

CHAPTER 4

DELEGATED LEGISLATION GENERAL PRINCIPLES

General : According to the traditional theory, the function of the executive is to administer the law enacted by the legislature, and in the ideal state, the legislative power must be exercised exclusively by the legislators who are directly responsible to the electorate. But, as observed in the third Chapter (*supra*), as a matter of fact, apart from 'pure' administrative functions, the executive performs many legislative and judicial functions also. Even in the United States of America where the doctrine of delegated legislation has not been accepted in principle, in practice the legislature has entrusted legislative powers to the executive. Due to a number of reasons, particularly after two World Wars, there is rapid growth of administrative legislation. Garner rightly states that "it is perhaps more realistic to say that the Government secures from Parliament such subordinate legislative powers as it wishes for itself."

Definition : "Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists."

In *Halsbury's Laws of England*, it is stated that "when an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the Legislature, it is called 'subordinate' legislation".

The simple meaning of the expression '*delegated legislation*' may be given as under:-

"When the function of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called delegated legislation."

According to Jain and 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.

The statute enacted by the legislature conferring the legislative power upon the executive is known as the 'parent Act' or 'primary law', and the rules, regulations, bye-laws, orders, etc., made by the executive in pursuance of the legislative powers conferred by the legislature are known as subordinate laws or subsidiary laws or the 'child legislation'.

Reasons for growth of delegated legislation : Many factors are responsible for the rapid growth of delegated legislation in every modern democratic State. The traditional theory of '*laissez faire*' has been given up by every State and old 'police state' has now become a 'welfare State'. Because of this radical change in the philosophy as to the rôle to be played by the State, its functions have increased. Consequently, delegated legislation has become essential and inevitable. As American lawyer and statesman Root remarks, "the old doctrine prohibiting the delegation of

legislative powers has virtually retired from the field and given up the fight". According to the Committee on Ministers' Powers, the following factors are responsible for the rapid growth of delegated legislation.

(a) Pressure upon Parliamentary time : As a result of the expanding horizons of state activity, the bulk of legislation is so great that it is not possible for the legislature to devote sufficient time to discuss all the matters in detail. Therefore, legislature formulates the general policy -- the skeleton - and empowers the executive to fill in the details -- 'thus giving flesh and blood to the skeleton so that it may live--by issuing necessary rules, regulations, bye-laws, etc.

(b) Technicality : Sometimes, the subject-matter on which legislation is required is so technical in nature that the legislator, being himself a common man, cannot be expected to appreciate and legislate on the same, and the assistance of experts may be required. Members of Parliament may be the best politicians but they are not experts to deal with highly technical matters which are required to be handled by experts. Here the legislative power may be conferred on experts to deal with the technical problems, e.g., gas, atomic energy, drugs, electricity, etc.

(c) Flexibility : At the time of passing any legislative enactment, it is impossible to foresee all the contingencies, and some provision is required to be made for these unforeseen situations demanding exigent action. A legislative amendment is a slow and cumbersome process, but by the device of delegated legislation, the executive can meet the situation expeditiously, e.g., bank-rate, police regulations, export and import, foreign exchange, etc. Therefore, in a number of statutes a 'removal of difficulty' clause has been added empowering the administration to overcome such difficulties by exercising delegated power.

(d) Experiment : The practice of delegated legislation enables the executive to experiment. This method permits rapid utilisation of experience and implementation of necessary changes in application of the provisions in the light of such experience, e.g., in road traffic matters, an experiment may be conducted and in the light of its application necessary changes could be made. The advantage of such a course is that it enables the delegate authority to consult interests likely to be affected by a particular law, make actual experiments when necessary and utilise the results of his investigation and experiments in the best possible way. If the rules and regulations are found to be satisfactory, they can be implemented successfully. On the other hand if they are found to be defective, the defects can be cured immediately.

(e) Emergency : In times of emergency, quick action is required to be taken. The legislative process is not equipped to provide for urgent solution to meet the situation. Delegated legislation is the only convenient--indeed the only possible--remedy. Therefore, in times of war and other national emergencies, the executive is vested with special and extremely wide powers to deal with the situation. There was substantial growth of delegated legislation during the two World Wars. Similarly, in cases of epidemics, floods, inflation, economic depression, etc. Immediate remedial actions are necessary which may not be possible by lengthy legislative process and delegated legislation is the only convenient remedy.

(f) Complexity of modern administration : The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. In a country like Pakistan, where control and regulation over private trade, business or property may be required to be imposed, it is necessary that the administration should be given ample power to implement such policy so that immediate action can be taken. By resorting to traditional legislative process, the entire object may be frustrated by vested interests and the goal may not be achieved at all.

There has, therefore, been rapid growth of delegated legislation in all countries and it has become indispensable in the modern administrative era.

Delegated Legislation in U.S.A.

(a) In theory : Under the Constitution of the United States of America, delegated legislation is not accepted in theory because of two doctrines:

(i) Doctrine of separation of powers : This doctrine is accepted under the Constitution of the U.S.A and by article I, legislative power is expressly conferred on the Congress and the judiciary has power to interpret the Constitution and declare any statute unconstitutional if it does not conform to the provisions of the Constitution. In the leading case of *Field v. Clark*, the American Supreme Court observed:

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

(ii) Delegatus non potest delegare (A delegate cannot further delegate) : According to this doctrine, a delegate cannot further delegate his power. As the Congress gets power from the people and is a delegate of the people in that sense, it cannot further delegate its legislative power to the executive or to any other agency. In the words of Cooley, "No legislative 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 undertakes to delegate the trust instead of executing it." A power conferred upon an agent because of his fitness and the confidence reposed on him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence, it is a cardinal principle of representative Government, that the legislature cannot delegate the power to make laws to any other body or authority.

(b) In practice : Though, in theory, it was not possible for the Congress to delegate its legislative power to the executive, strict adherence thereto was not practicable. Governmental functions had increased and it was impossible for the Congress to enact all the statutes with all particulars. The Supreme Court could not shut its eyes to this reality and tried to create

'a balance between the two conflicting forces; doctrine of separation of powers barring delegation and the invariability of delegation due to the exigencies of the modern Government'. The most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks', or apply the standards to particular cases.

Davis maintains that 'greatest delegation' was sanctioned by the Supreme Court as the "judicial language about standard was artificial". According to him, the definition of 'excessive profits' was given as 'excessive means excessive'.

(c) Conclusion : From the above discussion, it clearly transpires that the traditional theory has been given up and the Supreme Court has also adopted a liberal approach. Thus, 'pragmatic considerations have prevailed over theoretical objections' Schwartz rightly says: 'If the standards such as those contained in the Re-organisation and Communications Acts are upheld as adequate, it becomes apparent that the requirement of standards has become more a matter of form than substance.' I must quote here a well-known syllogism of Prof. Cushman:

Major Premise: Legislative power cannot be constitutionally delegated by Congress.

Minor Premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion: Therefore, the powers thus delegated are not legislative powers.

Functions which can be delegated (Permissible Delegation)

Commencement : Several statutes contain an 'appointed day' clause, which empowers the Government to appoint a day for the Act to come into force. In such cases, the operation of the Act depends on the decision of the Government. **A I R 1971 SC 454**. Here the Act comes into force when the notification is published in the *Official Gazette*. Such a provision is valid for, as Sir Cecil Carr remarks, "the legislature provides the gun and prescribes the target, but leaves to the executive the task of pressing the trigger".

Supplying details : If the legislative policy is formulated by the legislature, the function of supplying details may be delegated to the executive for giving effect to the policy. What is delegated here is an ancillary function in aid of the exercise of the legislative function **A I R 1989 SC 572**.

Inclusion : Sometimes, the legislature after passing an Act makes it applicable, in the first instance to some areas and classes of persons, but empowers the Government to extend the provisions thereof to different territories, persons or commodities, etc., e.g., Transfer of Property Act, 1882 was made applicable to the whole of the country except certain areas, but the Government was authorised to apply the provisions of the Act to

those areas also. In the same manner, the Dourin Act, 1910 was made applicable to horses in the first instance but by Section 2(2), the Government was authorised to extend the provisions of the Act to asses also. By Section 183 of the Railways Act, 1989, the Government was authorised to apply the provisions to other transport services also. **A I R 1990 SC 560.**

Application of existing laws : Some statutes confer the power on the executive to adopt and apply statutes existing in other states without modifications (with incidental changes) to a new area. There is no unconstitutional delegation in such cases, as the legislative policy is laid down in the statute by the competent legislature. **A I R 1976 SC 714.**

Framing of rules : A delegation of power to frame rules, bye-laws, regulations, etc., is not unconstitutional, provided that the rules, bye-laws and regulations are required to be laid before the legislature before they come into force and provided further that the legislature has power to amend, modify or repeal them. **A I R 1990 SC 560.**

Functions which cannot be Delegated (Impermissible Delegation)

Essential legislative functions : Even though there is no specific bar in our Constitution against the delegation of legislative power by the legislature to the executive, it is now well-settled that *essential legislative functions* cannot be delegated by the legislature to the executive. In other words, *legislative policy* must be laid down by the legislature itself and by entrusting this power to the executive, the legislature cannot create a parallel legislature. **A I R 1990 SC 560.**

Repeal of law : Power to repeal a law is essentially a legislative function, and therefore, delegation of power to the executive to repeal a law is excessive delegation and is *ultra vires*. **A I R 1990 SC 560.**

Modification : Power to modify the Act in its important aspects is an essential legislative function and therefore, delegation of power to modify an Act without any limitation is not permissible. **A I R 1979 SC 1475.** However, if the changes are not essential in character, the delegation is permissible.

Exemption : The aforesaid principle applies in case of exemption also, and the legislature cannot delegate the power of exemption to the executive without laying down the norms and policy for the guidance of the latter. **A I R 1980 SC 350.**

Retrospective operation : The legislature has plenary power of law-making and in the country, Parliament can pass any law prospectively or retrospectively subject to the provisions of the Constitution. But this principle cannot be applied in the case of delegated legislation. Giving an Act retrospective effect is essentially a legislative function and it cannot be delegated. **A I R 1954 SC 158.**

Future Acts : Legislature can empower the executive to adopt and apply the laws existing in other States, but it cannot delegate the power by which the executive can adopt the laws which may be passed in future, as this is essentially a legislative function. **A I R 1989 SC 572.**

Ouster of jurisdiction of Courts : Legislature cannot empower the executive by which the jurisdiction of Courts may be ousted. This is pure legislative function.

Offences and Penalty : The making of a particular act into an offence and prescribing punishment for it is an essential legislative function and cannot be delegated by the legislature to the executive. However, if the legislature lays down the standards or principles to be followed by the executive in defining an offence and provides the limits of penalties, such delegation is permissible. **A I R 1984 SC 1194.**

Taxing Statutes : With regard to delegation in taxing legislation, the following principles may be treated as well settled:--

- (1) The power to impose a tax is essentially a legislative function. No tax can be levied or collected *save by authority of law, and* here law means law enacted by the competent legislature and not made by the executive authority. Therefore, the legislature cannot delegate the essential legislative function of imposition of tax to executive authority.
- (2) Subject to the above limitation, a power can be conferred on the Government to exempt a particular commodity from the levy of tax. Similarly, the power may also be delegated to bring certain commodities under the levy of tax. **A I R 1979 SC 1475.**
- (3) The power to fix the rate of tax is a legislative function, but if the legislative policy has been laid down and necessary guidelines have been provided, the said power can be delegated to the executive. **A I R 1983 SC 1283.**
- (4) It is open to the legislature or executive to select different rates of tax for different commodities. **A I R 1968 SC 1232.**
- (5) Commodities belonging to the same category should not, however, be subjected to different and discriminatory rates of tax in absence of any rational basis or justifiable grounds. **A I R 1989 SC 1949.**
- (6) Needs of the taxing body is not a test for determining whether guidance was furnished by the legislature in exercising power to tax. **A I R 1968 SC 1232.**
- (7) The circumstance that the affairs of the taxing body (panchayat, municipality, corporation, etc.) are administered by the elected representatives responsible to the people is wholly irrelevant and immaterial in determining whether the delegation is excessive or otherwise.
- (8) A taxing statute should be construed strictly. If the provision is clear and unambiguous, full effect should be given to it. Where, however, such a provision is ambiguous or two interpretations are possible, the interpretation which favours the assessee should be accepted. **A I R 1978 SC 945.**

(9) A distinction should, however, be made between charging provisions and machinery provisions. Machinery provisions should be construed liberally so as to make charging provisions effective. A I R 1980 SC 485.

(10) General principles of delegated legislation are applicable to taxing statutes also.

(g) Conclusion : It is submitted that the following observations of Streatfield, J, in *Patchett v. Leathem* are worth remembering:-

"Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is a least four times cursed. *First*, it has seen neither House of Parliament; *secondly*, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; *thirdly*, it is a jumble of provisions, legislative, administrative, or directive in character; and, *fourthly*, it is expressed not in the precise language of an Act of Parliament or an Order-in-Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction."

General Principles

From various judgments 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 or 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. It is, however, the duty of the Court to strike down without hesitation any arbitrary power conferred on the Executive by the Legislature.
- (10) These principles apply to all forms of delegated legislation; such as conditional legislation, subordinate legislation, supplementary legislation, sub-delegation, etc.

.....