



A comparative study of delegated legislation: With special reference to United States of America and United Kingdom

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Abstract

The conduit of law and its implementation receives a boost in the form of the delegated legislation. In this regard, one can overview and find out a well-developed and neatly defined set up of delegated legislation in many countries across the globe. On account of having difference of the administrative methods and politics such as parliamentary democracy or presidential etc. the forma of delegation may vary from each other, but the notion of the administrative convenience and to enhance the efficacy of it remains the same everywhere.

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Introduction

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This paper basically deals with the comparative analysis of the delegated legislation with regard to some of the nation's such as- United Kingdom and United States of America. Its pertinent to note here that, having different genesis of the legal system such common law or civil law pattern, the nature of the delegation also varies in these countries. The difference of the delegated legislation remains continue in almost all the intricacies and elements involved within it, such as modes of delegation, the scope and permissible limits of the delegation, the methods of control over delegation and actual means to control it etc.

United States of America

By virtue of Presidential democratic set up the United States of America bears a natural tilt towards executive authorities as a backbone of the polity. However, being the supreme law of the land the Constitution of the USA bears different equation. At the outset, it provides that, "All legislative Powers herein granted shall be vested in a Congress of the United States ^[1]." As far as USA is concern, its constitution clearly states that, "the executive power shall be vested in a President of the United States of America ^[2]." Moreover the President of the USA has been bound to ensure that he shall take care that laws be faithfully executed ^[3]. Thus, a pellucid approach can be well observed under the Constitution of the USA pertaining to the form of executive functioning. Thus, it will be a futile hardship to trace the roots of the delegated legislation under the Constitution of USA.

In 1690, John Locke wrote that "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others ^[4]." A century later, in 1789, the federal Constitution provided that "all legislative Powers herein granted shall be vested in a Congress of the United States ^[5]."

Moreover, a motion by James Madison at the Constitutional Convention to give the president the power "to execute such other powers as may from time to time be delegated by the national Legislature" was refuted on the ground of being superfluous in view of implementation of the national laws ^[6]. However, the inherent uncertainty to take a form stance remained incessant in some of the landmark precedents in between, especially when A little more than a hundred years later, in 1892, the Supreme Court declared in *Field v. Clark* ^[7], "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance." In 1989, nearly a century after it the Supreme Court of USA in *Mistretta v. United States* ^[8] had upheld the urge and gross necessity of the grant of legislative power to the executive agencies to implement the same in most appropriate and efficient way based on the guidelines for federal criminal offences.

This precedent paved way towards more pragmatic and liberal judicial interpretations to welcome the radical changes in the field of administrative law such as delegated legislations. Similarly, it also renounced the traditional stand to strictly stick on to the doctrine of separation of power and has brought flexibility in it.

The Sweeping Clause ^[9] and Delegation

Being placed under the first Article of the USA Constitution, The Clause has limited breadth. The sweeping clause permits Congress to enact implementing (or execute) laws only if those laws are "necessary and proper" for effectuating federal powers ^[10]." This Sweeping Clause runs as- *The Congress shall have Power... To make all Laws which shall be necessary and*

proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. Although the word "proper" in the sweeping clause was largely ignored for more than two centuries, a careful study of the term in its constitutional context shows that congressional statutes under the sweeping clause must conform to background norms of federalism, separation of powers, and individual rights. The understanding that congressional statutes under the sweeping clause must conform to certain background norms has broad ramifications.

Current Scenario

Two phenomena operate in the USA namely—Separation of Power and "Delegatus non potest delegare". Since Congress was itself a delegate, how can it delegate its power? The framers of the American Constitution were imbued with the political theories propagated by John Locke and Montesquieu. The firm answer pertaining to the question, whether USA bears delegation of legislative power under its polity is yet to be found. In USA there are two theories exist about the subsistence of the delegated legislation.

Nullification

Prof. K.C. Davis has been regarded as an ardent supporter of this theory. According to this theory, the US Constitution or any other legal framework does not provide any firm rule which provides for the non-delegation^[11]. Prof. Davis ascertained that, the non-delegation doctrine evolved by the Court is 'verbiage.' The law also allows the delegation even though the policy involves major question of law. He also warned that, any other view apart from this, would make the administration of the modern Governments would be impossible without the delegation of powers. The harsher stricter non-delegation language and the pro-delegation favoured precedents have made the status of delegated legislation quite trembling under USA. However, the stand taken by the Prof. Davis in the appreciation of the delegated legislation requires much more facets ahead. The degree of such delegation has to be regulated and quantified. Therefore, the idea of limited validity has been emerged out in USA. Thus, a transition phase has been started pertaining the concretization of the delegated legislation in in US legal system.

Rule-Making Procedure

The enactment of the Administrative Procedure Act (APA) in 1946 was the landmark event in the history of American administrative law. This statute struck a compromise between advocates and opponents of procedural formality, one which has proved resilient and enduring. The APA grew out of a study in 1941 by the Attorney-General's Committee on Administrative Procedure^[12] (in much the same way that the Tribunals and Inquiries Act 1958 was inspired by the report of the Franks Committee). Building upon existing practices, the Attorney-General's Committee recommended an informal but mandatory rulemaking system which ultimately became Section 4 of the APA^[13]. More specifically, the APA requires an agency to give general notice of the terms or substance of a proposed rule^[14]. Interested persons are invited to submit written data, views, or arguments, with or without an oral presentation. The rule must incorporate a 'concise general

statement' of its basis and purpose and be published not less than thirty days prior to its effective date^[15]. No procedures are required to adopt non-delegated subordinate legislation or procedural rules; moreover, the undemanding steps required to adopt legislative rules can be omitted if they would be impracticable, unnecessary, or contrary to the public interest. However, non-delegated subordinate legislation of general applicability must be published in the Federal Register after it is adopted.

Though, in theory, 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: (i) doctrine of separation of powers barring delegation and (ii) inevitability of delegation due to the exigencies of the modern Government.'

In *Panama Refining Co. v. Ryan*^[16], popularly known as the Hot Oil case, under Section 9(c) of the National Industrial Recovery Act (NIRA), 1933, the President was authorized by the Congress to prohibit transportation of oil in inter-State commerce in excess of the quota fixed by the State concerned. The policy of the Act was 'to encourage national industrial recovery' and 'to foster fair competition'. The Supreme Court by majority held that the delegation was invalid. According to the Court the Congress had not declared any legislative policy or standards.

In *Schechter Poultry Corp. v. U.S.*^[17] (Sick Chicken case), the Supreme Court unanimously struck down Section 3 of the National Industrial Recovery Act (NIRA), 1933 which authorized the President to approve codes of fair competition and violation thereof was made publishable. The Court held that the discretion of the President was 'virtually unfettered'. Justice Cardozo stated; "This was delegation running riot."

After the above two cases, however, the Supreme Court took a liberal view and in many cases, upheld delegation of legislative power.

Thus, in *National Broadcasting co. v. U.S.*^[18] vast powers were conferred upon the Federal Communication Committee (FCC) to license broadcasting station under the Communication Act 1934. The criterion was public interest convenience or necessity. Though it was vague and ambiguous the Supreme Court held it to be valid statement.

Similarly, in *Yokus vs. US*^[19] under the Emergency Price Control Act, 1942 the Price Administrator was given the power to fix such maximum price which "in his judgment will be generally fair and equitable and will effectuate the purposes of the Act". The Administrator was required so far as practicable, to give due consideration to the prices prevailing between October 1 and October 15, 1941, but was allowed to consider a later date if necessary data were not available, and yet the Supreme Court sustained the delegation, holding that the standards were adequate, Justice Roberts (minority view) rightly observed that by the majority judgment, *Schechter* was overruled.

Again in *Litcher vs. US*^[20] the Reorganization Act, 1942 empowered Administrative Officers to determine whether the prices were excessive and to recover profit which they determined to be excessive. The Supreme Court held that, the delegation valid observing that the statutory term "excessive profits" was a sufficient expression of legislative policy and standards to render it Constitutional. In U.S.A., the

control of the Congress over delegated legislation is highly limited because neither is the technique of "laying" extensively used nor is there any Congressional Committee to scrutinise it.

United Kingdom

Being the essence of parliamentary democracy U.K. bears its own kind of set up for the delegated legislation. Having been based on the principle of 'parliamentary sovereignty', U.K. legal system bears paramount authority to the parliament. Thus every minute intricacy in this regard can be seen to be linked with the Parliament. In the earliest years of British Parliament, broad power to legislate by proclamation remained with the crown. In the 1539 Royal Power to issue proclamation for good order and governance was recognised by Henry VIII's Statute of Proclamations and such proclamations were enforced as if made by Act of parliament. However the aforesaid statute was replaced in 1547. Thereafter the Acts of parliament delegated power to the crown to make laws^[21]. The legal omnipotence of the King in Parliament means that there is no constitutional impediment to the delegation of legislative and judicial powers to the Executive. In the sixteenth century- a period of rapid social and economic change-Parliament was already conferring sweeping legislative powers upon the Crown.

With the vast extension of the functions of government in the nineteenth century, Parliament Was compelled to delegate far-reaching powers to a variety of administrative authorities. This century has seen the legislative output of Parliament easily outstripped in bulk and complexity by subordinate legislation. The present article will deal with the delegation of legislative powers, and it may be useful at the outset to state what the principal forms of delegated legislation are today^[22].

It means In fact, parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years^[23]. In England, Parliament is sovereign. In principle, it is only Parliament which can enact laws. But as observed by C.K. Allen: "*Nothing is more striking in the legal and social history of the nineteenth century in England than the development of subordinate legislation*"^[24]."

In twentieth century, Parliament was obliged to delegate extensive law-making power in favour of Government. A hue and cry was raised against the growth of delegated legislation. The matter was, therefore, referred to the Committee on Ministers' Power (Donoughmore Committee) in 1929. It observed and rightly stated; "The system of delegated legislation is both legitimate by permissible and constitutionally desirable for certain purposes, within certain limits and under certain safeguards^[25]." The making of Policy occurs at many points in an administrative system. At the highest level it is made by cabinet and becomes legislation; at lower level it is made by ministers and departments, by statutory agencies and regulatory bodies^[26] It's also pertinent to note that, being a colony of the British Empire, India has also seen the aftermaths of the recommendations of the Donoughmore Committee. The laws enacted for India by the British parliament did imbibe the delegated legislation as per the lines drawn by this committee.

Delegation of Power to Executive

U.K. Emergency Power Act 1920 makes permanent provisions enabling the executive to legislate subject to parliamentary safeguards in the event of certain emergencies^[27]. Legislative powers may be delegated to the Executive in one of two main

forms: His Majesty may be empowered to make Orders in Council for specified purposes; or power to make regulations, rules, schemes, or orders for those purposes may be given to a named Minister. Since the Statutory Instruments Act, 1946, came into operation^[28], all such Orders in Council and a large proportion of departmental regulations have been classified as "statutory instruments." Orders in Council are made at a formal meeting of the Privy Council. They do not differ in substance from departmental regulations, but it is sometimes appropriate to lend the dignity of an ancient institution to the making of an important legislative instrument. Also, it is usual for two particular types of delegated legislation to be made in Council: first, the fixing of the "appointed day" on which a statute is to come into operation, and, secondly, legislation for the majority of colonies and for other dependencies^[29]. Other types of authorities exercising delegated legislative powers include independent statutory authorities, e.g., the Milk Marketing Board, which makes schemes having the force of law; local authorities, which are empowered to make by-laws; and professional bodies, e.g., the Council of the Law Society, which makes regulations for the compulsory attendance at law schools of clerks articled to solicitors.

Current Scenario

The Government now has the power to make regulations "generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community"^[30]. Formidable statutes like the National Insurance Act, 1946, and the Town and Country Planning Act, 1947, have been described as "Skeleton Acts"; the responsible Ministers have been left to reverse the processes of nature by making regulations to clothe the bones with flesh and blood. The number of statutory rules and orders registered in 1937 was 1231; in 1947 it was 2916; and these figures represent only a small part of the total volume of delegated legislation. Protests are often made that the citizen now has to obey so many technical regulations that respect for the law has decreased. That there is some substance in these complaints is indisputable. But it is easier to diagnose an ill than to prescribe a cure. Unrepentant individualists like Professor F. A. Hayek and Dr C. K. Allen have perceived that there is no hope of substantially reducing the present volume of delegated legislation while collectivist doctrines are subscribed to by all political parties. And under modern economic and political conditions a return to anything resembling the laissez faire philosophy is out of the question.

Restraints on Delegation of Legislative Power in U.K.

The validity of statutory instrument may be challenged on two main grounds i.e. the content and substance of the instrument is ultra vires the parent act and that the correct procedure has to been followed in making the instrument^[31]. In 1998 the parliament enacted Human Rights Act 1998. Sec 3(1) of the Human Rights Act 1998 casts a duty to interpret the legislation consistently with the European convention rights where it is possible to do so. Thus, the requirement of a valid subordinate law is that it should be in conformity with European Convention Law. In *Bourgoinsa v. Ministry of Agriculture*^[32] a ministerial order was held to be unlawful on account of conflict with European Convention treaty.

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 subordinate law making power. *House of Lords in Hotel and Catering Industry Training Board v. Automobile Ply Ltd.* ^[33] Declared invalid an order of minister of labour which would have imposed Industrial Training Act, 1964.

Parliamentary Control

The initial control Parliament exercises over delegated legislation is through the limits it sets in the parent/enabling Act. Only the people or body specified in the parent Act have power to make law, and the extent of that power is also specified. In addition, the parent Act will set out how the delegated legislation must be made and may set out certain procedures, such as consultation, to be followed. Parliamentary supremacy is not compromised because Parliament ultimately remains in control of what law is made and how it is made. Although law-making is removed from the elected House of Commons through the parent Act, it specifies the limits of that power. Parliament may repeal or amend the piece of delegated legislation. This control also upholds parliamentary supremacy, as Parliament can make or unmake any law. However, the effectiveness of this control is limited because, due to the volume of delegated legislation made each year, Parliament will not be able to check it all. *The Joint Select Committee on Statutory Instruments*, more commonly known as the *Scrutiny Committee*, is made up of MPs and peers. Its role is to review statutory instruments and to refer provisions requiring further consideration to both Houses of Parliament. This is arguably one of the more effective controls, as many statutory instruments are subject to some scrutiny.

Judicial Control over Delegated Legislation

Under U.K. legal system, the validity of a delegated legislation can be challenged in the High Court through the judicial review procedure. Judicial review was defined by Mr Justice Simon Brown - now Lord Brown - in *Ex parte Vijayatunga* ^[34] as the 'exercise of the court's inherent power at common law to determine whether action is lawful or not'. However, this process of judicial review is not necessarily dig outs the merits or demerits of the legislation. Thus, judiciary doesn't subrogate the shoes of the legislatures whilst deciding the matter. It only concerns and determines that, whether such delegation is lawful or not. When the delegated legislation is made beyond the powers conferred by the parent/enabling Act, the delegated legislation can be declared ultra vires by the court and void. Ultra vires means 'beyond the powers' or 'exceeding the authority of'. Any individual may challenge the validity of delegated legislation provided he is affected by it.

Conclusion

The reasons for growth of delegated legislation in other countries were equally responsible for the development of delegated legislation in England. The Legislature had no time to deal with various matters in detail. Complexity, technicality, emergency and expediency compelled the Legislature to delegate its 'legislative office' to government.. Traditionally, administrative legislation was looked upon as an evil, but gradually it came to be regarded as justifiable in principle also.

It was realized that legislation and administration were not two fundamentally different forms of power.

In conclusion, it can be said that delegated legislation is necessary for many reasons; allowing faster, more specific or technical legislation to be created, where it would not be possible with insufficient parliamentary time and relevant knowledge. However, delegated legislation needs to be controlled as it is created more privately than statutes, and with the risk of sub-delegation and abuse of power, by non-elected bodies or individuals. The present controls over delegated legislation, although reasonably effective have their disadvantages, most being limited in their controls; enabling acts can allow very wide powers, affirmative resolutions do not allow for amendments, negative resolutions do not always allow for opposition or unease to be expressed, the Scrutiny Committee's reports are not always considered, and the courts can only look into delegated legislation if an affected individual challenges it.

References

1. Article 1-Section 1 of the US Constitution.
2. Article 2, Section 1 of the US Constitution.
3. Article 2, Section 3 of the US Constitution.
4. John Locke, *Second Treatise of Civil Government* (1690), Section 141, Available at- <https://www.marxists.org/reference/subject/politics/locke/ch11.htm>
5. Article 1, Section 1 of the US Constitution.
6. Article 2, Section 3, (Volume 4, Page 124), Document 5, Records of the Federal Convention, (1:21; Madison, 29 May) Available at- http://press-pubs.uchicago.edu/founders/print_documents/a2_3s5.html
7. 143 U.S. 649 (1892)
8. 488 U.S. 361 (1989)
9. The Necessary and Proper Clause, also known as the Elastic Clause, the Basket Clause, the Coefficient Clause, and the Sweeping Clause (1) is a provision in Article One of the United States Constitution, located at section 8, clause 18.
10. Gary Lawson, *Delegation and the Constitution, Regulation*, Vol. 22, No. 2, Available at- <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1999/7/delegation.pdf> n
11. Kenneth C. Davis, *Administrative Law of the Eighties* 66 (1989) (Hereinafter Davis. Eighties).
12. *Administrative Procedure in Government Agencies*. S Doc 8, 77th Cong 1st Sess (1941).
13. *APA Legislative History*, S Doc 248, 79th Cong 2d Sess (1946) 17-21, 304, 358-9.
14. APA s 553(4). Notice is published in the Federal Register, a daily document with a large national circulation, and is generally mailed to anyone whom the agency knows to be interested in the subject.
15. APA 8 553(c), (d). In a few instances, a statute other than the APA requires an on-the-record hearing prior to adoption of a rule. In such cases, the APA sets forth an abbreviated trial-type procedure which is referred to as 'formal rulemaking'. APA 553(c), 557(4).
16. (1934) 293 US 388.
17. (1935) 295 US 495; L Ed 1570
18. (1943) 319 US 190
19. (1944) 321 US 414

20. (1947) 334 US 742.
21. Jain MP, Jain SN. *Principles of Administrative law*, (5 ed) 2007, pg. 47.
22. Jstore SA, DeSmith. *The Western Political Quarterly*, University of Utah, 07/11/2014.
23. Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, (4th ed,) LexisNexis Butterworths, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Rutledge, 2012) 213.
24. 18 Law in the Making (1993) at p.531.
25. Wade & Forsth, *Administrative Law* (2005) at pp.857-58. For distinction between legislative and administrative functions, see supra, Lecture III.
26. Golligon DJ. *Administrative Law*, (Oxford University Press, New York, (4th Ed), 1996, ISBN-0-19-876408-1), p.18.
27. Jain MP, Jain SN. *Principles of Administrative law*, (5th ed), 2007, page.47.
28. On January 1, 1948. The term "statutory instrument" is defined in Section 1 of the Act and in Statutory Instruments, 1948, No. 1. 514
29. The normal organ of imperial legislation is not Parliament at all, but the Crown in Council. Martin Wight, *The Development of the Legislative Council, 1606-1945* (London, 1946), p. 139. For some colonies the Crown legislates by Order in Council under powers derived from the royal prerogative. Such powers are not of statutory origin and instruments made thereunder are not delegated legislation.
30. Supplies and Services (Extended Purposes) Act, 1947 (10 & 11 Geo. 6, c. 55), section 1 (1); see also Supplies and Services (Transitional Powers) Act, 1945 (9 Geo. 6, c. 10), section 1 (1).
31. RV. Ennviorment Sec. Exp. Spath Holme Ltd.,(2001) 1 AllER 195.
32. Bourgoinsa V. Ministry of Agriculture, (1985) 3 WLR 1027.
33. House of Lords in Hotel and Catering Industry Training Board v. Automobile Ply Ltd. (1969) 2 All ER 582.
34. [1988] QB 322; [1987]