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Delegation of Legislative Power: A Compulsory Necessity

Dr. N. Krishna Kumar

Assistant professor, Government Law College, Thrissur, Kerala, India

Abstract: **There is no general power with the Executive to supplement the laws made by the legislature. Whatever power the executive has in this behalf is derived from delegation made under specific enactments. In England, the Parliament being supreme can delegate any amount of powers because there is no restriction. On the other hand in America, like India, the Congress does not possess uncontrolled and unlimited powers of delegation. Though in theory, it is not possible for the congress to delegate its legislative power to the executive, strict adherence thereto is not practicable. When a statute is challenged on the ground of excessive delegation, there is a presumption in favour of its vires and if two interpretations are possible, one that makes it constitutional is to be adopted. Courts may also read down and interpret the law in a way as to avoid its being declared unconstitutional. This is being done in view of the fact that today delegation of legislative power has become a 'compulsory necessity'**

Keywords: **Administrative legislation, Compulsory necessity, Delegated legislation, Quasi-legislation, Vires**

I. INTRODUCTION

One of the salient features of a modern democratic country is the rapid development and growth of the legislative powers of the executive. According to traditional theory, the function of the executive is to administer the law enacted by the legislature and in the ideal state the legislative powers must be exercised exclusively by the legislature who are directly responsible to the electorate. Apart from the pure administrative function executive also performs legislative and judicial functions.

It evolves from the emergence of the concept of Welfare State[1], the functions of a modern Government and the legislature have increased beyond leaps and bounds. The Rule of law and judicial review require greater significance in a welfare state.[2]

In no democratic society which is committed to the establishment of a welfare state, the legislature monopolises the legislative power.lt shares the same with the Executive and other administrative organs of the state. Legislature has become more complex and as much as technical. A direct consequence of this development is the growth of rules, regulations, bye-laws, schemes and orders issued by various administrative departments under the authority received from parliament.

In India, Rules regulations orders, notifications, bye- laws all these denote delegated legislation. Also the same statute may employ or use different expressions to denote the exercise of the subordinate law-making power by an administrative body or agency[3].

Prof. Sathe has observed, rightly, "We do not have terminological consistency in the family of delegated legislation".[4] Actually the terms, rules, regulations, etc are used interchangeably in our country. In England theoretically it is only Parliament which can make laws. Even in United States of America where the doctrine of the delegated legislation has not been accepted in principal, in practice the legislature has entrusted legislative powers to the executive. Administrative legislation met with a rapid growth after World War II and in India during 1973 to 1977.[5]

The system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits and under certain safeguards. To set out briefly, the reasons can be summed up as follows:

(1) Pressure upon Parliamentary time is great. The more procedure and subordinate matters can be withdrawn from detailed Parliamentary discussion, the greater will be the time which Parliament can devote to the consideration of essential principles in legislation.

(2) The subject matter of modern legislation is very often of a technical nature. Apart from the broad principles involved, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament.

(3) If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required; it is impossible to foresee all the contingencies and local conditions for which provision must eventually be made.

(4) The practice, further, is valuable because it provides for a power of constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential. The method of delegated legislation permits the rapid utilisation of experience, and enables the results of consultation with interests affected by the operation of new Acts to brought into practice.

(5) The practice, again, permits of experiment being made and thus affords an opportunity, of utilising the lessons

of experience. The advantage of this in matters, like town planning, is obvious.

(6) In a modern State there are many occasions when there is a sudden need of legislative action. For many such needs delegated legislation is the only convenient or even possible remedy. No doubt, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outlines of the legislation shall be, or at least indicate the general scope of the delegated powers which it considers are called for by the occasion.

Delegated legislation may take several forms– regulations, orders in council, rules, and orders. Parliament usually makes delegated legislation as statutory instruments, which is governed by the Statutory Instruments 1946. The more important pieces of delegated legislation are Orders in Council. Legislative measures which would have been passed as Acts of the Northern Ireland Parliament before it was prorogued are now passed as Orders in Council.

There is no general power with the Executive[1] to supplement the laws made by the legislature. Whatever power the executive has in this behalf is derived from delegation made under specific enactments. This type of activity, namely, the power to supplement legislation has been described as delegated or subordinate legislation. Delegation of power means those power, which are given by the higher authorities to the lower authorities to make certain laws, i.e., power by the legislature to administration to enact laws to perform administrative function. [6]

The term 'delegated legislation'[7]is difficult to define. However, delegated legislation refers to all law-making which takes place outside the legislature and is generally expressed as rules, regulations, bye-law, orders schemes, directions or notifications, etc. Delegated legislation is, at times, referred to as "Ancillary" "Subordinate", "Administrative legislation or Quasi-Legislation". [8]

Mukherjee rightly says: Delegated Legislation is an expression which covers a multitude of confusion. lt s an excuse for the legislators, a shield for the administrators and a provocation to the Constitutional jurists.[9] According to M.P. Jain the term delegated legislation is used in two senses: it may mean (a)exercise by a subordinate agency of the legislative power delegated to it by the legislature, or (b) the subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature. [10]

The expression "Subordinate legislation" means the act of making statutory instruments by a body subordinate to the legislature and in exercise of the power, within specific limits ,conferred by the legislature. The term also connotes and covers the statutory instruments themselves. [11] The committee on Ministers powers has defined the term 'delegated legislation' as follows:

"Delegated legislation may mean either be the exercise by a subordinate authority, such as a minister, of the legislative power delegated to him by parliament or subsidiary laws themselves, passed by Ministers in the shape of departmental regulations and other statutory rules and orders"[12]. Delegated Legislation is a technique to relieve pressure on legislature's time so that it can concentrate on principles and formulation of policies[13]. This technique of delegated legislation is so extensively resorted to in modern administrative process that there is no statute enacted by the legislature today which does not delegate some power of legislature: to the Executive[14]. Statute may be inexact, incomplete, unintelligible and may even be misleading unless it is read with the delegated legislation made thereunder. It is now well established proposition of law that the power of delegated legislation is a constituent element of legislative power as a whole and that in modern times legislature enacts laws to meet the challenge of socio-economic problems[15].

Delegated legislation has been defined by Salmond as follows: Subordinate legislation is that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on same superior or supreme authority. They may be regarded as having their origin in a delegation of the power of parliament to inferior authorities, which is the exercise of their delegated functions rema'in subject to the control of the sovereign legislature[16].

Such authority may be the Central Government or the State Government depending upon whether the statute is a central, or a state law. Sometime central laws delegate legislative power to the State Governments[17] and sometimes both the Central and the State Government derive rule-making power from the same Act[18]. Some statutes use the term "appropriate Government" which means the Central or State Government as may have power in respect of a subject matter[19].

Broadly speaking, the power of subordinate legislation may be conferred by the sovereign legislature upon the following administrative authorities;

i) The Executive or Departments of the Administration; or

ii) A subordinate body, such as a municipal or other local body; or

iii) A statutory corporation or juristic person such as a railway company, a University or other society to regulate matters concerning itself[20].

Legislation includes law-making by the legislature or subordinate legislation by the executive. In constitutional

[1]. Theory of separation power as propounded by Montesquieu is based on the assumption that the three functions of the government i.e., legislative, executive and judicial are distinguishable from one another but in fact it is not so. Their cooperation is indispensable, there warfare fatal. See Friedman, Law in a changing society, 1st Edn. 9.382

theory, the law-making function essentially belonging to the legislature. The legislature is the body consisting of representatives of the people and when such a body makes law, it has the consent of the people. In parliamentary Government, however, the executive plays an unavoidable role in initiating legislation. It will suffice to say that the technique of administrative rule making is now regarded as "useful, inevitable and indispensable". Almost all the activities of the individual citizen and the society as well, are controlled by the subordinate legislation. [21]

Delegation of Power under the Constitution

It is generally accepted that there are three main categories of governmental functions- the Legislative, the Executive and the Judicial. At the same time ,there are three main organs of the Government in a state- the Legislature, the Executive and the Judiciary .According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by separate organs of the Government. Though our Constitution was based on the principal of Separation of Powers, a complete separation of power was not possible. Hence it maintained the sanctity of the doctrine in the modern sense.

The Indian Constitution does not prohibit the delegation of powers. On the other hand there are several provisions where the executive has been granted the legislative powers. Subordinate legislation or delegated legislation with which we are concerned here must not be confused with the executive legislation. This is to be seen in Articles 123[22] and 213[23] of the Constitution. The president (Art. 123) and the Governor (Art.213) can promulgate ordinances during the recess of the respective legislatures. This could be done only after the legislature ended its session. The power of issuing an ordinance is supposed to be exercised only in exceptional or urgent situation[24].

These ordinance are required to be ratified by parliament or the State Legislature, as the case may be, after its meet. Such an ordinance ceases to have effect of it is not ratified within six weeks after the Assembly of the legislature. It can be said to some extent that the nature of such legislation is very similar to subordinate legislation which the executive can make under the powers given from an Act[25].

Although there is need for ratification by parliament ultimately, the ordinance could have the full force of law until it lapse of the non- ratification or rejection by parliament. Therefore, in India, the ordinance issued by the President under Art. 123 do not form part of the delegated legislation. But the rules promulgated by the president under the Acts of parliament such as S. 12 of the Representation of Peoples Act, 1950, or S. 16 of the High Court Judges (Conditions of Service) Act, 1954 and other Acts fall under the category of delegated legislation[26].

The Legislature is quite competent to delegate to other authorities, to frame the rules to carry out the law made by it. In *D.S. Gerewal* v *The State of Punjab*, K.N. Wanchoo, the then justice of the Hon'ble Supreme Court dealt in detail the powers of delegated legislation under Article 312[27] of the Indian Constitution. He observed: "there is nothing in the words of Article 312 which takes away the usual power of delegation, which ordinarily resides in the legislature. The words "Parliament may by law provide" in Article 312 should not be read to mean that there is no scope for delegation in law made under article 312."

In England, the Parliament being supreme can delegate any amount of powers because there is no restriction. On the other hand in America, like India, the Congress does not possess uncontrolled and unlimited powers of delegation. Though in theory, it is not possible for the congress to delegate its legislative power to the executive, strict adherence thereto is not practicable.

In *Panama Refining Co.* v *Rayans*, the Supreme Court of the United States had held that the Congress can delegate legislative powers to the Executive subject to the condition that: it lays down the policies and establishes standards while leaving to the administrative authorities the making of subordinate rules within the prescribed limits. In Britain, the term "delegated legislation" excludes prerogative orders- in-Council another forms of legislation under the royal prerogative, because such power to legislate is inherent in the Crown. But if an Act delegates legislative power to the Crown, the legislation so made comes under the category of delegated legislation[28].

In our country there is no absolute separation of powers between the executive and the legislature. Unlike the American Constitution the Indian Constitution does not expressly vest the different departments of Government. Under Article 53(1), only the executive power has been vested in the president. But there is no similar vesting provision regarding the legislative and the judicial powers[29].

Under our Constitution, the power of making laws can be exercised by parliament or a State legislature. The Constitution also vests the president and the State Governors with original; law making powers. As discussed earlier the president under Article 123 and the Governor under Article 213 can issue ordinances during the recess of the respective legislatures. They can also make rules, regulations etc., under the authority of the Constitution[30]. The competence of parliament to confer on the president the power to make laws, and to authorize the president to delegate the power to be conferred to any other authority has been recognized only as an emergency provision in Article 357 of the Constitution under which the legislature has been expressly authorized to delegate its law-making powers.

It appears that the intention of the architects of our Constitution was that the duty of law-making should be performed by the legislative bodies themselves. But it will be wrong to suppose that they did not realize the need for administrative legislation, and were fully aware of the need. This becomes quite clear from a perusal of Articles 13(3) of the Constitution[31]. It is thus clear that, the Constitution intends that while primary legislative function was to be discharged by the legislative bodies themselves secondary

legislation for then purpose if administrating laws may be delegated to the executive or other competent authorities[32].
As M.P Jain pointed out, the term 'delegated legislation' is used in two senses:

i) Exercise by a subordinate authority of the legislative power conferred on it by the legislature, or

ii) The subsidiary rules themselves, made by the concerned authority in exercise of the power delegated to it by the legislature[33].

Subordinate legislation or delegation in India is commonly expressed by the term 'statutory rules and orders'. In modern India it covers a wide diversity of names. Apart from rule, regulations, order, bye-law and notification mentioned in Art. 13[34] of the Constitution, other common names are scheme, direction and form. These technologies are confusing because different words are used for the same thing and the same words are used for the same thing and the same words are used for different things. [35]

2. CLASSIFICATION OF ADMINISTRATIVE RULE-MAKING POWER OR DELEGATED LEGISLATION.

Rules and Regulations

Delegated legislation is designed in several names, such as, rules, regulations, bye-laws ,orders, etc, though the term 'rules' is more commonly employed. The terms 'regulations' and 'bye-laws' are usually used to denote the legislation framed by statutory corporations under delegated legislative power[36].

The term "rules" and "regulations'' are sometimes used inter change ably. Of the different names used in the sphere of administrative legislation in India the most common one is that of "rule". In England, the terms "regulation" and "rule" are being used for matters of procedure. In India, rules are often thought to cover matters of a general nature whereas regulations are concerned with matters of administrative detail.

Regulation[37], are somewhat inferior to rules and that they are generally made by a subordinate authority like a Board or other statutory body functioning under statute. [38] The Indian practice is to confer rule-making powers on the Government itself and where a specified subordinate authority is singled out for regulating any matter, the subsidiary legislation is generally in the form of regulation. Sometimes the term 'Orders' is used to denote delegated legislation[39].

In many cases the appropriate authority is empowered to make "rules" "to give effect to the provisions of the Act". This is accompanied in certain cases by a provision empowering another authority[40] to frame "regulations" for certain purposes. It has to be noticed that the width of the language "to give effect to the provisions of the Act" gives power to be made by the other authority. It is worth noticing that the status of "rule" in Indian legal hierarchy with that of "regulations". Act which provides for rules and regulations both usually lay down that regulations are to be made "not inconsistent with the Act" and "the rules made there under" [41].

The General Clauses Act, 1897, makes no distinction between "rule" and "regulation" [42]. Section 3 (43) of the Act says: "rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment". These rules may be made applicable to a particular individual or to the general public[44]. The scope of "rule" is thus wider then that of "regulation".

In a recent case the Hon'ble Supreme Court held that rules represent subordinate legislation. They cannot travel beyond the purview of the Act[45].

In fact this decision may be relied upon the following statement of law in Hulsbury's Laws of England: Where a statute provides that subordinate legislation made under it is to have effect as if enacted in the statute such delegation may be referred for the purpose of constraining a provision in the statute itself. Where a statute does not contain such a provision, and does not confer any power to modify the application of the statute by subordinate legislation, the subordinate legislation made under the statute cannot alter or vary the meaning of the statute itself where it is ambiguous[46].

The term "regulation" is not confined to delegated legislation. It means an instrument by which decisions, orders and acts of the Government are made known to the public. But in the sphere of administrative rule-making, the term relates to the situation where power is given to fix the date for the enforcement of an Act or to grant exemptions from the Act or to fix prices, etc[47].

Order

An 'order' is directed to an individual or to a body and contains a definite command. This term is used to cover various forms of legislative and quasi-judicial decisions. Orders may be specific or general. The former refers to administrative action while the latter refers to administrative rule- making[48]. While a rule is general in character and indiscriminate in its application, an order, broadly speaking, is specific and may be limited in its application. On the other hand, instances of orders having wide application and standing more or less on the same footing as enactments are not uncommon.

The term 'order' in India, and in England, is used for an enormous variety of purposes, and the contents of orders are often indistinguishable by their nature from those of rules and regulations. The term is also used at times in a generic sense to cover other sub-laws[49].

Notification

"Notify means make known and, in the case of public matters, it generally means that some persons whose duty it is to notify something, gives it in the manner prescribed and to persons entitled to receive it. The term 'notification' also covers a wide range of subjects and is quite often used in a general sense.

A vast majority of the statutes that empower the making of rules or regulations says that the Government (or any other authority) may by notification in the official Gazette make these rules or regulations. These rules and regulations naturally are published under the heading 'notification'. 'Orders' also are published at times under the same heading. Essential services maintenance (Application to the State of

Pondicherry) order, 1960, for instance, was published under the heading "notification" [50]. Appointments, posting and transfers of officers which are often notified in the Gazette cannot obviously have the force of law. [51]

Scheme

The term 'scheme' refers to a situation where the law authorizes the administrative agency to lay down a frame work within which the detailed administrative action is to proceed[52]. In India, as in England, the term 'scheme' is generally used for establishing some authority and defining its powers and duties or for laying down the frame work within which detailed administration will proceed. A "scheme", may be of two kinds. It may embody subordinate legislation containing a body of rules binding on person with whom the rules are concerned and in such a case, if passed by an authority having the necessary power to do so, they will be enforceable in courts of law or by other authorities and will have the force of law.

Directions

The term is used in two senses. The Constitution gives powers to the Central Government to give directions to the State Government for the execution of its laws. In this sense it has no application to delegated legislation. In the second sense, the term 'direction' is an expression of administrative rule-making under the authority of law or rules or orders made there under. They may be recommendary or mandatory. If mandatory, these have the force of law[53].

The term 'direction' is used for instruments, authorized by orders, which work out in specific details the provisions of the orders. In England also the term is used in the same sense.

Bye-Law

This term has been confined to rules made by semi-government authorities established under the Acts of legislature. Bye-laws usually are intended to govern the internal working of autonomous institutions. For example, co-operative societies make bye-laws to regulate the conduct of their members. A bye-law is an ordinance affecting the public or some members of the public. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which but for the bye-law they would be free to do. Further, if validly made, it has the force of law within the sphere of its legitimate operation. [54]

The term "bye-law", "as now generally understood, applies to the local laws or regulations made by public bodies of a municipal kind, or concerned with local Government, or by corporations, or societies formed for commercial or other purposes[55].

The contents of bye-law cannot always be distinguished from those of rules and regulations. But in its seventh report the committee of subordinate Legislation had explained the difference between rules, regulations and bye-laws in the following words: Generally, the statutes provide for power to make rules where the general policy has been specified in the statute but the details have been left to be specified by the rules. Usually, technical or other matters which do not affect the policy of the legislation are included in regulation. Bye-laws are usually matters of local importance and the power to make bye-laws is generally to the local or self Government authorities[56].

The tendency to regulate certain matters by subordinate legislation as exemplified in English Parliamentary Legislation, had earlier attracted a great deal of attention and considerable hostile comment. The publication of Hewart's book had been preceded by the appointment on the 30th October, 1929, of a Committee known as the Donoughmore Committee to consider the powers exercised by Ministers of the Crown by way of delegated legislation and to report what safeguards are desirable or necessary to secure the constitutional principal of the sovereignty of parliament and the supremacy of the law. The report of that Committee published in 1932 by H.M's stationery Office as Cmd. 4060 to a large extent provided the necessary corrective. [57]

"The truth is that if Parliament were not willing to delegate lawmaking power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires". [58] This apparent surrender by Parliament of a large part of its legislative functions to the executive departments of the State was focused in 1929 by Lord Hewart of Bury in the New Despotism (London). Cecil T. Carr in Delegated Legislation (Oxford University Press, (1921) and W.A. Robson in 'Justice and Administrative Law, Macmillan & Company (1928)', had already examined the extent of the growth of the phenomenon, the advantages and disadvantages of the practice, and the nature of the checks on it.

3. DELEGATED LEGISLATION: Discretion based classification.

On the basis of discretion, administrative rule making may be classified into subordinate and contigent or conditional legislation. [59]

Conditional Legislation

A very modest delegation of legislative power was upheld by the courts under the rubric of conditional legislation. The idea behind the term is that the legislature makes the law which is full and complete in all respects, but it is not brought into operation immediately. The enforcement of the law is made on the fulfillment of the condition, what is delegated to the outside agency is the authority to determine, by exercising its own judgement, whether or not the stipulated condition has been fulfilled. [60]

A legislation is contingent if it provides controls and specifies that they are to go into effect only when a given administrative authority finds the contingencies defined in the statute. In this case the condition and contingencies specified in the statute exist, and, on the basis of which, to bring the statute into operation[61].

The operation of the rule can be illustrated by reference to a few cases:

The classic case is *Queen* v. *Burah* in 1869, the legislature passed an Act to remove Garo Hills from the system of law and courts prevailing therein, and an act to vest the administration of justice there in such officers as the Lt.

Governor of Bengal might appoint The law also authorized the Lt. Governor to extend to Garo hills any law which might be then in Force in other territories under him. The Act was to come into force on a day appointed by the Lt. Governor. The Act was held valid by the privy council on the ground that the legislature having determined that a certain change should take place, had left to the discretion of Lt. Governor the time and manner of carrying the same into effect.

While considering the nature of legislation it was held in Delhi Laws Act case[62] that the law is full and complete when it leaves the legislative chamber, but operation of law is made dependent upon fulfillment of a condition and what is delegated to an outside body is the authority to determine by the exercise of its own judgement, whether or not the condition has been fulfilled. It was further held that conditional legislation had all along treated not to be a species of delegated legislation. It is further observed that the legislature of India, Australia, Canada and U.S.A has to discharge its legislative function i.e. to lay down a rule of conduct. In doing so it may lay own conditions which on being fulfilled, the legislation may become applicable to a particular area. And this is described as conditional legislation.

The courts have persisted with the concept of conditional legislation even after the emergence of the doctrine of excessive delegation. Conditional Legislation denotes an extremely limited kind of delegation of legislative power. Once this concept is invoked, it is not necessary for the courts to find the policy underlying the Act. In *Inder Singh* v. *State of Rajastha[63]* the Rajasthan Government promulgated an Ordinance for two years, but the Governor was authorized further to extend its duration by a notification. The Governor extended the life of the ordinance first by two years and then again by two years.

The Supreme Court held the power to extend the life of the ordinance valid as being conditional legislation. It is usual practice for the legislature to enact a statute but leave it to the Executive to bring the statute in force at such time it decides. The is regarded as an example of conditional legislation. [64] In *A.K. Roy* v. *Union of India*[65], the Court upheld a provision in a Constitutional Amendment giving unfettered discretion to the Executive to bring the amendment in to effect. From the it is clear that when the legislature enacts a law and authorizes an executive authority to bring it into force in such area, or at such time, as it decides, to extend the life of the legislation, it is characterised as conditional legislation.

Conditional legislation is classified into three categories :

(i) statute enacted by legislative future applicability to a given area left to the subjective satisfaction of the delegate as to conditions indicating the proper time for that purpose.

(ii) Act enforced but power to withdraw the same from operation in a given area or in given cases delegated to be exercised on subjective satisfaction or objective satisfaction of the delegate as to the existence of requisite condition precedent.

(iii) power exercisable upon the delegate's satisfaction on objective facts by a class of persons seeking benefit exercise of such power to deprive the real class of persons of statutory benefits. This category of conditional legislation attracts principles of natural justice. [66]

4. CONSTITUTIONALITY OF DELEGATED LEGISLATION

Legislature in India have been held to posses wide powers of delegation. [67] This power is, however, subject to one important limitation i.e., the legislature cannot delegate essential legislative functions which consist in the determination or choosing that policy into a binding rule of conduct. [68] The legislature cannot delegate its power to repeal a law or even to modify it in essential features. [69] These are cases where the Legislature does not limit the delegation to ancillary or subordinate legislative function but parts with the essential legislative functions and thereby transgresses the limits of permissible legislation.

When the Legislature requires the delegated legislation to be laid before it, there is no abdication as the delegate is kept under the vigilance and control of the legislature. [70] The court thus exercise judicial control over subordinate legislation and there have been several cases subsequent to the Delhi Laws Act case in which the question for consideration. Broadly state, the legislature cannot efface itself or strip itself of its function of laying down legislative policy in respect of a particular measure. It must declare the policy of the law and the legal principles which are to control any given case and must provide a standard to guide the official or body in power to execute the law.

Where, for instance, a power to grant or renew a license is given to an executive authority, care should be taken to see that in cases of refusal the law contains sufficient guiding principles for the purpose, that the authority is required to state his reasons for such refusal and that there is a right of appeal. It is always for the courts to declare on a fair, generous and liberal interpretation of the language employed in a statute whether the legislature has exceeded the permissible limits in the case of delegated legislation. [71]

After the commencement of the Constitution of India, recognition to the practice of delegation could no longer withheld. The modern constitutional documents, therefore, give equal importance to the subordinate or delegated legislation and has made sufficient mandatory provisions to control it so that the subordinate legislation does not transgress the right of the citizens of the nation.

Foremost consideration is, therefore, given to the subordinate legislation by Article 13 of the Constitution of India. Article 13(1) lays down that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part (Part III) shall, to the extent of the such inconsistency, be void. Article 13(2) states that the State shall not make any law which takes away or abridge the rights conferred by this Part (Part III) and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Parliamentary business has increased so much that in every session it feels short of time, and the legislative output is

always behind the schedule. Under modern conditions the legislature cannot foresee or anticipate all the circumstances to which a legislative measure should be extended and applied. Further it is difficult the parliament to provide for all consequences of contingencies. Some amount of delegation of its own authority to a subordinate body is thus permissible on the part of the legislature. Judicial recognition and acceptance of this practice of delegation is evident from the following words of Wanchoo, J. Now it is well settled that it is competent for the legislature to delegate to other authorities the power to frame rules to carry out the purposes of the law made by it[72].

On justifying the practice of delegated legislation, the committee on Minister's Powers observed that the delegated legislation permits a certain amount of flexibility and elasticity 'the field of social legislation and facilitates adoption and adjustment of law to the new circumstances at the exigency of the hour, which may be difficult through the cumbersome parliamentary process[73].

Delegation of legislative power raises a natural question as to what, extent the legislature can delegate its power to a subordinate authority it is there any limitation or restriction in the Constitution upon the delegation of legislative power. The term "constitutional limitation of delegated legislation" means the permissible limits of the Constitution of any Country within which the legislature can validity delegate rule-making power to other administrative agencies.

A comparative study about the experience of constitutional limitation on delegated legislation in India, U.K and U.S.A are dealt with.

(i) In U.K

In England, parliament being supreme or omnipotent, there is no limit to parliament's power to delegate legislative power to subordinate authority[74]. The reason for growth of delegated legislation in other countries were equally responsible for the development of delegated legislation in England. Parliament had no time to deal with various matters in detail. Complexity, technicality, emergency and expediency compelled Parliament to delegate its "legislative office" to government. It was but realized that legislation and administration were not two fundamentally different forms of power.

Tests formulated to distinguish legislative and administrative functions proved insufficient and inappropriate.[75]It is a well established constitutional principle that no court in England can go into the question whether parliament acted in excess by granting rule-making powers to the Executive. No doubt, parliament can delegate legislative power as much as it likes to the Governmental Departments. In England there exists the principle of parliamentary sovereignty which means that the parliament has unbridled or unquestionable power to delegate its legislative power as it needs, to the administrative authority.[76] In other words, since the legal sovereignty of parliament is unquestionable in the courts, it is competent for parliament to delegate its legislative power to the administration, without the risk of the judiciary invalidating such law on the ground that by excessive delegation, parliament has abdicated its legislative function[77]. Therefore in the United Kingdom parliament can leave to another person or body as it chooses and to any extent as it needs, its law-making power.

It is not necessary for the parliament to lay down in the enabling statute any standard, policy or guidelines by which the delegating power is to be exercised**[78]**. In England, the practice of the cabinet system is potent enough to tone down the parliamentary discussion or criticism upon delegated legislation. The matter was, referred to the Committee on Ministers' Powers (Donoughmore Committee) in 1929. The Committee submitted its report in 1932. It observed:

The committee on Ministers Powers, **[79]** in its third recommendation has suggested that the precise limit of law-making power which the parliament intends to confer on a minister should always be expressly defined in clear language by the statute which confers it; when discretion is conferred, its limit should be defined with equal clearness**[80]**. Laying down of limits in the enabling statute within which executive action must work is of greater importance to England than to any other country because in the basis of this parliamentary limits alone the power of judicial review can be exercised.

It is a well settled legal proposition by a catena of decisions that Parliament does not intend delegated powers to be exercised for certain purposes unless by express words or by necessary implication it clearly authorizes them. In Britain executive has no inherent legislative power. Statutory authority is indispensable. The delegated legislation does not have any immunity from challenge in courts which Acts of Parliament enjoy as there is a fundamental difference between a Sovereign and a subordinate law making power**[81].**The principle that delegates non protest delegate has also been recognized by the courts.

(ii) In U.S.A

In United States, the position is substantially different because of the prevalence of the doctrine of separation of powers and the doctrine of delegates on potest delegare. Both these theories stands as an initial constitutional impediment in the way of delegation of legislative power to the executive. Therefore the accepted proposition is that the legislature ought not delegate unlimited or unanalyzed power to an administrative authority.

In America, the doctrine of separation of powers has been raised to a constitutional status. The U.S Supreme Court has observed that the doctrine of separation of powers had been considered to be an essential principles underlying the Constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching up on the powers of another**[82].** In the case of *Field* v. *Clark*,**[83]** the American Supreme Court observed:

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The American Constitution provides that "All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a. Senate and House of Representatives**[84].** And the

Congress is empowered "'to make all laws which shall be necessary and proper for carrying into Execution" its general powers**[85]**.

Further executive powers vests in the president**[86].**If can therefore be said that the executive cannot perform the legislative function which must be performed exclusively by Congress. And the Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested**[87].** It is accepted at all hands that a rigid application of the doctrine nor feasible in view of the new demand on the executive.

Further, the Constitution of the United States is posited on the theory of delegation of enumerated powers by the people of the United States to the Congress, the President and the Supreme Court. Invoking the doctrine of delegates non potest delegate, the court argues that since the Congress is a delegate of the people, it cannot further delegate its power to any other authority**[88].** Strict adherence to these theories proved to be impracticable as the state under took more and more functions. The court could not shut the eyes to this reality and therefore evolved a theory which admitted delegation in fact while denying it in name. **[89]** Thus in course of time, the courts have released the strict enforcement of the doctrine of separation of power and permitted broad delegation of legislative power provided to Congress must lay down adequate standards and policies for the guidance of the authority concerned. If the statute contains no standards or gliding policy to limit the delegation of power, it amounts to giving a blank cheque to the administrative authority to make any rules, and thus, the authority becomes the primary legislator rather than the Congress**[90]**. The working of the rule can be illustrated with reference to some cases.

The first case in which a provision was held unconstitutional on the ground of excessive delegation by the Supreme Court of the United States was *Panama Refining Co.* v. *Rya***[91]**. Under the National Industrial Recover}' Act, 1933[83]. The President was authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the: products thereof produced or withdrawn from the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order there under by any board, commission, officer or any other duly authorized agency of a state.

The President authorized the Secretary of the interior to exercise all powers under Section 9. Regulation provided that every purchaser, shipper should submit the details of the purchase and sale of petroleum. Panama. Refining Company challenged Section 9 of the Industrial Recovery Act, 1933, as unconstitutional delegation of legislative powers. The Act laid down that the policy if the law is "to encourage national industrial recovery" and "to foster fair competition".

The U.S Supreme Court held the Act as unconstitutional on the ground that the adequacy of prescribed limits of delegation of legislative power is not satisfied by laying down a vague standards for administrative action. It was observed that an executive order must, in order to satisfy the constitutional requirement, show the existence of particular circumstances and conditions under which the making of such an order has been authorized by the Congress. It was found that the impugned section did not contain any standards. It gave to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he might see fit. Any disobedience to his order was made a crime punishable by fine and imprisonment.

In *Schechter Poultry Corporation* v. *United Stales***[92]** the corporation, which was engaged in live poultry operation, challenged the constitutionality of section 13 of the National; Industrial Recovery Act on the ground of unconstitutional delegation legislative power. Section 13 authorized the President of United Stated to approve "codes of Fair Competition" for the governance of particular trades and industries and made violation of any of the standard laid down in the; code "an unfair method of competition" and therefore punishable. Applying the panama doctrine the Supreme Court of the United States speaking through Chief Justice Hughes held that the code making authority conferred by Section 13 was an unconstitutional delegation of legislative power. Mr. Justice Cardozo in a concurring judgment pointed out: the delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. **[93]** It is unconfined and vagrant.

These two cases established the constitutional principles that where the legislature delegated legislative power, it must lay down the legislative policy and adequate standards in accordance with, which the delegated power might be exercised. Where such policy and standard were not discernible, the act of delegation would be unconstitutional. **[94]**The exigencies of modern Government have persuaded the courts to relent in their attitude towards delegation The Supreme Court of the United States has, since the Carter Case been consistently upholding the delegation of legislative power. The development of extent of delegated legislation in United States has been equally striking as in Britain. Inspite of the dilution of the theory of non delegation in the U.S.A, there is a real doctrinal difference between Britain and the U.S.A on the question of delegation. **[95]**

(iii) In India

The question of permissible limits of the Constitution within which law-making power may be delegated can be studied in different periods for the sake of better understanding:

(1) Privy Council- the highest court of appeal

The Judicial Committee of the Privy Council was the highest court of appeals from India till 1949. The question of the constitutionality of delegation of legislative power came before the Judicial Committee of the Privy Council in several cases. Most important among them is one is early in 1878 in *Queen* v. *Burah***[96].** In *Keshav Talapade* v. *King Emperor*, **[97]**the Federal Court of India held that rule 26 of the Defence of India Rules ultra vires on the ground that it went beyond the rule making power conferred by Clause (X) of Sub-Section (2) of Section 2 of the Defence of India Act, 1939, though it was

not denied that the rule could be covered by the language of Sub-Section (1) of Section 2.

The Privy Council, however, did not accept the interpretation by the Federal Court. According to the Privy Council the function of Sub-Section (2) is merely an illustrative one. The rule making power conferred by Sub-Section (1) and "the rules" which are referred to Sub-Section (2) are the rules which are authorized by, and made under those Sub-Sections. The provisions of Sub-Section (2) are not restrictive of Sub-Section (1), and is expressly stated by the words "without prejudice to the generality of the powers conferred by Sub-Section".

This decision must be examined in detail, as it has always been treated as a leading authority in Indian law on delegated legislation. Act XXII of 1869 purported to remove a district called Garo Hills from the jurisdiction of the civil and criminal courts and from the control of the officers of revenue constituted by the regulations of the Bengal Code and the Acts passed by the legislature then or thereto established in British India and from the laws prescribed for such courts and officers and to vest the administration of civil and criminal justice within the territory in the Lieutenant Governor of Bengal.

To summarize, the powers given by the impugned Act to the Lieutenant Governor were of three types: (i) Power to bring the Act in to operation by fixing a date for the commencement thereof; (ii) power to determine what laws were to be applicable to the particular district, namely the Gar Hills Here the choice was limited to the laws which were in operation in the other areas subject to his control; and (iii) power to extend the application of the Act to the Khasi Jaintia and Naga Hills and thus to exclude them, from the jurisdiction of the ordinary laws and tribunals.

The Calcutta High Court declared section 9 as unconstitutional delegation of legislative power by the Indian legislature on the ground that the Indian legislature was an agent of British parliament and hence a delegate could not further delegate the powers which the British parliament had reposed in it**[98].** On appeal, the Judicial Committee of the Privy Council reversed the Calcutta decision and upheld the constitutionality of Section 9 on the ground that it is merely a conditional legislation, rejecting the view that the Indian Legislature was a delegate of the Imperial Parliament. The Privy Council observed that the Indian legislature has power expressly limited by the Act of the Imperial parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent of the Imperial parliament, but has plenary power of legislation, as large, and of the same nature, as those of parliament itself**[99]**

The decision of the Privy Council was interpreted in two different ways. One interpretation was that since Indian legislature is not a delegate of Imperial parliament, there is no limit on the delegation of legislative functions. According to the other interpretation it was argued that since Privy Council has validated only conditional legislation, delegation of legislative power is not permissible.

The kind of delegation which the Privy Council upheld in the Burah Case is known as conditional legislation. This is not delegation strictly speaking. The doctrine of conditional legislation was again applied by the *Privy council in Emperor* v. *Benoari Lai Sharma***[100]** when it upheld the constitutionality of an ordinance**[101]** passed by the Governor-General for the establishment of special courts and delegated power to their provincial governments to declare this law applicable in their provinces at any time they deem fit. The local Government has bring the Act in to force when it thought that an emergency existed.

The Calcutta High Court held the ordinance invalid on the ground of excessive delegation and this decision was affirmed by the Federal Court**[102]**. The Privy Council on appeal reversed the decision of the Federal Court and upheld the Act. The legislation was complete and was to become operative on the fulfillment of certain conditions which were also laid down in the ordinance. What the executive was required to do merely to determine whether those conditions were fulfilled. If and when these conditions were fulfilled, it has to bring the provisions of the ordinance in to operation. It was therefore not delegated legislation but conditional legislation. The Privy Council further held that the discretion given to the executive to select offences or classes of offences to be tried by the special courts was controlled by the purpose of the ordinance stated in its preamble. This confirmed that a legislature could delegate legislative power if it retained control over the delegate and if it laid down a policy or standards in accordance with which the delegate wads to act.

(2) Federal Court became the highest court of appeal

Jatindra Nath v. *providence of Biha***[102]** was decided by the Federal Court of India as the final court of Appeal in India**[103]** in which delegation of legislative power was held ultra virus the parliament. The Bihar maintenance of Public Order Act of 1948 was to remain in force for one year - provided that the provincial Government might by notification on resolution passed by the council, direct that it should remain in force for a further period of one year with such modification, as might be specified in the notification. The Federal Court held that the power to extend the operation of the Act beyond the period mentioned in the Act was prima facie a legislative power and could not be delegated. Similarly the court held that the power to modify an Act of the legislature without specifying any limitation on such power of modification was undoubtly legislative in nature and hence could not be delegated. An analysis of the pre-independence judicial decisions of the Privy Council leads to the conclusion that delegation of legislative power was permitted if (i) the delegated power was ancillary to legislation and (ii) the legislature retained the power to control the delegate and did not efface itself.

The Jurisdiction of the Privy Council in respect of appeals from India was established by the Court in *Jatindra Nath* v. *Biha***[104]** however, narrowed down the scope of the delegation. In Jatindra Nath, the Federal Court took a more, restricted view. If an Act is to make modifications, it amounted

to self abdication or self effacement by the legislature. This narrow view was not in consonance with the liberal view adopted by the Privy Council in several decision discussed above. Moreover such a restricted view could not be realistic and could unnecessarily imperil the flexibility of legislative operation .

(3) Supreme Court became the highest court of appeal

The decision on Jatindra Nath casts a shadow on many laws which contained similar provisions. Those who appreciated the complex nature of modern Government could not deny that delegation such was held unconstitutional in Jatindra Nath was a normal and unavoidable. However, if the decision were to govern future legislation, all such delegations would have become invalid.

In order to remove doubts and confusion regarding the validity of number of laws which contained such delegation and also to clarify the position of law for the future guidance of the legislature in matters of delegation of legislative power, the President of India by reference under Article 143 of the Constitution invited the Supreme Court to give opinion on the constitutional validity of the delegation of legislative power by an Indian legislature. Three Central Acts, namely, section 7 of Delhi Law's Act, 1912; Sect ion 2 of the Ajmeer - Meswara (Extension of Laws) Act, 1974; and Section 2 of part C States (Laws) Act, 1950, were referred. In *In re Delhi Laws Act,* **[105]** the Supreme Court dealt with the following question:

(i) Could the legislature empower the executive to extend to any area within the jurisdiction of such legislature any law or laws that might, have been passed or would be passed by such legislature for other territories subject to its control?

(ii) Could an Indian legislature empower the executive to extend laws passed by other legislature for other territories to the territory subject to the control of such executive. This was answered affirmatively by a majority of five judges to two.

(iii) Whether a legislature can empower the executive to make restrictions and modifications in a law of another legislature while applying it?

The Supreme court was called upon to adjudge the validity of this above mentioned provision. Seven Judges participated in the decision and seven opinions were declined exhibiting a change of judicial views on the question of limits subject to which the legislature in India should be permitted to delegate legislative power. It was unanimously held that the executive could make incidental changes which did not affect the essential features of the law.

(iv) could a legislature empower the executive to repeal or amend any law which was in force in the territory subject to its control

The majority opinion was that such delegation was not permissible. A close perusal of the various judgments delivered in the Refines case shows that two distinct points of view were presented to the court. It was contended by the learned Attorney-General, Mr. M.C Stalwad, that plenary legislative power to delegate such power so long as the legislature did not abdicate its authority or offence itself. It was further contended that as long as the legislature retained the power to control the actions of the delegate, there was no abdication of authority by the legislature. According to this view, delegation of legislative power was valid. Mr. N.C Chatterji on the other hand, based his arguments on the theory of separation of powers and delegates non potest delegare to show that there existed an implied prohibition against delegation of essential legislative power by the legislature.

The Supreme Court took a via media between these two views and held: Doctrine of separation of power is not a part of the Indian Constitution. Indian parliament was never considered an agent of anybody, and therefore doctrine of delegates non potest delegare is not applicable. Parliament cannot abdicate or efface itself by creating a parallel legislative body. Power of delegation is ancillary to the power of legislation.

The limitation upon delegation of power is that the legislature cannot delegate its essential legislative power that has been expressly vested in it by the Constitution. It can delegate the power of filling up of details or of supplementing the legislation to the executive.**[106]** On the basis of this reasoning, the Supreme Court came to the conclusion that:

(i) Section 7 of the Delhi Laws Act, which gave power to the provincial Government to extend with such restrictions and modification as it thought fit, to the Province of Delhi or part thereof, any enactment which was in force in British India was valid;

(ii) Section 2 of Ajmeer-Merwars (Extention of Laws) Act, 1947, which empowered the Central Government to extend to the Province of Ajmeer-Merwars with such restrictions and modifications as it thought fit, any enactment which was in force in any other province was valid;

(iii) Section 2 of the part C States (laws) Act, 1950, which empowered the Central Government to extend to any part C State or any part of such state, with restrictions as it thought fit, any enactment which was in force in a part A state was valid;

5. EXCESSIVE DELEGATION IS UNCONSTITUTIONAL

It is now firmly established that excessive delegation of legislative power is unconstitutional.**[107]** The legislature must first discharge its essential legislative functions and then can delegate ancillary or subordinate legislative functions which are generally termed as power to fill up details. After laying down policy and guidelines, the legislature may confer discretion administrative agency to execute the legislative policy and work out details within the framework of the policy and guidelines.

As observed in *Avinder Singh* v. *State of Punjab,* the founding document of the nation (Constitution) has created three great instrumentalities and entrusted them with certain basic powers - legislative, executive and judicial. Abdication of these powers by any organ would amount to betrayal of the Constitution itself and it is intolerable in law.

Principles

The question whether there is excessive delegation or not, has to be examined in the light of three broad principles:

1. Essential legislative functions to enact laws and to determine legislative policy cannot be delegated. In the context of modern conditions and complexity of situations, it is not possible for the legislature to envisage in detail every possibility and make provisions for them. The legislature, therefore, has to delegate certain functions provided, it lays down legislative policy.
2. In the context of modern conditions and complexity of situations, it is not possible for the legislature to envisage in detail every possibility and make provisions for them.
3. If the power is conferred on the executive in a manner which is lawful and permissible, the delegation cannot be held to be excessive merely on the ground that the legislature could have made more detailed provisions. **[108]**

Whether a particular legislation suffers from excessive delegation is a questions to be decided with reference to certain factors which may include the following: Subject matter of the law, Provisions of the statute including its preamble, Scheme of the law, Factual and circumstantial background in which law is enacted.

When a statute is challenged on the ground of excessive delegation, there is a presumption in favour of its vires and if two interpretations are possible, one that makes it constitutional is to be adopted. Courts may also read down and interpret the law in a way as to avoid its being declared unconstitutional.**[109]** This is being done in view of the fact that today delegation of legislative power has become a 'compulsory necessity'.

In deciding whether the legislature in enacting a statute has exceeded the limits of its authority to enunciate policy and principle. Entrustment of legislative power without laying down policy is inconsistent with the basic concept on which our constitutional scheme is founded.

Our Constitution-makers have entrusted the power to legislate to the elected representatives of the people, so that the power is exercised not only in the name of the people, but by the people. The rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of the people. It is not claimed to be nor intended to be a panacea against the shortcomings of public administration. Governance of the State in manner determined by the people through their representatives being the essence of our form of government, the plea that a substitute scheme for governance through delegates may be more effective is destructive of our political structure. **[110]**

Essential legislative function

After the decision of this case the main controversy in every case involving delegation has been the question of determination of what is essential legislative function which cannot be delegated and which is non- essential which can be delegated. Unless this term is defined with specificity, the limits of delegation of legislative power cannot be precisely drawn. There is no agreed formula with references to which one can decide the permissible limits of delegation. Therefore the opinion of the Supreme Court in individuals cases is to be analysed in order to determine the extent of delegation permissible.

In *Raj Narayan Singh* v. *Chairman Patna Administration Committee***[111]**, the Supreme Court connected that "exactly what constituted an essential features of legislative function cannot be enunciated in general terms**[112]**. Section 3(1)(f) of the impugned Act powered the Patna local administration to select any provision of the Bengal Municipality Act, 1884 and apply it to Patna area with such restriction and modification as the Government may think fit. The Government picked up Section 104 and after modification applied it to the town of Patna. The Supreme Court declared the delegation ultra virus on the ground that the power to pick out a section for application to another area amount to delegating the power to change the policy of the Act which is an essential legislative power, and hence cannot be delegated.

The court however ventured to spell out the most prominent aspects of the essential legislative function in *Harishankar Bagla v. State of MP***[113]** as follows: It was settled by the majority judgment in Art. 143 of the Constitution of India and Delhi Laws Act, 1912. etc., that essential powers of legislation cannot be delegated. In other words, the legislature cannot delegate its function of laying down the legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of law and the legal principles which are to control any given cases and must provide a standard to guide officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy into a binding rule of conduct**[114]**.

In *Edward mills* v. *state of Ajmeer* **[115]** the impugned Act authorized the administrative agency for setting up minimum wages for certain industries specified in the schedule and further empowered the authority to vary the schedule by adding other industries to the list. The Supreme Court upheld the validity of the delegation on the ground that the legislative policy was to guide in the selection of industries, is clearly indicated in the Act, to avoid exploitation of labour due to unequal bargaining power for other reasons. This case also stands for the proposition that the rule of the exercise of essential legislative function by the legislature is applicable to all types of delegation including conditional legislation.

The first case in which the Supreme Court struck down an Act on the ground of excessive delegation of legislative power is *Hamdard Davakhana* v. *Union of India***[116]**. Parliament passed the Drug and Magic remedies (Objectionable Advertisement) Act, 1954 to check the mischief being done to innocent patients suffering from certain incurable diseases through advertisements claiming magic remedies for such diseases. Section 3 laid down a list of diseases for which the advertisement was prohibited and authorized the Central Government to include any other diseases in the list. The court struck down the Act on the ground of excessive delegation of legislative powers and held that nowhere had the legislature

laid down any policy for guidance to the Government in the matter of selection of diseases for being included in the list. The decision of the court is certainly not in line with its earlier approaches because the mention of certain diseases in the list could have supplied the standards ad criteria for the selection of other diseases. Furthermore, the title of the Act lays down sufficiently the policy of the Act.

The question sought to be settled in *In re Delhi Laws Act* case was again opened in Gwalior Rayon**[117]**. Justice K.K Mathew in his dissenting opinion, propounded a new test to determine the constitutionality of delegated legislation. According to him, so long as a legislature can repeal the enabling Act delegating law making power, it does not abdicate its legislative function and therefore the delegation must be considered as valid, no matter howsoever broad and general the delegation may be. However the majority did not agree to this "abdication test" and reiterated the already well established test of "policy and guidelines". The majority opinion is that when a legislature confers power on an authority to make subordinate legislation, it must lay down policy, principles or standard for the guidance of the authority concerned. Nevertheless Justice Mathew ignoring the majority opinion applied his own test in 1975 in *N.P. Papiah* v. *Excise Commissioner***[118]**. Thus the courts decisions in Gwalior Rayons and Papiah cases took two different and conflicting views on the question of constitutionality of delegated legislation. Added to this, the Supreme Court's decision in *Registrar of Co-operative Societies* v. *K. Kunjambu***[119]**, though upholds the "policy and guideline test" yet creates an impression that this test is tentative and can be re-opened. The court observed that, we do not wish in this case to search for the precise principles decided *in In re Delhi Laws Act* Case, nor to consider whether N.K Papiah beat the final retreat from the earlier position. For the purpose of this case we are content to accept the 'policy and guidelines' theory**[120]**.

It is to be remembered that in *In re Delhi Laws Act case*, the Supreme Court held that the power delegated by Parliament to the Central Government under Section 2 of the part C States (Law) Act, 1950**[121]** to extend, by notification in the official gazette, to any part C States (Union Territory) or any part of such state, with such restrictions and modifications and it thought fit, any enactment which was in force in a part A State on the date of notification, did not amount to excessive delegation of legislative power. It was however emphasized that the modification contemplated under that section could be made only within the identity, structure or the: essential purpose served by it. Later Sarkaria, J. held in *Zachmi Narain v. Union of India***[122]** that the power to make modification could be exercised only once, contemporaneous with the extension of the law. That power exhausted itself and could not be exercised repeatedly or subsequent to extension. A similar question was decided again in *Brij Sunder Kapoor* v. *1st Additional District Judge***[123]**. In this case the validity of S.3 of the cantonments (Extension of Rent Control Laws) Act, 1957**[124]** was questioned.

Relying on the observations of Sarkasria J. in Zachmi Narain case, Ranganadhan J. held that the power conferred on the Central Government to apply any law of the state to a union territory with such restrictions and modifications as it thought fit did not amount to complete abdication of power by parliament as that Government could not change the basic and essential character or the material provision of the legislation sought to be extended to the cantonment areas. According to him, the majority in *In re Delhi Lows Act* case had uphold the validity of the Part C States (Laws) Act, 1950 in so far as it authorized the executive to modify either an existing or future law but not in any essential features.

In *Ramesh Birch* v. *Union of India***[125]**. In this case, the court considered the validity of notification issued by the Central Government under section 87 of the Punjab Reorganization Act, 1966, which is identical with the provision of the East Punjab Urban Rent Restriction (Amendment) Act, 1985 to the union territory of Chandigarh. The court upheld not only the delegation of power but also its exercise even subsequent to extension of the legislation. It emphasized that the power to make modification and restrictions was a limited power which permitted only changes that the context required and not changes in substance. With regard to S. 87, the court held that the provision only conferred power on the executive to determine, having regard to the local conditions prevalent in the Union Territory of Chandigarh, which one of the several laws approved by one or the other of the legislatures in the country, would not most suited to Chandigarh. Such delegation of power was valid in view of what the court had upheld in *In re Delhi Laws Act* case.

6. CONCUSION

From various judgments**[126]** of the Supreme Court, the following general principles regarding delegated legislation emerge:

1. The Constitution confers a power and imposes a duty on the legislature to make laws and the said function cannot be delegated by the legislature to the executive or even to another legislature. It can neither create a parallel legislature nor destroy its legislative power.
2. The legislature must retain in its own hands the essential legislative function. The essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct.
3. Once the essential legislative function is performed by the legislature and the policy has been laid down, it is open to the legislature to delegate to the executive authority ancillary and subordinate powers necessary for carrying out the policy and purposes of the Act as may be necessary to make the legislation effective, useful and complete.
4. The legislative policy may be reflected in as few or as many words as the legislature thinks fit. It may be express or implied. It may be gathered from the history, Preamble, title, scheme, statement of objects and reasons, etc.
5. The authority to which delegation is made is also one of the factors to be considered in determining the validity of

such delegation. However, delegation cannot be upheld merely on the basis of status, character of dignity of the delegate.

6. Safeguards against the abuse of delegated power including power to repeal do not make delegation valid if otherwise it is excessive, impermissible or unwarranted.

7. The delegated legislation must be consistent with the parent Act and cannot travel beyond the legislative policy and standard laid down by the legislature.

8. Whether the legislature has performed the essential legislative function and laid down the policy and the delegation is permissible or not depends upon the facts and circumstances of each case.

9. It is for the court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature has exceeded limits of permissible delegation.

REFERENCES

[1]. When India became independent, the philosophy of welfare state was made the creed of Constitution. The Preamble of the Constitution laid down that the Constitution aims at establishing a Sovereign ,Socialist, Secular, democratic, republic. so as to recure to all its citizens, social, economic and political justice, liberty of thought, expression , belief, faith and worship, equality of status and opportunity and to promote among them fraternity, assuring dignity of the individual and the unity of the nation. I.P. Massey Administrative Law, 7th Edn, 2007, p. 15

[2]. For eg. Orders, Notified Orders, Notifications under the Essential Commodities Act,1958.

[3]. S.P .Sathe, Administrative Law, 1998. 6th edn, p.23.

[4]. C.K. Takwani Lectures On Administrative Law, 3rd Edn, 1998,p59.

[5]. Delegated Legislation Monica, Chowla, 1997, 5th Edn p.67.

[6]. Theory of separation power as propounded by Montesquieu is based on the assumption that the three functions of the government i.e., legislative, executive and judicial are distinguishable from one another but in fact it is not so. Their cooperation is indispensable, there warfare fatal. See Friedman, Law in a changing society, 1st Edn. 9.382

[7]. C.K. Takwani, Lecture on Administrative Law, 3rd edn. 1998, p.61.

[8]. Salmond defines delegated as that which proceeds from any authority other than sovereign power and is therefore depended for its continued existence and validity on some superior or supreme authority. See Salmond, Jurisprudence, 12th Edn. P.116.

[9]. Schwartz, Administrative Law a case book, 1st Edn 1977 p. 119

[10]. C.K. Takwani, Lecture on Administrative Law, 3rd edn. 2000, p.60.

[11]. Ibid 59.

[12]. John Salmond, Jurisprudence, 9th edn. Landon, 1938, p. 210.

[13]. Report of the Committee on Ministers Powers (1932), 15.

[14]. Garner, Administrative Law, 1st Edn,1977,p.49

[15]. MP Jain & SN Jain, ' Principles of Administrative Law',6th Edn,2010,p43

[16]. S.P Sathe, Administrative Law,7Ih Edn,2012,p.34

[17]. Salmond, Jurisprudence, 2010 (9th Edn.) p.l 19

[18]. See Section 11 of the Mussalman Warfs Act, 1923; Section 62 of the Administrators General Act.

[19]. The Mines and Minerals Act. 1957. Section 13 and 13A give rule-making power to the Central id Section 15 wives a similar to the State Government.

[20]. See Section (a) of the Industrial Disputes Act, 1947: Section 27 of the Minimum Wages Act, 1948. Latest Example of this is the Administrative Tribunals Act, 1985, Section 36

[21]. D.D. Basil, Administrative Law, 1986, 3ld Edn.P.33

[22]. B.R. Atre, Legislation Drafting, Principles and Techniques. 2001 Edn. p. 224

[23]. Under Article 123 the President had the power to promulgate the ordinance and unrestricted power to frame regulations for peace progress and good government of the territory under Article 240.

[24]. Article 213 of the Constitution of India deals with the power of the Governor to promulgate Ordinances during recess of the legislature.

[25]. See S.P. Sathe, "Constitutional Law", XXIII A.S.I.L (1987), 76, 104.

[26]. See S.P Sathe. "Ordinance Making Power of the President of India", 1959, S.C.J (Journal Section) 231.

[27]. V.N. Shukla, Constitution of India, 1st Edn.1984.p.134

[28]. Article 31 2 of the Constitution of India deals with the all India services.

[29]. See H.W.R Wade, *Administrative Law*, pp. 20, 213, 741 (1982, 5th Edn).

[30]. See H.W.R Wade, *Administrative Law*, p. 213.

[31]. Article 78, 148 and 309 of the Constitution of India.

[32]. Article 13 of the Constitution of India.

(3) In this Article, unless the context otherwise requires-

(a) "Law" includes any ordinance, order bye-law, rule, regulation, notification, custom or usage having, in the territory of India, the force of law.

(b) "Law in force" includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (This Article stood as Art. S in the draft Constitution).

[33]. The makers of our Constitution were also fully conscious that such legislation existed even earlier. Art. 366(10) also says: "existing law" means any law, ordinance, order, bye-law, rule regulation, passed or made before the commencement of this Constitution by any legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule, regulation: See C.A.D, Vol VII, 611-12, 640-42, 643-46 (1948, Nov. 25, 26 and 29).

[34]. M.P. Jain, Principles of Administrative law, 26 (1986, 4th Edn)

[35]. Article 13(3)(a) provides that 'law' includes any ordinance, Order, bye-law, rules, regulation, notification, customs or usage having in the territory of India the force of law. Every rule, regulation, order, bye-law or scheme framed under an Act of Parliament must be intra vires the provisions of the Act under which it has been framed and also consistent with the provisions of the country. See also B.R. Atre, Legislation Drafting, Principles and Techniques. 2001 Edn. p. 224

[36]. J.P. Massey, Administrative Law, 72 (1990, 3rd Edn).

[37]. supra n31

[38]. as opposed to laws made in the form in Regulation and falling within the definition of Regulation as contained in the General Clauses Act, 1897

[39]. See A.K. Maity v. Board of Secondary Education, 71 CWN 396 (1976) where it is stated that a rule is superior to a regulation.

[40]. An example of promulgating delegated legislation through "orders" is provided by the imports and Exports(Control) Act,1947.

[41]. For example, a statutory corporation.

[42]. Section 59(1) of the State Bank of India Act, 1958 (23 of 1958), for example, says that the Central Board may make regulations, "not inconsistent with this Act" and the rules made there under.

[43]. General Clauses Acts of different states also contain similar provisions. These Acts also draw no line of distinction between them apart from making the scope of rule wider than that of 'regulation'.

[44]. I.P Massey, Administrative Law, 7th Edn, p88

[45]. Hotel Balaji v. State of A.P,AIR 1993 SC 1048, (1061-62)

[46]. Halsbury's Laws of England, 401 (3rd Edn)

[47]. I.P. Massey, Administrative Law, 7th Edn. P, 88

[48]. Ibid

[49]. Gazette of India Extra Ordinary, pt. 11. Sec.3(i), March 29, 1962, p. 157. For example: The Sugar (Regulation or Production) Second Amendment Rules, 1972, G.S.R 422, were published under the heading "Order"

[50]. S.O. 1716. Gazette of India Extra Ordinary, pt 11, Sec. 3(ii), July 9. 1960.

[51]. J.A. Shodhan v. F.N. Rana, AIR 1964 Sc 648 at 667.

[52]. I.P.Massey,p88

[53]. Ibid

[54]. A bye-law can be challenged if it is unreasonable; while a rule cannot be so challenged. Mulchand Gulachand v. Mukumd Shivram, AIR 1952 Bom. 296. The early history of the expression "bye-law" is that when the Danes acquired possession of a shire in England, the township was often called a "by" and as they enacted law of their own, they were called "by-laws" "town-laws" (Iyer's Law Lexicon; see also the definition in Stroud and Wharton). Also see Kurse v. Johnson, (1892) 2 QB 91 at 96.

[55]. Caries on Statute Law, 322-323, (6th edn).

[56]. 7th Rep. (VI L.S), 3.

[57]. For instance, Sir Henery Jenkyns, a Parliamentary Conusel, Has recorded the following official minute.

"Statuotry rules in themselves of great public advantages because the subject of them can thus be regulated after a Bill passes into an Act with greater care and minuteness, and with better adaptation to local or other special circumstances than they possibly can be in the passage of Bill through Parliament. Besides, they mitigate the inelasticity which often otherwise makes and Act non-workable and are susceptible of modifications from time to time by the Government Department at any time of the year as circumstances arise".

[58]. Report of the Committee on Minister's Powers, at 23.

[59]. Contigent or conditional legislation is discretionary. The contigent legislation formula is a fiction developed by the U.S. Court to get away from the operation of the doctrine of separation of powers. Supra.n.

[60]. M.P. Jain & S.N. Jain Principle of Administrative Law, 6th edn. 2011 p. 84.

[61]. Section 3(1) of the Railway Companies (Emergency Provisions) Act of 1951 is an example of contingent legislation. Under this section the Central Government may apply the Act if it is of the opinion that:

(a) A situation has prejudicially affected the convenience of the persons using a railway administered by the company to which the Act is intended to apply.

(b) It has caused serious dislocation in any trade or industry using the railway or.

(c) lt has caused serious employment amongst a section of the community.

Further it may apply the Act when in its opinion such as course is 'necessary' in the national interest. Under S.12 it may terminate the operation of the Act when its purpose is fulfilled

[62]. AIR 1951 SC 332

[63]. AIR 1957 SC 510

[64]. *Supra* Jain & Jain

[65]. AIR 1982 SC 710.

[66]. I.P. Massey, 'Administrative Law', 7th edn, 2008, P.91

[67]. Inre Art. 143 (Delhi Law Act), AIR 1951 SC 332, Rajnarain Singg v. Chairman P.A.

[68]. Harishankar Bagla v. State of M.P., AIR 1954 SC 465 at 468; A.N. Parasuraman v. State of Tamil Nadu, AIR 1990 SC 40 at 42; Agricultural Market Committee v. Shalimar Chemical Works Ltd., AIR 1997 SC 2502 at 2507; Kunj Bibarilal Butail v. State of H.P., AIR 2000 SC 1069 at 1071; Kiran Gupta v. State of U.P., AIR 200 SC 3299 at 3305.

[69]. Ramesh Babu v. Union of India, AIR 1990 SC 560 at 569.

[70]. D.S. Garewal v. State of Punjab, AIR 1959 SC 512 at 518; A.V. Naonane v. Union of India, AIR 1982 SC 1126 at 1134; State of M.P. v. Mahalaxmi Fabrics Mills Ltd, 1995 (1) SCALE 758 at 770.

[71]. V.M. Sanjanwall's case, supra note 1; see also Bhatnagar v. Union of India, AIR 1957 SC 478; Hari Chand v. Mizo District Counsil, AIR 1971 SC 474 at 476; Chandrakant v. Jasjit Singh, AIR 1962 SC 204.

[72]. *D.S. Garewiil* v. *State of Punjab,* AIR 1959 SC 512,516.

[73]. Report of the Committee on Ministers Powers (1932), 51-53

[74]. Daymond v. South West Water Authority, Plymouth City (1976) AC 609.

[75]. Wade & Forsyth, Administrative Law, (2009) 731-769. See for distinction between legislation and administrative functions, Chap, 3, 62.

[76]. A Select Committee on Statutory Rules and Orders appointed by the British Parliament, drew attention to the anomalies in the machinery of Parliamentary control and of rules publication. They referred to

(1) the lack of uniformity in the periods for which rules, regulations and orders have to be laid before Parliament and similar lack of uniformity in reckoning the various periods;

(2) the vagueness of the requirement that regulation should be laid before Parliament as soon as may be after they are made;

(3) the absence of any principle for determining when the affirmative resolution produce and when the negative resolution procedure should be adopted.

[77]. Halsbury's Laws of England, 4th edn, Vol. 1, p. 18.

[78]. M.P. Jain, Principle of Administrative Law, 33 (1986), 4th edn.

[79]. The Committee on Ministers Power known as the Donnoughmore Committee had been constituted to look at two specific but which reflected the concern at the important areas both of extent of Ministerial Power. There were delegated begin and the making of judicial or quasi- judicial decisions by a minister of those under his control. Administrative Law, P.P. Gaog, 4th Edn, 1999, p 66.

[80]. Report of Committee of Ministers Powers (1932) 65.

[81]. M.P. Jain & S.N Jain, Principle of Administrative Law, 6th edn, 2011, p. 50.

[82]. Field v. Clarke, 143 U.S 949, 692 (1892). Article 1. Section 1.

[83]. 36 L ED 294: 143 US 649 (1891).

[84]. Article 1 . Section 1.

[85]. Article 1. Section 8, para 18.

[86]. Article 11, Section 1.

[87]. Thus, pragmatic considerations have prevailed over theoretical objections and, incourse of time the courts have relaxed the regours of the doctrine of separation of powers and permitted broad delegation of power subject to the rider that the congress itself should lay down standars or policies for the guidance of the delegate. Supra. n.

[88]. *Jaffe,* 'An Essay on Delegation of Legislative Power', *47 Col. L.R (1947), 359.*

[89]. In the words of Cooley:

No legislation body can delegate to another department of the Government or to any other authority the power, either generally or specially, to enact laws. The reason is found in the very existence of its own powers. The high prerogative has been entrusted to its own wisdom, judgment and patriotism and not to those of other persons, and it will act ultra vires if it undertake to delegate the trust instead of executing it.

[90]. Supra.n., p 32.34,

[91]. 203 U.S 388 (1935)

[92]. 295 U.S 405 (1935).

[93]. Id at 551.

[94]. Besides Panama and Schechter the other case is Carter v. Carter Coal Co. 298 U.S 238 (1936).

[95]. Supra n. p.54

[96]. (1878) 3 AC 889.

[97]. AIR 1943 FC 72. Also see Emperor v. Sibnath Banerji, AIR 1945 PC 156, which overruled this decision Santhosh Kumar v. State, AIR 1951 SC 201..

[98]. Queen v. Burrsah and Book Singh, ILR 4 cat. 172 (1 879).

[99]. Supra n, 24 at 903-4.

[100]. AIR 1945 PC 48.

[101]. Ordinance was made by Section 72 of Schedule IX of the Government of India Act, 1935.

[102]. Emperor v. Benoari Lal Sharma, AIR 1984, PC 36.

[103]. AIR 1949 SC 175.

[104]. Abolition of the Privy Council Jurisdiction Act, 1949 (Act IV of 1949)

[105]. Supra, n. 30.

[106]. AIR 1951 SC 332. There were a few Part C states, under the direct administration of the: central Government without having a legislature of their own, Delhi being one of these. Parliament had to legislate for these states. As it was very difficult for Parliament to find the necessary time to do so in view of its other manifold engagements , Parliament passed a law, the Part C states (Laws) Act,1950 ! he Act authorized the Central Government to extend to any Part C state, with such restrictions and modifications as it thought lit,

any enactment in force in a Part C state while doing so, the Government could repeal or amend any corresponding law' which might be operative at the time in the Part C state concerned.

[107]. On the other hand, Bose J (Rajendrain Singh v. Patna Admn. Committee, AIR 1954 SC 569: (1955 r SCR 290) and Basu (Commentary on the Constitution of India, Vol.4, 141)are of the opinion that in spite of separate opinions, certain principles have been laid down by the Supreme Court in Delhi Laws Act, 1912, re (AIR 1951 SC 332: 1951 SCR 747) Jain and Jain are right when they ' state that on two points there was similarity in the outlook evidenced in the opinions. First, keeping the exigencies of the modern government in view, Parliament and the State Legislatures in India need to delegate legislative power if they are to be able to face the multitudinous problems _ facing the country, for it is neither practicable nor feasible to expect that I each of the legislative bodies could turn out complete and comprehensive legislation on all subjects sought to be legislated upon. Second, since the legislatures derive their powers from the written Constitution which creates them, they could not be allowed the same freedom as the British Parliament in the matter of delegation; some limits should be set on their capacity to delegate.

[108]. Primary legislative functions must be performed by the legislature itself and they cannot be delegated to the executive.

[109]. Jyoti Pershad v. UT of Delhi, AIR T961 SC 1605: (1962) 2 SCR 125; Sitaram v. State of U.P., (1972) 4 SCC 485: AIR 1972 SC 1168; Avinder Singh v. State of Punjab, (l979) 1 SCC 137: AIR 1979 SC 21; Registrar of Coop. Societies v. Kunjabmu, (1980)1 SCC 340: AIR 1980 SC 350.

[110]. St. Johns Teachers Institute .v. Regional Director, NNCTE, (2003)3 SCC 321.

[111]. MCD v. Birla Cotton, Spg and Wvg. Mills, AIR 1968 SC 1232: (1968) 3 SCR 251 (per Shah); Ajoy Kumar v. Union of India (1984, 3 SCC 127: AIR 1984 SC 1130; Kishan Prakash Sharma v. Union of India (2001) 5 SCC 212: AIR 2001 SC 1493.

[112]. AIR 1954 SC 569.

[113]. Id at 574.

[114]. AIR 1954 SC 465.

[115]. Id at 468.

[116]. AIR 1954 SC 569.

[117]. AIR 1960 SC 554.

[118]. Gwalior Raayons v. Assistant Commissioner of Sales Tax, AIR 1974. SC 1660.

[119]. AIR 1975 SC 1007, See also M.P. Jain, Changing Face and Administrative law in India and Abroad, 2d (J982)

[120]. AIR 1980 SC 550.

[121]. Id at 352.

[122]. Now the Union Territories (Laws) Act, 1950.

[123]. AIR 1976 SC 714.

[124]. AIR 1989 SC 572.

[125]. Section 3: The Central Government may, by notification in the official gazette, extend to any cantonment with such restriction and modification as it thinks fit, any enactment relating to the control of rent and regulation of house accommodation which is in force on the date of notification in the state in which the cantonment is situated.

[126]. AIR 1990 SC 560; Delhi Laws Act, 1912, re, AIR 1951 SC 332: 1951 SCR 747., MCD v. Birla Cotton,Spg and Wvg Mills, AIR 1968 SC 1232, , Avinder Singh v. State Of Punjab, (1979) 1 SCC 137: AIR 1979 SC 321; Briji Sundar Kappor v. ADJ, Meerut, (1989) 1 SCC 561: AIR 1989 SC 572; Ramesh Birch v. Union of India, 1989 Supp (1) SCC 430: AIR 1990 SC 560; Haniraj L. Chulani v. Bar Council of Maharashtra and Goa, (1996)3 SCC 342; AIR 1996 SC 1708; Kiran Gupta v. State of U.P., (2000) 7 SCC 719.

