seldom intervenes, then the core legislative function has in effect been outsourced, rendering the legislative role illusory. Relying on repeal powers as a proxy for legislative control risks transforming a constitutional democracy into an administrative state with executive dominance.

In *M.K. Papiah v Excise Commissioner*²⁹, Justice Mathew, without invoking the majority or minority reasoning in *Gwalior Rayon*, reaffirmed his stance on delegated legislation. The case involved challenges to Sections 22 and 71 of the Karnataka Excise Act, 1996, which authorised the government to fix excise duty rates and frame rules, subject to post-facto legislative laying. The petitioners contended that since rules took effect immediately upon enactment, subsequent legislative oversight was insufficient. Justice Mathew, delivering a unanimous opinion, dismissed this concern, arguing that in light of modern administrative exigencies, legislative laying constituted adequate control. Seervai³⁰ hailed this judgment as a long-overdue return to the Privy Council's 1878 approach³¹, suggesting a resolution to India's long-standing doctrinal confusion. However, his optimism proved premature, as the Supreme Court in *Kerala State Electricity Board v Indian Aluminium Co.*³² reverted to the stricter majority view of *Gwalior*

²⁷ [1974] 4 SCC 98: AIR 1974 SC 1660

²⁸ N.C. Chatterjee, 'Control of the Legislative Powers of Administration' (1958) Vol 1(1) 123

²⁹ [1975] 1 SCC 492: AIR 1975 SC 1007

³⁰ *Constitutional Law of India*, 1976 Vol II 1204-05

³¹ *Supra* note 19

³² [1976] 1 SCC 466: AIR 1976 SC 1031. For critical discussion, see C.K. Thakker, 'Administrative Law' (1996) 80

Rayon, reaffirming the necessity of more substantive legislative control.

III. EXCESSIVE DELEGATION: Preliminary Analysis of the Waqf (Amendment) Bill, 2025

This part aims to present a preliminary analysis of the Waqf (Amendment) Bill, 2025³³, though ostensibly a procedural intervention into the administration of religious endowments, it raises fundamental constitutional concerns when analysed by applying the doctrine of excessive delegation. As established, the argument that Parliament's power to amend or repeal delegated legislation cannot itself justify the delegation of law-making authority, gains acute relevance when situated within the broader critique of the increasing institutional tolerance for excessive delegation. After the *Delhi Laws Act* case, *Hamdard Dawakhana v Union of India*³⁴ It was probably the first case in which a Central Act was held *ultra vires* on the ground of excessive delegation³⁵. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, was enacted to regulate advertisements of specific drugs. Section 3 banned advertisements for certain listed diseases and allowed the Central Government to add more diseases to the list. However, the Supreme Court struck down Section 3, ruling that it conferred unchecked and unguided power to the executive without any defined criteria or guiding principles³⁶.

The Bill amends the Waqf Act, 1995³⁷, which aimed at providing for better administration of waqf and matters connected therewith or incidental thereto, and introduces wide-ranging powers to the Central Waqf Council and State Governments, even though the purpose is to modernise waqf governance. The need to modernise entails that the Bill confers authority over an executive authority. The key provisions of the Bill, which encompass the changes, are Section 3-C (wrongful claim of waqf on government property) read with Section 4 of the Bill, which empowers the Collector, and not the Survey Commissioner, to prescribe, via notification, the manner of survey and identification of waqf properties. These provisions cumulatively allow the executive to define both the scope and application of the Bill without substantive parliamentary involvement.

³³ *The Waqf (Amendment) Bill, 2025*, Bill No. 109-C of 2024

³⁴ AIR 1960 SC 554; (1960) 2 SCR 671

³⁵ C.K. Takwani, *Lectures on Administrative Law* (4th edn, EBC) 71

³⁶ *ibid.*

³⁷ No. 43 of 1995

The judicial pronouncements have consistently held that delegation is permissible only if the legislature lays down clear policy, guidelines, and standards. In *D.S. Garewal v State of Punjab*³⁸ and *Ajoy Kumar Banerjee v Union of India* Supreme Court emphasised that essential legislative functions must remain with the legislature. Yet, the Bill contains no coherent policy directives or limitations governing executive discretion. From the standpoint of the doctrine of separation of powers, not as strict as Montesquieu's separation³⁹, the Bill appears to erode the structural balance envisaged under the Indian Constitution. The Bill empowers the executive to unilaterally modify or even repeal certain substantive regulatory norms governing waqf properties.

Advocates of broad delegation often invoke the rebuttal that Parliament retains the power to amend or repeal any executive action, opening the door for critique. As argued, this formal power cannot serve as a meaningful check, since parliamentary oversight is largely episodic, politically contingent, and practically ineffective. While Parliament nominally retains control, the operational reality is that administrative notifications under Section 3-C will likely proceed with negligible debate, given the legislative backlog and ruling party majorities. Parliamentary committees, when involved, lack binding powers and are often bypassed in urgent rule-making⁴⁰. This critique dovetails with the imperatives of the rule of law, particularly the requirement that law-making be transparent, reasoned, and accountable. The contention that post-facto repeal or amendment by Parliament offers adequate control is structurally unsound. As cogently argued, such oversight is often illusory. The volume and technicality of delegated legislation, compounded by a lack of institutional bandwidth in legislatures, make retrospective correction improbable.

A substantive notice must be accorded to the provision "power to remove difficulties" provided under Section 113 of the Act⁴¹, which is also known as the Henry VIII Clause in administrative law. The Bill no longer provides for this provision, but the fact that the provision existed for almost thirty years raises concerns regarding the extent of power given to the executive. Justice Shah in the case of *Jalan Trading Co. (P) Ltd. v Mill Mazdoor Sabha*, held that Section 37 of the Payment of Bonus Act, 1965, was *ultra vires* to the extent that it conferred unfettered and unguided discretion on the executive without laying down any intelligible principles or

³⁸ [1959] Supp (1) SCR 792: AIR 1959 SC 512

³⁹ Montesquieu, *Spirit of the Laws*, Book XI

⁴⁰ *Supra* note 11.

⁴¹ *Supra* note 37.

criteria⁴². This clause grants the executive the authority to make such provisions, including modifications of the Act itself, as may be deemed necessary or expedient for removing difficulties arising in the implementation of the statute. In the Indian legal framework, such clauses have been a subject of sustained judicial and academic scrutiny, primarily due to their potential to undermine the legislative function of Parliament. Where the delegated legislation is already extensive due to administrative complexity and the volume of laws enacted annually, the incorporation of such clauses demands enhanced parliamentary oversight mechanisms, including prior publication of draft rules, mandatory laying procedures to ensure temporality and transparency.

The dangers of excessive delegation in the Bill are not merely procedural, they have substantive constitutional consequences. Waqf properties are linked to minority religious and charitable rights under Article 26 of the Constitution⁴³. The executive's unchecked power without legal protection or unilaterally determine their character may enable arbitrary state interference in minority institutions. Moreover, the centralisation of power undermines the federal spirit, sidelining State Waqf Boards and local Muslim communities in property governance. The Bill illustrates the dangers of legislative abdication masked as efficiency.

Further, applying Madison's legal functionalism, which emphasised the dynamic equilibrium between institutional actors and the diffusion of power to prevent tyranny, the Bill constitutes a tilt towards executive centralisation. In *Federalist No. 47*⁴⁴ Madison warned against the "accumulation of all powers...in the same hands", highlighting that liberty is imperilled when boundaries between departments blur. By vesting in the executive the capacity to frame, apply, and modify rules without prior legislative specification, the Bill converges legislative and executive authority in a manner Madison would classify as institutional overreach.

IV. CONCLUSION

While parliamentary oversight remains the bedrock of democratic legitimacy in delegated legislation, it is neither the sole nor always the most efficacious mechanism of control. A robust

⁴² [1966] SCC OnLine SC 88

⁴³ The Constitution of India, 1950. Reference made to *Tilkayat Shri Govindlalji Maharaj vs The State of Rajasthan* and he quoted: "Article 26 brings out the competence of the legislature to make a law in regard to the administration belonging to religious denomination...the denomination's right must however not be extinguished, diminished or destroyed under the guise of regulating the administration of the property by the denomination".

⁴⁴ James Madison, *The Federalist Papers: No. 47* (1788) New York Packet

legal system must engage with a spectrum of complementary safeguards that reinforce accountability and curb potential overreach. Judicial review, for instance, acts as a crucial corrective mechanism, empowering courts to invalidate delegated legislation that transgresses constitutional bounds or acts *ultra vires* the enabling statute⁴⁵. Additionally, procedural controls, such as mandatory consultations, publication requirements, and pre-enactment scrutiny by committees like the Committee on Delegated Legislation, introduce layers of transparency and deliberation, ensuring that delegated authorities remain tethered to both legal propriety and public interest.

Academic critiques and civil society engagement also contribute to a culture of vigilance, often prompting reconsideration or withdrawal of problematic regulations. Thus, while Parliament's authority to repeal or amend is indispensable, it is through this mosaic of legal, procedural, and societal controls that the legitimacy and accountability of delegated legislation are truly fortified.

⁴⁵ V.N. Shukla, 'Judicial Control of Delegated Legislation in India' (1959) Vol 1(3) 360